

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ADAM MURRAY COSTELLO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-1384

December 22, 2021

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Lee County; Margaret O. Steinbeck, Judge.

Christopher E. Cosden, Fort Myers, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

SILBERMAN, Judge.

Adam Murray Costello appeals the order summarily denying his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We reverse with instructions for the

postconviction court to strike the motion with leave for Mr. Costello to amend.

Mr. Costello was charged with leaving the scene of a crash resulting in death (count one), a first-degree felony punishable by thirty years' imprisonment, and tampering with physical evidence (count two), a third-degree felony punishable by five years' imprisonment. He pleaded nolo contendere pursuant to a negotiated plea agreement and was sentenced to concurrent sentences of ten and a half years' imprisonment with a four-year minimum mandatory term on count one and five years' imprisonment on count two.

Mr. Costello claimed that his trial counsel provided ineffective assistance by failing to note that victim injury points had been improperly included in his Criminal Punishment Code scoresheet and by affirmatively misadvising him as to the lowest permissible sentence he could receive if found guilty at trial. He asserted that counsel misadvised him that the lowest permissible sentence was 126.3 months' imprisonment when it should have been 36.3 months. He argued that victim injury points are only proper when the underlying offense caused the victim injury and that his

scoresheet improperly assessed 120 victim injury points when there was no evidence that the victim died because he fled the scene of the accident. He asked the court to vacate his sentence.

The postconviction court summarily denied the claim on the merits, finding that the claim was conclusively refuted by the record because victim injury points were appropriate. See Fla. R. Crim. P. 3.704(d)(9) (stating that victim injury points are scored when there is "physical injury or death suffered by a person as a direct result of any offense pending before the court for sentencing"); *Sims v. State*, 998 So. 2d 494, 506–07 (Fla. 2008) (holding that victim injury points are properly assessed when the evidence indicates that the victim's death was a direct result of the underlying offense of fleeing the scene of a crash resulting in death).

An error in the scoresheet could render a plea involuntary where the defendant shows that the sentence pled to was *based on* the minimum permissible sentence according to the erroneous scoresheet calculation and that the defendant would not have entered into the plea if he or she would have been aware of the correct sentencing range.

Wright v. State, 174 So. 3d 400, 402 (Fla. 4th DCA 2015)

(emphasis added) (citing *Towery v. State*, 977 So. 2d 774, 775–76 (Fla. 2d DCA 2008)).

Mr. Costello's claim as to the improper inclusion of victim injury points is not conclusively refuted by the record or the postconviction court's order. The court did not include any attachments refuting the claim, and the record does not include any information regarding the victim's cause of death.¹ *See Harrell v. State*, 79 So. 3d 231, 232 (Fla. 2d DCA 2012).

However, Mr. Costello's claim is facially insufficient because it does not include a request to withdraw his plea. *See Agent v. State*, 19 So. 3d 1114, 1115 (Fla. 2d DCA 2009) ("[O]ur review of the record also indicates that Agent's rule 3.850 motion was facially insufficient because it does not include an affirmative request to withdraw the plea."). Rather, Mr. Costello merely requested that the postconviction court vacate his sentence and resentence him using a corrected scoresheet. That is impermissible. *See Johnson v. State*, 60 So. 3d 1045, 1052 (Fla. 2011) ("[A] defendant who establishes that his plea was entered involuntarily is entitled to

¹ For this same reason, we are unable to determine whether assessment of victim injury points would have been appropriate pursuant to section 921.0021(7)(e), Florida Statutes (2016), which permits victim injury points if "the court finds that offender caused victim injury."

withdraw the plea but not to unilaterally rewrite the plea agreement to his advantage.").

Accordingly, we reverse the summary denial of Mr. Costello's rule 3.850 motion and remand the case to the postconviction court with instructions to strike the motion with leave to amend. See Fla. R. Crim. P. 3.850(f)(2). On remand, if Mr. Costello chooses to amend his motion and seeks to withdraw his plea, the postconviction court shall either attach those portions of the record that conclusively refute Mr. Costello's claim or conduct an evidentiary hearing.

Reversed and remanded.

SLEET and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.