

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

ERIC MUNOZ,

Petitioner,

v.

Case No. 5D17-154

STATE OF FLORIDA,

Respondent.

Opinion filed April 21, 2017

Petition Alleging Ineffectiveness
Of Appellate Counsel,
A Case of Original Jurisdiction.

Eric Munoz, Crawfordville, pro se.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Samuel A. Perrone,
Assistant Attorney General, Daytona Beach,
for Respondent.

PER CURIAM.

Eric Munoz (the defendant) files a petition, alleging ineffective assistance of appellate counsel. Because the defendant's sentence is illegal and appellate counsel was ineffective for failing to file a motion challenging the sentence, pursuant to Florida Rule of Criminal Procedure 3.800(b), we grant the petition, in part.

The defendant was convicted and sentenced on multiple counts of delivery of cocaine within 1000 feet of a school and delivery of cannabis within 1000 feet of a school. The court imposed a general sentence of fifteen years in the Department of Corrections followed by ten years' probation on all counts.

The defendant filed this petition which included allegations that appellate counsel was ineffective for failing to: 1) preserve and argue an illegal general sentence, and 2) argue that certain of the sentences exceed the statutory maximum. The State properly concedes that the defendant was entitled to receive relief on both claims.

The sentence on all the counts is an illegal general sentence. See Inclima v. State, 570 So. 2d 1034 (Fla. 5th DCA 1990) (finding sentence of twelve years' incarceration followed by eight years' probation to be a prohibited general sentence and in excess of statutory maximum where total time exceeded statutory maximum where counts involved combination of first and second-degree felonies).

In addition, the general sentence is illegal for the delivery of cannabis convictions, as it exceeds the statutory maximum. A sentence in which the incarcerative portion and the probationary portion, when combined, exceed the statutory maximum is an illegal sentence. Wiskusky v. State, 707 So. 2d 1187 (Fla. 2d DCA 1998). The three counts of delivery of cannabis within 1000 feet of a school are second-degree felonies punishable by up to fifteen years in prison. §§ 775.082(3)(c), 893.13(1)(c)2, Fla. Stat. (2013). Accordingly, we grant the petition in part and remand for resentencing. We deny the defendant's other claims for relief.

DENIED in part; GRANTED in part; REMANDED for resentencing.

PALMER, EVANDER, and EDWARDS,JJ., concur.