

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

LAVORAL SEBASTIAN HAMILTON, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D2025-1231

September 9, 2026

Appeal from the Circuit Court for Sarasota County; Frederick P. Mercurio, Judge.

Blair Allen, Public Defender, and Maura Kiefer, Assistant Public Defender, Bartov, for Appellant.

James Bothmer, Attorney General, Tallahassee, and Sonia Carrine Lawson, Assistant Attorney General, Tampa, for Appellee.

SMITH, Judge.

Lavoral Sebastian Hamilton, Jr., challenges the judgment and sentence imposed on him after a jury found him guilty of possession of a firearm by a convicted felon, a violation of section 790.23(1)(a), Florida

Statutes (2024).¹ We find merit in one issue raised by Mr. Hamilton, that the trial court's imposition of a three-year mandatory minimum term under section 775.087(2)(a)(1), Florida Statutes (2024), was error despite the jury's verdict finding him in actual possession of the firearm, where there was no evidence that Mr. Hamilton was "carrying [the firearm] on [his] person" or that the firearm was "within immediate physical reach with ready access with the intent to use the firearm during the commission of the offense." See § 775.087(4). We affirm Mr. Hamilton's conviction but reverse the imposition of the three-year mandatory minimum sentence and remand for correction of the sentence.

The trial court properly denied Mr. Hamilton's motion for judgment of acquittal where there was sufficient evidence to support a conviction for possession of a firearm by a convicted felon under section 790.23(1), since the firearm was found wedged between the driver's seat and console of the vehicle driven by Mr. Hamilton. See *Hunter v. State*, 914 So. 2d 985, 986 (Fla. 4th DCA 2005) ("Possession may be actual or constructive, and constructive possession exists where a person, without physically possessing a firearm, knows of its presence on the premises and has the ability to maintain control over it.").

In order for the enhancement provision of section 775.087(2)(a)(1) to apply, the State must prove, and the jury must find, actual possession. See *Endrager v. State*, 814 So. 2d 1133, 1134 (Fla. 2d DCA 2002). Section 775.087(2)(a)1 provides, in pertinent part, "[A] person who is convicted for possession of a firearm by a felon . . . shall be

¹ After the jury found Mr. Hamilton guilty on the single count of felon in possession of a firearm, Mr. Hamilton pleaded no contest to a number of drug related offenses; Mr. Hamilton has not appealed those convictions.

sentenced to a minimum term of imprisonment of 3 years if such person possessed a 'firearm' . . . during the commission of the offense." However, unlike section 790.23(1), section 775.087(4) defines "possession" as "carrying [the firearm] on the person," or "possession may also be proven by demonstrating that the defendant had the firearm within immediate physical reach with ready access with the intent to use the firearm during the commission of the offense." (Emphasis added.)

The State presented no evidence that Mr. Hamilton was carrying the firearm on his person. Nor did the State offer any evidence that the firearm was within Mr. Hamilton's "immediate physical reach with ready access with the intent to use the firearm during the commission of the offense." To be sure, on appeal the State does not argue otherwise and rests only on the jury's finding of actual possession.

Because no factual basis exists for the application of the three-year mandatory minimum enhancement, we affirm the conviction for a felon in possession of a firearm but reverse the imposition of the three-year mandatory minimum sentence. See *Callentine v. State*, 55 So. 3d 728 (Fla. 2d DCA 2011); *Williams v. State*, 997 So. 2d 486, 487 (Fla. 2d DCA 2008); *Washington v. State*, 876 So. 2d 1242, 1243 (Fla. 2d DCA 2004); *Rock v. State*, 392 So. 3d 721, 792-93 (Fla. 4th DCA 2024); *Redding v. State*, 996 So. 2d 875, 876 (Fla. 4th DCA 2008). Mr. Hamilton's presence is not required when the trial court corrects the sentence. See *Washington*, 876 So. 2d at 1243.

Finally, while his appeal was pending, Mr. Hamilton filed a supplemental brief arguing that he was entitled to a twelve-person jury on his noncapital offense under the Sixth and Fourteenth Amendments—

an argument that was not preserved below.² While Mr. Hamilton did not make this argument below, we may review for fundamental error. See *Baptiste v. State*, 324 So. 3d 453, 455 (Fla. 2021). We find no basis to reverse on these new grounds. See *Serrano-Delgado v. State*, 392 So. 3d 251, 253-54 (Fla. 2d DCA 2024); *Williams v. Florida*, 399 U.S. 78, 103 (Fla. 1970) (holding that the Sixth and Fourteenth Amendment do not require a twelve-person jury in noncapital cases); see also *Jack v. State*, 349 So. 3d 925, 927 (Fla. 1st DCA 2022) (holding that a defendant tried by a six-person, as opposed to a twelve-person, jury is not fundamental error).

Affirmed in part, reversed in part, and remanded.

NORTHCUTT and GUARD, JJ., Concur.

Opinion subject to revision prior to official publication.

² As grounds for supplemental briefing, Mr. Hamilton relied upon the recent grant of certiorari by the United States Supreme Court in *Kiam v. State*, 421 So. 3d 439 (Fla. 4th DCA 2025), *cert. granted*, *Kiam v. Florida*, No. 25-6623 (U.S. June 15, 2026), which sought certiorari review of the same twelve-person jury issue.