

Third District Court of Appeal

State of Florida

Opinion filed September 4, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2375
Lower Tribunal No. 98-28508B

Derrick Allen,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Milton Hirsch, Judge.

Chase Law Florida, P.A., and Brett S. Chase (Saint Petersburg), for appellant.

Ashley Moody, Attorney General, and Brian H. Zack, Assistant Attorney General, for appellee.

Before EMAS, C.J., and FERNANDEZ and LINDSEY, JJ.

EMAS, C.J.

Derrick Allen appeals the trial court's order denying his motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). We affirm without discussion that portion of the order denying relief on the life sentences imposed on Allen for five counts of armed kidnapping, one count of armed robbery, and one count of armed carjacking. See Acosta v. State, 103 So. 3d 234 (Fla. 3d DCA 2012); Corria v. State, 932 So. 2d 530 (Fla. 3d DCA 2006).

However, we reverse and remand that portion of the order denying relief on Allen's claim that the three-year mandatory minimum sentences, imposed pursuant to section 775.087(2), Florida Statutes (1998),¹ are illegal. We agree with Allen that the verdict form failed to provide the "clear jury finding" that Allen personally possessed a firearm, a prerequisite for imposition of the three-year mandatory minimum sentence. See Tucker v. State, 726 So. 2d 768 (Fla. 1999); State v. Hargrove, 694 So. 2d 729 (Fla. 1997) (superseded on other grounds as recognized in Galindez v. State, 955 So. 2d 517, 523 (Fla. 2007)); State v. Tripp, 642 So. 2d 728 (Fla. 1994); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) (superseded on other grounds as recognized in Galindez, 955 So. 2d at 523).

¹ At the time of these offenses, section 775.087(2) provided that if a person was convicted of certain enumerated felonies (including robbery, kidnapping or carjacking) and "during the commission of the offense, such person possessed a firearm," that person "shall be sentenced to a minimum term of imprisonment of 3 years."

In the instant case, the Information alleged that Allen *and a co-defendant* committed the above-described crimes with a firearm. At trial, the jury was instructed that it could find Allen guilty as a principal to the crimes charged. The verdicts did not contain a finding that Allen personally possessed a firearm during the commission of these offenses. Instead, the verdict for each count merely found Allen guilty of kidnapping “with a firearm,” robbery “with a firearm,” and carjacking “with a firearm,” all as charged in the Information. Had Allen been the *only* defendant charged with the crimes for which he was convicted, this verdict would have been sufficient to sustain the three-year mandatory minimum sentences. See Tucker, 726 So. 2d at 769 n. 1 (upholding three-year mandatory minimum sentence where verdict found defendant guilty of attempted murder “with a firearm” as charged in the Information and was the only defendant and assailant); Gillis v. State, 486 So. 2d 706, 707 (Fla. 5th DCA 1986) (reversing three-year mandatory minimum sentence under similar circumstances and noting the “verdict form would be sufficient to comply with the requirement of a jury finding of possession by Gillis pursuant to State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), if there had been but one defendant and one firearm”).

But where, as here, the defendant and co-defendant were jointly charged with committing a crime with a firearm, and the defendant could be found guilty as a

principal to the crime,² the three-year mandatory minimum sentence under section 775.087(2) may not lawfully be imposed unless the jury makes a factual finding that during the commission of the crime the defendant personally possessed a firearm. Gillis, 486 So. 2d at 707; Alusma v. State, 939 So. 2d 1081 (Fla. 4th DCA 2006).

We therefore affirm in part, reverse in part, and remand this cause to the trial court to vacate the three-year mandatory minimum portions of the sentences imposed.³

² To be clear, Allen could properly be convicted and sentenced as a principal to the crimes of armed kidnapping, armed robbery, and armed carjacking, even if he did not personally possess a firearm during the commission of the crimes. See Stripling v. State, 645 So. 2d 589 (Fla. 3d DCA 1994); Nesbitt v. State, 677 So. 2d 1381 (Fla. 1st DCA 1996); Lewis v. State, 625 So. 2d 102 (Fla. 1st DCA 1993). However, he could not be sentenced to a three-year mandatory minimum pursuant to section 775.087 absent a “clear jury finding” that he personally possessed a firearm.

³ Because we are remanding for a ministerial, non-discretionary act (entry of a corrected sentence that omits the three-year mandatory minimums), the defendant need not be present. Holmes v. State, 100 So. 3d 281, 283 n.5 (Fla. 3d DCA 2012).