

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,)	
)	
Appellant,)	
)	
v.)	Case No. 2D09-5470
)	
JOSHUA DELMAR MALONE,)	
)	
Appellee.)	
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Opinion filed December 8, 2010.

Appeal from the Circuit Court for
Pinellas County; Philip J. Federico,
Judge.

Bill McCollum, Attorney General,
Tallahassee, and Susan D. Dunlevy,
Assistant Attorney General, Tampa,
for Appellant.

James Marion Moorman, Public
Defender, and Allyn M. Giambalvo,
Assistant Public Defender, Bartow,
for Appellee.

CRENSHAW, Judge.

The State appeals the sentence imposed after Joshua Delmar Malone
pleaded no contest to attempted first-degree murder with a firearm. Malone concedes

and we agree that the trial court erred in sentencing Malone as a youthful offender for a life felony. We therefore reverse and remand for further proceedings.

Malone was charged by information in 2008 with attempted first-degree murder with a firearm pursuant to sections 782.04(1)(a), 777.04, 775.087(1), and 775.087(2)(a)(2), Florida Statutes (2008). Malone pleaded no contest to the charge and was sentenced as a youthful offender to six years' imprisonment following a plea colloquy.¹ The State objected to the imposed sentence, arguing that Malone was subject to a mandatory minimum sentence of twenty years' imprisonment under section 775.087(2)(a)(2).

We find the trial court erred in sentencing Malone to six years' prison as a youthful offender because Malone pleaded no contest to a life felony, making him ineligible for youthful offender sentencing. First-degree murder is a capital felony under section 782.04(1)(a)(1), and therefore attempted first-degree murder qualifies as a first-degree felony. See § 777.04(4)(b). Because the use of a firearm is not an essential element of the offense of attempted first-degree murder, the felony here is reclassified as a life felony because a firearm was used during the commission of the attempted murder. See § 775.087(1)(a). And because Malone was convicted of a life felony, it was error for the court to sentence him as a youthful offender. See § 958.04(1)(c), Fla. Stat. (2008) ("[A] person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act."); McKinney v. State, 27 So. 3d 160,

¹Although the plea form and written judgment list the offense as attempted first-degree murder and omit any mention of a firearm, the written judgment lists the offense as a life felony, and the factual basis provided at the plea colloquy supports the charge of attempted murder with a firearm. Malone concedes he pleaded to the offense as charged in the information.

161 (Fla. 2d DCA 2010) ("The trial court has discretion to sentence as a youthful offender a defendant who is at least 18 years old and has been found guilty of a felony (except for a capital or life felony) committed before the defendant's 21st birthday." (emphasis added)). Instead, a life felony is punishable by a "term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment." § 775.082(3)(a)(3). Further, because a firearm was discharged during the course of the attempted murder, Malone, after pleading no contest to the charge, was subject to a minimum mandatory term of twenty years' imprisonment. See § 775.087(2)(a)(2). Because the trial court erroneously sentenced Malone as a youthful offender when Malone was subject to a minimum mandatory term of twenty years' imprisonment, we reverse the judgment and sentence and remand to the trial court for further proceedings. On remand, the trial court shall give Malone the opportunity to withdraw his plea. See State v. Smith, 654 So. 2d 1299, 1299-1300 (Fla. 4th DCA 1995).

Reversed and remanded.

CASANUEVA, C.J., and NORTHCUTT, J., Concur.