IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: 13CF-8334-XX

CHARLES E. LEWIS,

Defendant.
_____/

ORDER ON DEFENDANT'S *AMENDED MOTION FOR POST-CONVICTION RELIEF* AND SETTING STATUS HEARING

This matter came before the Court upon Defendant's *Amended Motion for Post-Conviction Relief* filed pursuant to Fla. R. Crim. P. 3.850 on December 3, 2018. This Court filed an Order to Show Cause on January 8, 2019, for the State to show why Defendant is not entitled to an evidentiary hearing on his first claim of relief. Defendant's remaining three claims of relief were denied. The State filed a response to the Order to Show Cause on January 11, 2019, and Defendant filed a Reply to the State's response on March 6, 2019. On April 17, 2019, the Court granted Defendant an evidentiary hearing as to Ground One of his Motion. An evidentiary hearing was held on September 6, 2019, at which the court heard testimony from trial attorneys William Oulette and Michael Dicks, as well as from Defendant. After consideration of the various filings, the case record, testimony of the witnesses at the evidentiary hearing, and applicable case law, this Court finds as follows:

HISTORY OF THE CASE and DEFENDANT'S GROUND FOR RELIEF:

Defendant's surviving claim for relief alleges ineffective assistance of counsel for failing to object to an incorrect scoreheet.

Defendant was sentenced on eight counts of Unlawful Sexual Activity with a Minor on May 15, 2015. He had previously entered an open plea to the charges. The scoresheet presented totaled 802 points, with a lowest permissible minimum prison sentence of 580.5 months. The scoresheet included 640 victim injury points—eighty sexual penetration points for each count in

the information. The trial court sentenced the Defendant to 72.5 months prison for each count. The sentences were to run consecutively for a total sentence of 580 months. Six of the eight counts alleged sexual penetration "and/or" union between the Defendant's and victim's mouths and sexual organs. Defendant claims that he did not specifically plead to sexual penetration in all counts and that therefore, assessment of 80 sexual penetration points instead of 40 sexual contact points in six of the eight counts was error.

EVIDENTIARY HEARING TESTIMONY:

At the evidentiary hearing, Mr. Ouelette testified that he represented Defendant for some, but not all, of the duration of this case. He reviewed with Defendant the scoresheet in this case, but was not sure he discussed the significance between "sexual contact" and "sexual penetration" as these terms relate to the scoresheet. Ouelette reviewed the facts of the case with Defendant and did not think it was a good case "to put in front of a jury." Ouelette recalled having negotiated a plea offer of ten years' prison, and recommended to Defendant that he accept the offer. Possibly because of familial influence, Defendant did not accept the offer. Defendant's eventual entry of an open plea was handled by another attorney, Mr. Dicks. Ouelette recalled that Defendant's family discouraged Ouelette from further involvement in the case.

Mr. Dicks testified that he came into the case after Mr. Ouelette had represented Defendant for "some time." Dicks also recalled reviewing the scoresheet with Defendant in general, but could not specifically recall reviewing the particulars of "contact" and "penetration" with him. Dicks was present at the sentencing hearing. He did not object to the scoresheet and stipulated to a factual basis for the plea. Dicks recalled that the maximum sentence Defendant faced was 120 years. He believed that Defendant understood that he was being scored 80 points per count for penetration.

Defendant testified that neither attorney explained the significance of "contact" and "penetration" as they affected his scoresheet. He testified that if he had known of the significance of the issue, he would not have entered his plea and would have asked his attorney to argue against the assessment of points for penetration. Defendant admitted that he refused the plea offer of ten years' prison. The reason for the refusal was that he thought he could get a lesser sentence based on his having been an army veteran who was diagnosed with post-traumatic stress disorder.

FINDINGS OF FACT and CONCLUSIONS OF LAW:

As this Court stated in its Order to Show Cause in this case, "[l]ack of prejudice from scoresheet errors challenged in 3.850 motions can only be found if the record conclusively shows that the court would have imposed the same sentence using a correct scoresheet" (citing Harrelson v. State, 40 So. 3d 57, 59 (Fla. 2d DCA 2010)). This Court cannot rule out prejudicial error because it is obvious that the sentencing court based its sentence on what was presented to it as the bottom of the guidelines. The sentencing court divided the total sentence points by the total number of counts in arriving at the sentence on each count in this case.

Also as stated in this Court's Order to Show Cause, Mann v. State, 974 So. 2d 552 (Fla. 4th DCA 2008), is on point with the present case. In Mann, the defendant pled guilty to three counts of lewd or lascivious battery that charged penetration in the alternative to union. The Court held that, because the defendant did not specifically plead to penetration in those three counts, the assessment of sexual penetration points was error. The Court remanded the case for resentencing with a corrected scoresheet.

The Court finds that counsel was ineffective for failing to object to the additional sexual penetration points on the scoresheet. The Court also finds that the ineffectiveness was prejudicial to Defendant's sentencing result because the sentencing court clearly based its sentence on the bottom of the guidelines. Defendant is entitled to be resentenced with a corrected scoresheet.

Based on the above, it is **ORDERED AND ADJUDGED** as follows:

1) A Status Hearing on this matter is scheduled for Oct. 18th, 2019, at 8:30 a.m.
2) This is a non-final Order. No right to appeal exists until a final order in this matter has been rendered.

DONE AND ORDERED at Bartow, Polk County, Florida, this 23rd day of September, 2019.

LARRY HELMS, Circuit Judge

Copies furnished to:
--Michael Ufferman, Esq., 2022-1 Raymond Diehl Road, Tallahassee, FL 32308
--Charles E. Lewis, DC# H45833, Walton Correctional Institution, 691 Institution Road, DeFuniak Springs, FL 32433
--John C. Berndt, Esq., Assistant State Attorney

LH/jmp

I HEREBY CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed parties on this 23rd day of September, 2019.

CLERK OF THE CIRCUIT COURT
By: _____
Deputy Clerk