

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

DEANDRE T. WOODRUFF, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
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Case No. 2D09-4836

Opinion filed February 4, 2011.

Petition Alleging Ineffective Assistance of  
Appellate Counsel. Hillsborough County;  
William Fuente, Judge.

Deandre T. Woodruff, pro se.

Pamela Jo Bondi, Attorney General,  
Tallahassee, and Sonya Roebuck Horbelt,  
Assistant Attorney General, Tampa,  
for Respondent.

DAVIS, Judge.

Deandre T. Woodruff, in his petition filed pursuant to Florida Rule of  
Appellate Procedure 9.141(c), contends that appellate counsel was ineffective in failing  
to challenge the sentence the trial court imposed for his conviction of one count of third-

degree murder.<sup>1</sup> He alleges that because his trial counsel failed to preserve the issue, his appellate counsel was ineffective for failing to file a motion to correct the sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). Although we agree that his appellate counsel's performance was deficient at the time of the appeal, under current case law Woodruff is not entitled to relief and we must deny his petition.

Woodruff's conviction resulted from the jury finding that he discharged a firearm resulting in the death of the victim. The third-degree murder charge is a second-degree felony for which the statutory maximum penalty is fifteen years. See §§ 777.04(4)(c), 775.082(3)(c), Fla. Stat. (2005). However, the trial court sentenced Woodruff to thirty-five years' prison to be followed by fifteen years' probation based on its application of section 775.087(2)(a)(3) of the 10-20-Life statute. That portion of the statute provides that if a person is convicted of discharging a firearm resulting in death, "the convicted person shall be sentenced to a minimum term of imprisonment of not less than [twenty-five] years and not more than a term of imprisonment of life in prison."

Woodruff, however, argues that prior to the time of his appeal, this court had construed section 775.087(2)(a)(3) to limit his sentence to twenty-five years because the statutory maximum for his offense was less than the bottom of the 10-20-Life sentencing range. See Sousa v. State, 976 So. 2d 639, 640 (Fla. 2d DCA 2008) (stating that the statutes setting statutory maximums should be construed together with the minimum mandatory sentence set by the 10-20-Life statute in the light most favorable to the defendant), disapproved, Mendenhall v. State, 35 Fla. L. Weekly S631 (Fla. Oct. 28, 2010). Because Woodruff faced a statutory maximum of fifteen years and

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<sup>1</sup>Woodruff also was convicted of shooting at, within, or into a building; however, the sentence for that conviction is not challenged within this petition.

a minimum mandatory under the 10-20-Life statute of twenty-five years, Sousa indicated that Woodruff could be sentenced to no more than twenty-five years. Accordingly, Woodruff argues that if his appellate counsel had filed the rule 3.800(b) motion to correct sentence, either the sentencing court would have resentenced him pursuant to Sousa or this court would have granted him a new sentence on direct appeal.

"[T]his court must apply the law in effect at the time of the appeal to determine whether counsel's performance was deficient . . . ." Brown v. State, 25 So. 3d 78, 80 (Fla. 2d DCA 2009). Because Sousa was the law in effect at the time of his appeal, we conclude that Woodruff's appellate counsel's performance was deficient when he failed to file a rule 3.800(b)(2) motion based on Sousa. However, "we must apply the current law to determine whether [the petitioner] is entitled to relief on the issue raised." Brown, 25 So. 3d at 80. Since the conclusion of Woodruff's direct appeal, the Florida Supreme Court has disapproved this court's opinion in Sousa and held "that the specific provisions of the 10-20-Life statute with regard to mandatory minimums control over the general provisions of section 775.082 regarding statutory maximums." Mendenhall, 35 Fla. L. Weekly at S631. Had Woodruff's appellate counsel properly litigated this issue, Woodruff would have been resentenced based on Sousa prior to the issuance of Mendenhall. However, under the current case law, he is no longer entitled to relief.

We therefore deny the petition alleging ineffective assistance of appellate counsel. In so doing, we certify the following question to be one of great public importance:

WHEN A PETITIONER CLEARLY ALLEGES DEFICIENT PERFORMANCE ON THE PART OF APPELLATE COUNSEL BASED ON CASE LAW IN EFFECT AT THE TIME OF THE APPEAL THAT WOULD HAVE RESULTED IN RELIEF HAD APPELLATE COUNSEL RAISED THE ISSUE ON APPEAL BUT THE CASE LAW UPON WHICH THE PETITIONER BASES THE CLAIM IS SUBSEQUENTLY DISAPPROVED, IS THE PETITIONER STILL PREJUDICED BY APPELLATE COUNSEL'S DEFICIENT PERFORMANCE AND THUS ENTITLED TO RELIEF THROUGH A PETITION ALLEGING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL?

Petition denied; question certified.

KELLY and LaROSE, JJ, Concur.