DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

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ELIGIO PATLAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-326

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March 30, 2022

Appeal from the Circuit Court for Pasco County; Kimberly
Campbell, Judge.

Howard L. Dimmig, II, Public Defender, and Richard P. Albertine,
Jr., Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Cynthia
Richards, Assistant Attorney General, Tampa, for Appellee.

VILLANTI, Judge.

Eligio Patlan appeals from his judgment and sentence

following a no contest plea to charges of (count one) failure to report

vacating permanent residence pursuant to section 943.0435(4)(b),

Florida Statutes (2018), and (count two) failure to register as a

sexual predator pursuant to section 775.21(10)(a), Florida Statutes

(2018). Because Patlan has never been designated a sexual

predator, we reverse his conviction and sentence as to count two.

We need not engage in an explanation of the complicated

procedural history of this case because the error is clear: Patlan

pleaded no contest to an offense he did not commit. He was not

required to register as a sexual predator pursuant to section

775.21(10)(a) because he is not and never has been designated as a

sexual predator. Count two of the information alleged that Patlan

"failed to provide a home telephone or cellular telephone number, or

did otherwise fail, by act or omission, to comply with the

requirements of [section] 775.21(10)(a)." This requirement pertains to

the sexual predator statute, not the sex offender statute, section

943.0435.[1]

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[1] Section 775.21(10)(a) provides that a person violates the statute by failing "to provide all home telephone numbers and cellular telephone numbers." Section 943.0435 contains no similar provision.

Florida Rule of Criminal Procedure 3.172(a) states, "Before accepting a plea of guilty or nolo contendere, the trial judge shall determine that the plea is voluntarily entered and that a factual basis for the plea exists. Counsel for the prosecution and the defense shall assist the trial judge in this function." In this case, the trial court did not ask the State for a factual basis; instead, it asked Patlan's counsel if she stipulated to a factual basis for both charges. Counsel simply answered yes. On appeal, Patlan argues that his counsel was ineffective by failing to object to the erroneous charge, and that this resulted in fundamental error. We agree. *See Steiger v. State*, 328 So. 3d 926, 928 (Fla. 2021) (holding that ineffective assistance of counsel claims "may only be raised on direct appeal in the context of a fundamental error argument"); *see also Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002) (holding that a claim of ineffective assistance of counsel may not be raised on direct appeal unless "the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable").

Where the record affirmatively demonstrates that a defendant has pleaded guilty or no contest to a crime he did not commit, fundamental error occurs. *See Dydek v. State*, 400 So. 2d 1255, 1258 (Fla. 2d DCA 1981) ("We can think of no error more fundamental than the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged."). "Notwithstanding defense counsel's stipulation to a factual basis, appellant could not have been convicted of [the charged offense], and the trial court therefore erred in accepting appellant's nolo plea to this charge." *Id.* at 1257-58. Thus, despite the fact that the charging error was not brought to the trial court's attention, the error is fundamental and requires reversal. Accordingly, we vacate Patlan's conviction and sentence on count two and remand for dismissal of that charge. We affirm Patlan's conviction and sentence as to count one.

Affirmed in part, reversed in part, and remanded.

MORRIS, C.J., and SILBERMAN, J., Concur.

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Opinion subject to revision prior to official publication.