

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR OSCEOLA COUNTY, FLORIDA

CASE NO. 2012-CF-3896
DIVISION 10-A

STATE OF FLORIDA,
Plaintiff / Appellee,

vs.

PHILLIP ROY KIRKLAND
Defendant / Appellant.

_____ /

ORDER GRANTING
MOTION TO CORRECT SENTENCING ERROR

This matter came before the Court for consideration of Defendant Phillip Roy Kirkland's Motion to Correct Sentencing Error, filed February 28, 2017, pursuant to Florida Rule of Criminal Procedure 3.800(b).

Procedural History

On May 21, 2013, Defendant pled nolo contendere to three counts of sexual battery on a child under 12 by a person under 18. On June 7, 2013, he received a departure sentence of 12 days in the Osceola County Jail, with credit for 12 days, followed by 15 years of probation. On July 1, 2013, the Court conducted a status hearing and found him to be a sexual offender.

On July 9, 2013, through counsel, Defendant filed a Motion to Show Cause or Otherwise Withdraw Plea, alleging that during plea negotiations, it was stipulated that he would not be required to register as a sexual offender or a sexual predator. A hearing was scheduled for August 2, 2013, but it was cancelled and no ruling was ever entered.

On May 19, 2014, Defendant was arrested for violations of probation. Probation was restored on August 26, 2014.

On September 12, 2015, Defendant was again arrested for violations of probation. Competency proceedings and evaluations ensued, and on March 16, 2016, the Court found him competent to proceed.

On August 25, 2016, Defendant admitted the violations. The Court revoked probation and sentenced him to three concurrent terms of 15 years in the Department of Corrections with credit for 383 days. His appeal is pending under case number 5D16-3198.

Noting that the Information charged that the offenses were committed during a four-year range, from June 8, 1979, to June 8, 1983, Defendant now alleges that during the plea and sentencing hearings, the Court accepted the offense date as 1979 and agreed that Defendant would be sentenced under the 1979 version of the statute. Counsel advised the Court that Defendant would not be required to register as a sexual offender or predator because “based on the statute as it existed in 1979, there’s no registration requirement.” At the VOP hearing in 2016, the State argued that the Rule 3.988 scoresheet governed the sentencing and that there was no basis for a downward departure sentence. The Court found that a further downward departure was not appropriate.

Defendant argues his offenses were never subject to Florida’s sentencing guidelines because they occurred prior to the effective date, he never affirmatively elected to be sentenced under the 1983 guidelines, and it was “a legal impossibility” to sentence him under the Criminal Punishment Code. Therefore, he asserts he is entitled to a *de novo* resentencing.

This claim has merit. The first sentencing guidelines first became effective on October 1, 1983. *In re: Rules of Criminal Procedure (Sentencing Guidelines)*, 439 So. 2d 848 (Fla. 1983) (creating Rule 3.801 and Form 3.988). The Florida Supreme Court subsequently held that these guidelines were unconstitutional prior to July 1, 1984, so that became the new effective date. *Smith v. State*, 537 So. 2d 982 (Fla. 1989). The Rule

3.988(j) scoresheet became effective on January 1, 1991, so it applies only to offenses committed on or after that date. *In re: Florida Rules of Criminal Procedure 3.701 and 3.989 (Sentencing Guidelines)*, 566 So. 2d 770 (Fla. 1990).

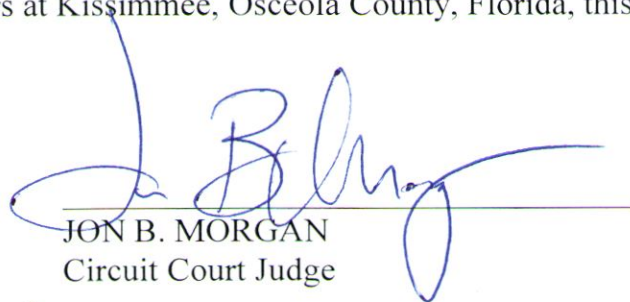
The record corroborates Defendant's claim that in 2013, the parties were operating under the mistaken belief that "the 1979 guidelines" applied, when in fact, no guidelines existed at that time. However, once a defendant has enjoyed the benefits of probation without challenging the legality of the sentence, he is precluded from complaining that it is illegal when probation is revoked. *Norton v. State*, 691 So. 2d 616 (Fla. 5th DCA 1997). Therefore, he cannot challenge his original sentence. However, the record is also clear that when he was resentenced in 2016 after violating probation, the Court again used the Rule 3.988(j) sentencing guidelines scoresheet. Because his offense was committed prior to July 1, 1984, he is entitled to be resentenced under the pre-guidelines law. *Kunkel v. State*, 765 So.2 d 244 (Fla. 1st DCA 2000); *Smith v. State*, 948 So.2 d 1078 (Fla. 2006).

Based on the foregoing, it is ORDERED AND ADJUDGED

1. The Motion to Correct Sentencing Error is GRANTED.
2. Defendant shall be brought before the Court on April 17, 2017 @ 1:30 p.m. for a resentencing hearing.

DONE AND ORDERED in chambers at Kissimmee, Osceola County, Florida, this

2nd day of March 2017.



JON B. MORGAN
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Order Granting Motion to Correct Sentencing Error has been provided this 3d day of March 2017 via U.S. Mail / electronic mail to William Mallory Kent, The Law Office of William Mallory Kent, 24 North Market Street, Suite 300, Jacksonville, Florida 32202, kent@williamkent.com / susan@williamkent.com; Danielle Grobmyer, Assistant State Attorney, 2 Courthouse Square, Suite 3500, Kissimmee, Florida 34741, dgrobmyer@sao9.org; and the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, crimappdab@myfloridalegal.com/



Judicial Assistant