

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

PAUL CROSS,

Appellant,

v.

CASE NO. 1D08-4710

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed July 8, 2009.

An appeal from the Circuit Court for Duval County.
Michael R. Weatherby, Judge.

William M. Kent, Jacksonville, for Appellant.

Bill McCollum, Attorney General, and Natalie D. Kirk, Assistant Attorney
General, Tallahassee, for Appellee.

PER CURIAM.

The appellant challenges the trial court's summary denial of his motion for
postconviction relief, filed pursuant to Florida Rules of Criminal Procedure

3.800(a) and 3.850, in which the appellant claimed that: (1) the trial court improperly resentenced him without allowing him or his attorneys to be present and argue for an appropriate sentence; (2) his sentence violated the prohibition against double jeopardy; and (3) the appellant suffered ineffective assistance of counsel. We affirm the trial court's summary denial of the appellant's third claim without further discussion. However, we reverse and remand the trial court's summary denial of the appellant's first and second claims.

The State had not filed charges under the 10/20/Life statute, but at sentencing, both parties and the court thought that the 10/20/Life minimum mandatory sentence applied. Thus, while trial counsel argued for a downward departure for youthful offender status, which the court rejected, counsel never argued, and the court never considered, any other appropriate sentence. The court then erroneously sentenced the appellant to concurrent minimum mandatory sentences of 10 years. Subsequently, the appellant notified the trial court of its mistake, and the court, without the appellant's presence or that of his counsel, amended the sentence to strike the mandatory minimum, but otherwise kept the sentences of 10 years' imprisonment.

A defendant has the right to be present and represented by an attorney at resentencing. See McGeogh v. State, 876 So. 2d 26, 26 (Fla. 1st DCA 2004);

Bines v. State, 837 So. 2d 1146, 1147 (Fla. 1st DCA 2003). Although the State argues that the striking of the minimum mandatory term was merely ministerial, not requiring the appellant's presence or counsel, under the facts as alleged by the appellant, we conclude otherwise and determine that further proceedings are warranted. See McGeogh, 876 So. 2d at 26; see also Mullins v. State, 997 So. 2d 443, 444 (Fla. 3d DCA 2008).

In his second claim, the appellant argues that the trial court violated the prohibition against double jeopardy by sentencing him both for armed robbery and for the lesser-included offense of grand theft. For purposes of a double-jeopardy analysis, in determining whether offenses arise from a single criminal episode, courts consider: (1) whether separate victims are involved, (2) whether the crimes occurred in separate locations, and (3) whether there has been a temporal break between the incidents. See Williams v. State, 959 So. 2d 790, 793 (Fla. 2d DCA 2007). The appellant committed armed robbery of a business and then stole an employee's car. Armed robbery of a business and of a store employee, if done during one continuous episode, constitutes a single action for double jeopardy purposes. See Taylor v. State, 751 So. 2d 659, 662 (Fla. 5th DCA 1999). The appellant's allegations are therefore facially sufficient. Furthermore, while a negotiated plea will waive such double jeopardy challenges, see Novaton v. State,

634 So. 2d 607, 609 (Fla. 1994); Taylor, 751 So. 2d at 662, the present record does not establish that the appellant entered into a negotiated plea bargain.

We accordingly reverse the summary denial of the appellant's first and second claims and remand for further proceedings. If the trial court is unable to support its denial of relief with record attachments, it should hold an evidentiary hearing and grant further relief as required.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

BARFIELD, DAVIS, and ROBERTS, JJ., CONCUR.