

IN THE SUPREME COURT OF FLORIDA

BRYAN GORDON,
Petitioner,

v.

Case No.: (To Be Assigned)
DCA Case No: 5D12-4341

STATE OF FLORIDA,
Respondent.

PROVIDED TO COLUMBIA
CORRECTIONAL INSTITUTION
ON 7-9-13 (DATE) FOR MAILING
CS (STAFF INITIAL) BS (JIM INITIAL)

**ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA**

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF FACTS

(1) On July 21, 2011 Petitioner filed a Motion to Correct Illegal Sentence raising multiple sentencing errors. (2) On June 13, 2012 trial court struck ground two of the motion and afforded petitioner opportunity to amend. (3) Petitioner amended motion attaching 88 pages of non-hearsay and trial documents including the decision from this Honorable Court directing the trial court to sentence petitioner accordingly. (4) Trial court struck amended motion on July 26, 2012 ordering petitioner to re-file motion attaching a sworn oath containing petitioner's signature. Trial court ordered petitioner not to re-file the attachments that were filed with the motion on August 15th 2012. (5) Petitioner filed a second amendment of and to ground two of the Motion to Correct Illegal Sentence. (6) On March 16, 1998 Petitioner was charged with four counts as follows: Attempted Premeditated First Degree Murder (Count 1); Causing Bodily Injury during a Felony with a Firearm (Count 2); Aggravated Battery causing Great Bodily Harm with a Firearm (Count 3); and; Robbery with a Firearm (Count 4).

It was alleged at trial that Petitioner confronted victim and demanded his wallet. Victim testified that, after refusing to give up his wallet, Petitioner then placed a gun to side, grabbed his hair and shot him while simultaneously removing his wallet from his pocket.

(7) On September 16, 1998 Petitioner was found guilty on all for counts. Trial court adjudicated petitioner guilty. On September 17, 1998, Petitioner was sentenced to 276 months FDOC with 3 years mandatory for count one and 60 months FDOC with 3 years minimum mandatory four count four, to run consecutive to count one. Count one was reclassified pursuant to Fla. Statute § 775.087(1)

(8) On direct appeal Petitioner argued that the convictions but not the sentences, for counts two and three were imposed in violation of the double jeopardy clause as they were subsumed in count one. The District Court in *Gordon v. State*, 744 So.2d 1112 (Fla. 5thDCA 1999)(Petitioner), did not agree that convictions were subsumed in count one, and affirmed in part, reversed in part and remanded for resentencing on counts two and three, certified questions to the Florida Supreme Court of whether, “the double jeopardy clause precluded convicting and sentencing a defendant on charges of Attempted first Degree Murder, causing bodily injury during a felony, and Aggravated Battery causing great bodily harm (when crimes are committed during a single criminal episode).

The Supreme Court held that convictions did not violate double jeopardy clause, approved the District Courts decision, and remanded in *Gordon v. State*, 780 So.2d 17 (Fla. 2001). On remand Petitioner was

resentenced to 17 years (count 2) and 10 years (count 3) nunc pro tunc to the September 17, 1998 sentence. Both offenses were reclassified pursuant to § 775.087(1) and count 3 was given a three year minimum mandatory pursuant to § 775.087(2).

(9) Circuit court denied Petitioner's 3.800(a) motion to correct illegal sentence on October 5, 2012. The District Court affirmed and remanded on May 3, 2013. This petition follows.

ARGUMENT
GROUND ONE

Did the trial court err in its summary denial of Petitioner's claim that his sentence is illegal as a matter of law, where the scoresheet prepared in Petitioner's sentencing contains scoring errors, i.e., by reclassifying Petitioner's convictions for counts one, two, and three by way of Fla. Statute § 775.087? Petitioner filed a facially sufficient Rule 3.800(a) Motion to the Circuit Court of Orange County, Florida, presenting a prima facie entitlement to relief.

In summarily denying this claim, the trial court stated that "claims of trial court error are not cognizable under Rule 3.800(a) Motion to Correct Illegal Sentence." The District Court affirmed and remanded on other grounds. Denying relief where Petitioner raised factual error is fundamentally unfair where the Fla. Supreme Court has clarified that relief

of this type is available through a motion under Fla.R.Crim P. 3.800(a). *Bover v. State*, 797 So.2d 1246 (Fla. 2001), *Carter v. State*, 786 So.2d 1173 (Fla. 2001). Offense level severity for counts one, two, and three were ranked one degree higher for offenses under Fla. Stat. § 775.087(1)(See amended judgment and sentencing order) Firearm was an essential element in each offense (and in the underlying offense [Robbery with a Firearm]). Error is apparent from the face of the record. See *Tunsil v. State*, 797 So.2d 651, 652 (Fla. 3rd DCA 2001): Defendant's claim that firearm enhancement of his convictions due to inclusion of firearm use in underlying offense raised by motion to correct illegal sentence was not procedurally barred. Defendant's claim could be brought by means of Motion to Correct Illegal Sentence under Rule 3.800(a) Id.

By motion to correct illegal sentence Petitioner contends that, attempted premeditated first degree murder enhanced to a life felony is impermissible when robbery with a firearm is a underlying felony.

In *Gonzales v. State*, 585 So.2d 932 (Fla. 1991) the courts held: [I]t was impermissible to enhance the third degree murder on account of use of a firearm as the use of a firearm had already been taken into account in the underlying offense. Id.

The charge of causing bodily injury during the commission of an (enumerated) felony (count two) which in the underlying offense jury was instructed it must be proved petitioner used a firearm as a element of the crime.

The charge of aggravated battery causing great bodily harm with a firearm requires the use of a firearm and firearm is an essential element of offense. *Cabral v. State*, 944 So.2d 469 (Fla. 1st DCA 2006); *Webb v. State*, 997 So.2d 469 (Fla. 2nd DCA 2008). Precluding reclassification and causing scoresheet error apparent on the face of record. Trial courts erroneous calculation of Petitioner's scoresheet was not harmless error where there was no basis for concluding that sentencing court would have imposed the same sentence using correct scoresheet. *Williams v. State*, 903 So.2d 1062 (Fla. 2nd DCA 2005) Petitioner in the instant case received a guideline sentence. Fla. Rule of Criminal Procedure Rule 3.800(a) Provides: Rule 3.800 Correction, reduction, modification of sentences (a) Correction, a court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing guideline scoresheet.

In *Raley v. State*, the 5th District Court held: "[I]n imposing the sanctions of the law upon a defendant for illegal conduct the judicial system itself must follow and obey the law and not impose an illegal sentence, and,

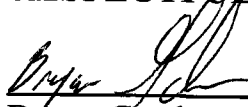
when one is discovered, the system should WILLINGLY remedy it. Raley v. State, 675 So.2d 172 (Fla. 5th DCA 1996). An illegal sentence must be corrected as a matter of law in Rule 3.800(a) proceeding. State v. Calloway, 658 So.2d 988 (Fla. 1995). Scoresheet error by the trial court is cognizable under Rule 3.800(a), Petitioner's motion was facially sufficient and petitioner presented a Prima Facie entitlement to relief.

CONCLUSION

Wherefore, Petitioner request that the Court grant all relief which he may be entitled to in this proceeding including but not limited to.

1. Recalculation of scoresheet,
2. Resentencing under Newly Calculated Scoresheet.

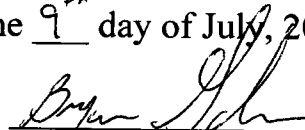
RESPECTFULLY SUBMITTED,



Bryan Gordon pro se
X/2643

CERTIFICATE OF SERVICE


I certify that a copy of this document has been placed in the hands of prison officials for mailing to Office of the Attorney General 444 Seabreeze Blvd., Daytona Beach, FL 32118 this the 9th day of July, 2013.



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CERTIFICATE OF FONT

I certify that this brief has been prepared using a 14 point Times New Roman font.



Bryan Gordon