IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

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STATE OF FLORIDA,

vs. CASE NO. 2007 CF 3791

DONALD MOBLEY, JR.,

Defendant.

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ORDER GRANTING DEFENDANT'S 3.800(B) MOTION TO CORRECT SENTENCING ERRORS & SETTING RESENTENCING DATE

THIS CAUSE came before this Court upon Defendant's *Motion to Correct Sentencing Errors* filed pursuant to Florida Rule of Criminal Procedure 3.800(b).[1] This Court having considered the motion, reviewed the record, and being otherwise fully advised, hereby finds as follows:

Defendant entered a plea[2] to the thirty-one counts contained in the information; namely, sixteen counts of grand theft, three counts of forgery, and twelve counts of uttering. All of the

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[1] Given the volume of work before this Court, and for good cause shown, this Court granted Defendant's *Unopposed Motion for Extension of Time* extended the time within which this Court had to rule on the motion and did so within the original sixty (60) day period. *See Davis v. State*, 887 So. 2d 1286 (Fla. 2004); *Conroy v. State*, 933 So. 2d 687 (Fla. 2d DCA 2006).

[2] Defendant pled "straight up." That is, the plea was not made pursuant to a negotiated agreement with the State.

offenses involved Defendant utilizing a State-issued credit card to purchase items for personal use. This Court sentenced Defendant to 13.5 months in the Department of Corrections – the lowest permissible sentence under the sentencing scoresheet. In so doing, this Court's predecessor explicitly stated that she would not have sentenced Defendant to prison if he had not scored prison. Defendant timely filed a notice of appeal. While the appeal was pending before the First District Court of Appeal, Defendant timely filed the motion which is the subject of these proceedings.

Defendant challenges whether his sentences for various counts, and the scoring of these counts on the Criminal Punishment Code scoresheet, violate double jeopardy principles. *See* U.S. Const. amends. V & XIV; Art. I, § 9, Fla. Const. The State argues that Defendant is precluded from raising this claim in a rule 3.800(b) motion. In so arguing, the State misses the mark. This Court finds that rule 3.800(b) is the proper vehicle for the Defendant to raise his double jeopardy claims.

While Defendant says that he does not challenge his conviction for these counts, it is difficult to accept such a legal fiction given the fact that "a traditional double jeopardy challenge attacks both the conviction and, by default, the sentence . . . [and] rule 3.800(a) is limited to claims that a sentence itself is illegal, without regard to the underlying conviction." *See Coughlin v. State*, 932 So. 2d 1224, 1226 (Fla. 2d DCA 2006); *see also Lopez v. State*, 2 So. 3d 1057, 1059 (Fla. 3d DCA 2009) (holding that a claim that "convictions violate double jeopardy is not cognizable on a Rule 3.800(a) motion"). However, the First District permits defendants to raise double jeopardy claims via rule 3.800(a) and thus this Court is obliged to do so. *See Cross v. State*, 2009 WL 1940708 (Fla. 1st DCA July 8, 2009); *see also Diaz v. Sec.*

For Dept' of Corrections, 313 Fed. Appx. 262, 265 (11th Cir. 2009) (recognizing disagreement among Florida courts on this precise issue). Inasmuch as rule 3.800(b) encompasses any claim that could be raised under rule 3.800(a), *see Brooks v. State*, 969 So. 2d 238, 242 n.7 (Fla. 2007), Defendant's claims are properly before this Court under rule 3.800(b).

It is no answer, as argued by the State, that a defendant can negotiate a plea whereby the State agrees not to file additional counts, secure the benefit of the bargain and then collaterally attack the sentence. If there had been a negotiated plea then the State would have "the option of either agreeing to the defendant's resentencing or withdrawing from the plea agreement and proceeding to trial." *Raines v. State*, 34 Fla. L. Weekly D456, D457 (Fla. 2d DCA Feb. 27, 2009). In the instant case, Defendant pled "straight up" and thus Defendant is not seeking the benefit of the bargain of a negotiated plea only to collaterally attack his sentence. Here, there was no agreement and thus Defendant is not seeking to have his proverbial cake and eat it too.

On June 12, 2009, the Court held an evidentiary hearing on the Defendant's rule 3.800(b) motion. Prior to the hearing, the State objected and argued that the Defendant was not entitled to introduce any evidence in support of his rule 3.800(b) motion. The State's argument would be correct if the Defendant had filed his motion pursuant to Florida Rule of Criminal Procedure 3.800(a). *See Mauldin v. State*, 9 So. 3d 25, 27 (Fla. 4th DCA 2009) ("A Rule 3.800(a) motion cannot be used to set aside the convictions, but Mauldin could raise a double jeopardy challenge to his sentences if the illegality of the sentence is apparent from the face of the record."). However, the Defendant's motion was filed pursuant to rule 3.800(b), and rule 3.800(b) specifically authorizes an evidentiary hearing. *See* Fla. R. Crim. P. 3.800(b)(1)(B) ("If an evidentiary hearing is needed . . . .").

Having determined that Defendant states cognizable claims and an evidentiary hearing was needed and thus held, this Court must address his claims on the merits.

In the first claim raised in his rule 3.800(b) motion, Defendant contends that his sentences for counts IV and V violate principles of double jeopardy. While the State took a contrary position at hearing, the State now "does not contest the removal of one of these two counts from scoring on the sentencing scoresheet as it appears the actions on October 1, 2006 were a single criminal episode."[3] Notwithstanding the State's concession, this Court addresses the claims on the merits because such analysis relates to the other claims pending before this Court.

Count IV of the information alleged that Defendant committed a grand theft ($300 or more) on October 1, 2006. Similarly, count V of the information alleged that Defendant committed a grand theft ($300 or more) on October 1, 2006. The probable cause affidavit alleges that Defendant obtained two items on October 1, 2006: (1) "DR3500" and (2) "B52 Matrix 200 sound system, etc." The probable cause affidavit indicates that both items were obtained from the "Guitar Center."

At the evidentiary hearing, Defendant presented the testimony of Shawn Cole, the manager of the Guitar Center. Mr. Cole testified that he was working at the Guitar Center on October 1, 2006. Mr. Cole further testified that Defendant came inside the store one time on October 1, 2006. Mr. Cole stated that while Defendant was inside the store, Defendant purchased some items from the store. Mr. Cole explained that the total for the items that

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[3] The State made this concession in its proposed order submitted to this Court on or about July 27, 2009.

Defendant purchased exceeded $1,000 and Defendant's credit card had a maximum one-time charge limit of $1,000, so the store swiped Defendant's credit card twice. Mr. Cole testified that the two credit card swipes occurred within moments of each other. Defendant introduced into evidence the two credit card receipts for the purchases made while Defendant was in the Guitar Center on October 1, 2006.

In his rule 3.800(b) motion, Defendant argues that separate grand theft sentences for the items purchased from the Guitar Center on October 1, 2006, violate principles of double jeopardy. In *Johnson v. State*, 490 So. 2d 182 (Fla. 1st DCA 1986), the First District considered whether double jeopardy principles prevented a defendant from being convicted/sentenced for six counts of grand theft for stealing six money orders from a convenience store during one criminal episode. The district court held that the defendant could only be convicted/sentenced for one count of grand theft:

> Appellant's first asserted basis for reversal, that only one grand theft was committed, implicates the double jeopardy clauses of the Florida and United States constitutions. It is true, as asserted by the state, that current double jeopardy doctrine allows multiple convictions flowing from one criminal episode where a legislative intent to allow separate punishments is clear. The corollary to this rule, however, is that the asserted legislative intent must be unambiguous. In analyzing a criminal statute to discern legislative intent, a strict reading is required, based upon the rule of lenity in construing penal statutes.
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> Here, the statute under which appellant was prosecuted, section 812.014(2)(b) 1, Florida Statutes (1983), provides that a person may be found guilty of grand theft if:
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> > . . . the property stolen is (1) valued at $100 or more, but less than $20,000.
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> This statute is ambiguous on its face as to the allowable "unit of prosecution," since no limiting or expansive language such as "a" or "any" is used with reference to property stolen. *Compare Grappin v. State*, 450 So. 2d 480 (Fla. 1984) (use of article "a" in reference to theft of firearms under section

> 812.014(2)(b)3 indicated legislative intent to allow multiple punishments for stealing a number of firearms from one person at the same time), with *State v. Watts*, 462 So. 2d 813 (Fla. 1985) (use of word "any" in section 944.47 regarding possession of firearms in correctional institutions established legislative intent of single prosecution). Therefore, we hold that the trial court should have granted appellant's motion for judgment of acquittal on five of the six grand theft counts.

Johnson, 490 So. 2d at 183-84 (some citations omitted) (footnotes omitted). Pursuant to *Johnson* and the rule of lenity, double jeopardy principles prevent Defendant from being sentenced for both count IV and count V because only one grand theft was committed on October 1, 2006. That is, as the State now concedes, the items were taken from the same store during the same criminal episode.

In the second claim raised in his rule 3.800(b) motion, Defendant contends that his sentences for counts VII and VIII violate principles of double jeopardy. Count VII of the information alleged that the Defendant committed a grand theft ($300 or more) on January 31, 2007. Count VIII of the information alleged that Defendant committed a grand theft ($300 or more) on February 3, 2007. The probable cause affidavit indicates that on January 31, 2007, Defendant "Establish[ed] Credit on Account" at the Guitar Center. The probable cause affidavit further indicates that on February 3, 2007, Defendant obtained "Two Mackie SRM 450 Powered Speakers [sic] systems, etc." from the Guitar Center.

At the evidentiary hearing, Defendant testified that on January 31, 2007, he went to the Guitar Center to obtain the items in question. However, some of the items were not in stock and had to be ordered by the store. Therefore, Defendant made a partial payment on January 31, 2007, but he did not leave the store with any property. On February 3, 2007, less than 72 hours later, Defendant returned to the Guitar Center. By the time that Defendant returned on

February 3, 2007, the store had received all of the items that Defendant had sought on January 31, 2007. Thus, on February 3, 2007, the Defendant paid the remaining balance due on the items and left the store with all of the items.[4] Mr. Cole's testimony at the evidentiary hearing was consistent with Defendant's testimony. That is, Mr. Cole confirmed that Defendant came to his store on January 31, 2007, but some of the items in question were not in stock, so Defendant made a partial payment on January 31, 2007, and then returned on February 3, 2007, and made the final payment and obtained the items.

In his rule 3.800(b) motion, the Defendant argues that count VII and count VIII constitute a single criminal episode and therefore separate grand theft counts for the items purchased during this single criminal episode violate principles of double jeopardy. This Court agrees.

The record establishes that Defendant had the intent to steal a single unit of property; namely, all of the items ordered by Defendant on January 31, 2007. Some of the items were not available on January 31, 2007, and therefore Defendant had to return to the store on

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[4] A copy of the January 31, 2007, receipt and copies of the February 3, 2007, receipts were introduced into evidence by the Defendant at the evidentiary hearing. The January 31, 2007, receipt indicates that the Defendant made a partial payment ("COA" or "credit on account") towards the items in question. The amount of the January 31, 2007, charge was $899.95. The February 3, 2007, receipts demonstrate that the payment from January 31, 2007, was applied to the items that the Defendant purchased and obtained on February 3, 2007. The first receipt in the amount of $149.97 states "USE OF CREDIT ON ACCOU[NT]." Part of the second receipt also states "USE OF CREDIT ON ACCOU[NT]" (in the amount of $749.98). $149.97 plus $749.98 equals $899.95 (i.e., the amount of the payment made on January 31, 2007).

February 3, 2007.[5] Ultimately, Defendant obtained only one group of items. Hence, this Court finds that Defendant formed a single criminal intent – the intent to obtain the items that he ordered on January 31, 2007, some of which were not available until February 3, 2007. When Defendant returned to the store on February 3, 2007, he did not form a new intent; rather, he was acting pursuant to the same intent to obtain the same property as existed at the time that he initially entered the store on January 31, 2007. The two grand theft counts concern the same victim, the State of Florida, the same location, the Guitar Center, and, most importantly, the same property, the items ordered on January 31, 2007, and obtained on February 3, 2007. The fact that Defendant ordered the items on one day and obtained the items four days later does not negate a conclusion that the two counts were part of a single criminal episode. *See Kilmartin v. State*, 848 So. 1222, 1223-25 (Fla. 1st DCA 2003) (finding that convictions for theft and dealing in stolen property were part of a single scheme or course of conduct and therefore violated double jeopardy where "the grand theft charge was predicated on appellant's having stolen some $3,300 worth of postage stamps from the United States Postal Service, and that the dealing in stolen property charge was predicated on appellant's having attempted to sell the stamps to a coin shop *two days later*") (emphasis added); *Barnlund v. State*, 724 So. 2d 632, 633-34 (Fla. 5th DCA 1998) (finding that convictions for theft and dealing in stolen property were part of a single scheme or course of conduct and therefore violated double jeopardy even though the items were stolen on one day and sold at a pawn shop more than ten days later).

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[5] Had the items been available on January 31, 2007, the Defendant would have obtained the items at that time and he would not have returned on February 3, 2007. Because the items totaled more than $1,000, the store would have been required to swipe the credit card twice as was done on October 1, 2006.

In short, this Court finds that the incident amounts to one continuing offense; namely, a single criminal episode which began on January 31, 2007, and ended on February 3, 2007.

It also bears noting that the State could have aggregated the sums from January 31, 2007, and February 3, 2007, for purposes of meeting the threshold for charging a felony or establishing the degree of the felony. Under the standard jury instructions, the jury may be instructed that "Amounts of value of separate properties involved in thefts committed pursuant to one scheme or course of conduct, whether the thefts are from the same person or several persons, may be added together to determine the total value of the theft." *Fla. Std. Jury Instr. (Crim.) 14.1 Theft.* The State cannot have it both ways. If the State could aggregate for purposes of establishing a particular degree of theft, then the sums must be viewed in the aggregate for purposes of determining whether there is a single criminal episode.

For all of these reasons, this Court finds that Defendant committed only one grand theft.[6] Thus, double jeopardy principles prevent Defendant from being sentenced on both count VII and count VIII.

In the final claim raised in his rule 3.800(b) motion not addressed on the record at

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[6] The State charged the Defendant with multiple counts of grand theft based on his use of a State-issued credit card. However, "Fraudulent use of credit cards" is an offense proscribed by Florida law. *See* § 817.61, Fla. Stat. Theft and fraudulent use of a credit card are degrees of the same offense for double jeopardy purposes. *See Riley v. State*, 854 So. 2d 807 (Fla. 1st DCA 2003). Notably, under section 817.61, even if the defendant uses a credit card multiple times in a six-month period, the defendant is nevertheless guilty of only one offense. *See* § 817.61, Fla. Stat. ("A person who, in any 6-month period, uses a credit card in violation of this section more than two times, or obtains money, goods, services, or anything else in violation of this section the value of which is $100 or more, is subject to the penalties set forth in s. 817.67(2)[, Fla. Stat.]").

hearing,[7] Defendant contends that his sentence for count XXX violates principles of double jeopardy.

At the evidentiary hearing, the Defendant introduced a copy of the January 2007 end-of-the-month envelope and copies of the invoices contained within the envelope. The invoices, the record, and the Defendant's testimony at the evidentiary hearing established that on December 27, 2006, the Defendant went to "Music Masters" and obtained two "Mackie SRM450 powered speaker[s]" (count XIV/grand theft). The Defendant forged two invoices for this transaction whereby he changed the identity/description of the items purchased (counts XVII and XVIII/forgery). On January 5, 2007, the Defendant went to "Music Masters" and obtained "Two Shure microphone systems, etc." (count XV/grand theft). The Defendant also forged the invoice for the January 5, 2007, transaction (count XIX/forgery).

The two December 27, 2006, invoices and the January 5, 2007, invoice were placed in the January 2007 end-of-the-month envelope. Count XXX charged the Defendant with uttering for the submission of the January 2007 end-of-the-month envelope which contained the invoices described above.

Defendant argues that principles of double jeopardy prevent him from being sentenced for count XXX because he cannot be sentenced for both uttering based on the act of submitting the invoices/receipts and uttering based on the act of submitting the envelope containing these

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[7] Defendant also challenges his sentences on Counts XX, XXI, and XXII. These counts charged Defendant with three counts of uttering for submitting three different improper invoices. For the reasons stated on the record, this Court denies Defendant's motion as it relates to these counts. Under section 831.02, Florida Statutes, the unit of prosecution is each "false, forged or altered record, deed, instrument or other writing mentioned in s. 831.01 . . ."

same invoices/receipts. In so arguing, Defendant misses the mark.

Section 831.02, Florida Statutes, proscribes uttering forged instruments. Under section 831.02, Florida Statutes, the unit of prosecution is each "false, forged or altered record, deed, instrument or other writing mentioned in s. 831.01 . . ."

In the case at bar, the State alleged that each of the invoices constituted a false uttering and the envelope constitutes a separate false uttering. This Court finds that an envelope that is signed by a state employee and verifies that the invoices contained therein are valid submissions for reimbursement constitutes a separate false uttering and thus Defendant's claim on this point is due to be denied.

It is no answer, as argued at hearing, that the envelope was signed but only verified that the receipts equal the total purchases listed on the Paid Charges Aging Report. In so arguing, Defendant is not arguing double jeopardy principles but instead seeks to overturn his conviction on count XXX arguing that the envelope is not false – as opposed to arguing it is not a separate false uttering but subsumed by the other utterings.

Removing counts V and VIII from the sentencing scoresheet will reduce the "total sentence points" on the sentencing scoresheet by 2.4 points,[8] leaving the total at 43.6 points. Because 43.6 is less than 44, the Defendant is eligible for a "non-state prison sentence."[9] *See*

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[8] All thirty-one of the offenses in this case were level 2 offenses. The primary offense was assigned a score of 10 points and the remaining thirty counts were assigned a score of 1.2 points.

[9] At hearing, Defendant argued that if only one count was remove for purposes of sentencing, leaving a total of 44.8 points, then he would still be entitled to resentencing because 44.8 is less than 44 because less than 44 includes anything up to 45. For the reasons stated on the record, this Court rejects that argument.

Fla. R. Crim. P. 3.704(d)(25). It is clear from the transcript of the sentencing hearing that the judge who presided over the Defendant's case intended to impose a non-state prison sentence if she had been legally permitted to do so. The Defendant is therefore entitled to be resentenced with a correctly calculated sentencing scoresheet.[10]

Accordingly, for the reasons set forth above, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's rule 3.800(b) motion is GRANTED in part, and DENIED in part.

2. Defendant's case shall be set for a resentencing hearing. Counsel for the Defendant shall contact this Court's judicial assistant and opposing counsel and thereafter coordinate a time to schedule the resentencing hearing. At the resentencing hearing, the State shall submit an amended sentencing scoresheet removing counts V and VIII.

3. Absent a showing of necessity, resentencing by a successor judge is prohibited. *See* Fla. R. Crim. P. 3.700(c)(1); *Horne v. State*, 918 So. 2d 1011, 1012-13 (Fla. 2d DCA 2006). Unless the Defendant and the State waive the requirements of rule 3.700(c)(1), *see Scott v. State*, 909 So. 2d 364, 368 (Fla. 5th DCA 2005), the resentencing hearing must be conducted by Judge Dekker who presided over the original sentencing hearing. Unless the parties stipulate otherwise, this case is set for resentencing before Judge Walker on August 20, 2009, at 8:30 a.m. consistent with

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[10] The judge intended to impose the lowest permissible sentence in this case. Moreover, in *State v. Anderson*, 905 So. 2d 111, 112 (Fla. 2005), the Florida Supreme Court held that "a scoresheet error requires resentencing unless the record conclusively shows that the same sentence would have been imposed using a correct scoresheet."

this Court's prior order reserving jurisdiction until August 20, 2009.

DONE AND ORDERED on this 18th day of August, 2009.

Mark E. Walker
Circuit Judge

Copies furnished to:

Michael Ufferman, Counsel for the Defendant
Assistant State Attorney Eddie Evans