DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CHRISTOPHER GLOSTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-601

April 1, 2022

Appeal from the Circuit Court for Lee County; Nicholas R. Thompson, Judge.

Howard L. Dimmig, II, Public Defender, and Susan M. Shanahan, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Johnny T. Salgado, Assistant Attorney General, Tampa; and Taylor A. Schell, Assistant Attorney General, Tampa (substituted as counsel of record), for Appellee.

SILBERMAN, Judge.

After admitting to violations of probation, Christopher Gloster appeals the order revoking his probation and the resulting judgment and concurrent sentences as a habitual violent felony offender (HVFO) of ten years in prison for two counts of armed robbery (counts two and three).[1] He contends (1) that the trial court erred in sentencing him as an HVFO as to count three after revocation of probation and (2) that the written judgment entered upon revocation should be amended to reflect the correct date. We affirm the revocation order and sentence as to count two. Because Gloster was not properly sentenced as an HVFO on count three at his original sentencing, we reverse the revocation order and sentence to the extent that they reflect a sentence as an HVFO on count three and remand for the court to strike that HVFO designation on count three in the revocation order and sentence. Rather than correct the date on the judgment entered upon revocation, we reverse and direct the trial court on remand to strike the duplicative judgment.

[1] The other counts are no longer at issue.

Gloster was originally sentenced on June 4, 1990, for offenses committed on November 22, 1989. Gloster's sentences on counts two and three indicate that he was sentenced as an HVFO. The trial court imposed the following concurrent sentences: count two, thirty years in prison with a three-year minimum mandatory, to be followed by ten years' probation; and count three, three years in prison with a three-year minimum mandatory, to be followed by ten years' probation.[2] The three-year prison term was below the fifteen-year minimum mandatory for an HVFO on a first-degree felony, *see* § 775.084(4)(b)1, Fla. Stat. (1989), and below the permitted range on Gloster's sentencing guidelines scoresheet.

In 2021, Gloster admitted to violations of probation occurring in 2019 based on new law offenses. The trial court revoked probation and imposed concurrent sentences on counts two and three of ten years in prison with credit for time served as an HVFO under section 775.084(4)(b). It was acknowledged that Gloster had served thirty years on count two, so the ten-year sentence on count two was in essence a time-served sentence. Gloster appealed and

[2] Gloster's probationary period for both counts began following the completion of his prison term on count two.

subsequently filed a motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800(b)(2). The trial court denied the motion.

In issue one on appeal, Gloster contends that the HVFO designation shown on his 2021 revocation order and sentence as to count three was improper and should be stricken because he was not properly sentenced as an HVFO at his original sentencing in 1990. We agree.

In denying relief, the trial court treated the issue as one alleging an illegal sentence. But an improper sentencing as a habitual felony offender is cognizable under a rule 3.800(b) motion because the error "affects the ultimate sanction imposed." *Mapp v. State*, 71 So. 3d 776, 780 (Fla. 2011); *Simpson v. State*, 326 So. 3d 195, 198 (Fla. 5th DCA 2021) (recognizing "*Mapp*'*s* holding that the errant HFO designation in that case was cognizable via a rule 3.800(b) motion because the error affected 'the ultimate sanction imposed' "). We note that Gloster's HVFO sentence affects his eligibility for gain time. *See* § 775.084(4)(e).

There is no dispute that Gloster qualified as an HVFO. Upon qualification, the trial court may exercise its discretion on whether

to impose a habitual offender sentence. *See Pankhurst v. State*, 796 So. 2d 618, 620 (Fla. 2d DCA 2001). When sentencing a defendant who qualifies as a habitual offender to a more lenient sentence than what the habitual offender statute requires, "the judge has necessarily decided that a habitual offender sentence is not necessary." *Id.* at 621 (quoting *Geohagen v. State*, 639 So. 2d 611, 612 (Fla. 1994)).[3] When a trial court does not impose a habitual offender sentence, the court "must state appropriate reasons for any downward departure from the sentencing guidelines." *Geohagen*, 639 So. 2d at 612; *see also State v. Rinkins*, 646 So. 2d 727, 729 (Fla. 1994) (same).

If the trial court does not impose a habitual offender sentence at the original sentencing, then "[a] habitual offender sentence may not be imposed upon revocation of probation." *Pankhurst*, 796 So. 2d at 621.[4] The State contends that *Pankhurst* is distinguishable

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[3] Under the current version of the statute, the trial court must provide written reasons why an HVFO sentence "is not necessary for the protection of the public." § 775.084(3)(a)6, Fla. Stat. (2021).

[4] *Pankhurst* recognized an exception to this rule: "If Pankhurst had entered a negotiated plea whereby he agreed to be sentenced as a habitual offender upon revocation of his probation, he would not

because Pankhurst was originally sentenced to probation rather than a term of years. *See id.* at 619. But that distinction does not control the result in this case. In *Pankhurst* this court explained:

> The sentences provided for in the habitual offender statute have been interpreted by the supreme court to mean "any term of years" up to the maximum specified for the particular offense level, *provided the term of years is not more lenient than that required by the habitual offender statute* or recommended by the sentencing guidelines.

Id. at 620 (emphasis added) (citing *Geohagen*, 639 So. 2d at 612). Here, the three-year term of years is more lenient than the required fifteen-year minimum mandatory. *See* § 775.084(4)(b)1. Therefore, the trial court in 1990 did not impose an HVFO sentence on count three.

The State argues that we do not know the trial court's intent in imposing a three-year sentence because a copy of the 1990 sentencing transcript is no longer available and, further, that a downward departure without written reasons is not an illegal sentence. But Gloster is not claiming that the 1990 sentence is illegal. He is claiming that the trial court did not impose an HVFO

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be entitled to relief." 796 So. 2d at 619 n.1. That exception is not applicable here.

sentence in 1990; thus, an HVFO sentence on revocation of probation is not permitted. *See Pankhurst*, 796 So. 2d at 621.

Because the trial court was not permitted to impose an HVFO sentence upon revocation when the original sentencing court did not impose an HVFO sentence, we reverse the sentence and the revocation order to the extent that they reflect a sentence as an HVFO on count three and remand for the court to strike that HVFO designation on count three in the revocation order and sentence. It is undisputed that without the HVFO designation upon revocation, Gloster's ten-year sentence is within the permitted range of the applicable sentencing guidelines.

In issue two, Gloster argues that the 1990 date on the judgment that the trial court entered upon revocation in 2021 is incorrect and should be corrected. Contrary to that argument, the duplicative judgment filed on January 29, 2021, should not be corrected to reflect the entry date of January 25, 2021, rather than the original conviction date in 1990. Instead, the trial court should not have entered a duplicative judgment at all.

Gloster was adjudicated guilty in the judgment that was originally rendered on June 5, 1990. A "duplicative judgment of

guilt" entered upon revocation of probation for the same underlying crime is unauthorized when the defendant has previously been adjudicated guilty. *Byra v. State*, 268 So. 3d 207, 208 (Fla. 2d DCA 2019); *see also Calhoun v. State*, 296 So. 3d 1006, 1006 (Fla. 2d DCA 2020) ("[W]e reverse the written judgment that was reentered upon revocation as superfluous in light of the judgment adjudicating his guilt that was entered at the time of his original convictions and remand for the striking of that second written judgment."); *Butler v. State*, 195 So. 3d 1147, 1148 (Fla. 2d DCA 2016) ("Duplicative adjudications of guilt after revocation of probation or community control are superfluous, are unauthorized, and can cause undue confusion in future proceedings.").

Thus, in addition to reversing and remanding for the trial court to strike the HVFO designation on count three, we also reverse the duplicative judgment filed on January 29, 2021, and direct the trial court to strike it on remand. *See Calhoun*, 296 So. 3d at 1006.

Affirmed in part, reversed in part, and remanded.

LaROSE and BLACK, JJ., Concur.

Opinion subject to revision prior to official publication.