IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NO. 1D11-1226

AHMAD J. SMITH
Appellant-Petitioner,

v.

STATE OF FLORIDA
Appellee-Respondent.

A DIRECT APPEAL OF AN ORDER OF THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, BAY COUNTY, FLORIDA, DENYING WITHOUT AN EVIDENTIARY HEARING A MOTION TO VACATE THE DEFENDANT'S JUDGMENT AND SENTENCE UNDER RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE

BRIEF OF APPELLANT
(ORIGINAL)

WILLIAM MALLORY KENT
Fla. Bar No. 0260738
1932 Perry Place
Jacksonville, FL 32207-3443
(904) 398-8000 Telephone
(904) 348-3124 Fax
kent@williamkent.com

Counsel for Appellant
AHMAD J. SMITH

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COURSE OF PROCEEDINGS AND STATEMENT OF FACTS[1]

Ahmad J. Smith ("Smith") was tried by jury and sentenced to life imprisonment. His trial counsel, Jean Marie Downing, engaged in post-judgment litigation concerning potential juror issues via a motion for new trial, and at the time she did so both she, and apparently the trial Court as well, thought that her post-judgment motion had tolled the time for filing Smith's notice of direct appeal. It did not, apparently because the motion for new trial itself was untimely. After her post-judgment jury litigation concluded, attorney Downing filed what she thought to be a timely notice of direct appeal, however the appeal was dismissed by the First District Court of Appeal ("DCA") as untimely. *Smith v. State*, 17 So.3d 764 (Fla. 1st DCA 2009).

In dismissing the direct appeal, the DCA did so by citation decision, which the lower Court described as follows:

> On October 19, 2009, the First District, in a *per curium* order, dismissed the Defendant's direct appeal as untimely. *Smith v. State*, 17 So.3d 764, 765 (Fla. 1st DCA 2009) reh'g denied. In its order dismissing the appeal, the First District included the following citation: "See Fla. R. Crim. P. 3.050 (excepting the time for making a motion for new trial from the scope of the trial court's general authority to grant extensions of time); *Denard v. State*, 410 So. 2d 976 (Fla. 5th DCA 1982) (an untimely motion for new trial does not postpone rendition of the

[1] Except as otherwise expressly noted the following statement of facts and course of proceedings is taken from the underlying 3.850 motion, R-8.

underlying judgment and sentence)." *Id*.

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As the lower Court noted, Attorney Downing (trial and direct appeal counsel) moved for rehearing and attempted to persuade the DCA that the appeal was timely, but her motion for rehearing was denied. *Smith v. State*, 2009 Fla. App. Lexis 15986 (Fla. 1st DCA 2009).

Thereupon Smith, proceeding *pro se*, filed a habeas petition seeking a belated appeal pursuant to Rule 9.141(c), Florida Rules of Appellate Procedure, based on his trial counsel's having filed his notice of appeal in an untimely fashion. The DCA denied Smith's habeas for belated appeal by a *per curiam* denied order, stating simply that the habeas petition was denied "on the merits." *Smith v. State*, 29 So.3d 295 (Fla. 1st DCA 2010).

Smith then filed a motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure, challenging his *trial counsel*'s failure to file a timely motion for new trial and thereafter failure to file a timely notice of appeal as ineffective assistance of *trial counsel*, arguing that the remedy would be for the trial Court to vacate the judgment and sentence for the limited purpose of allowing Smith to refile his motion for new trial in a timely manner, whereupon the trial Court could without further proceedings, reenter its previous order denying the motion for new trial, then reenter the prior

judgment and sentence, thereupon triggering Smith's right to a belated appeal and right of review in that belated appeal the denial of his motion for new trial.

That was the relief requested in his 3.850 motion the denial of which is the subject of this appeal.

In denying relief on Smith's 3.850 motion, the lower Court held:

> For this Court to grant the instant "limited" motion for postconviction relief, and thus grant the remedy the Defendant seeks, it would have to enter a ruling on the merits that trial counsel was ineffective for failing to file a timely notice of appeal. However, when the First District denied the Defendant's petition for belated appeal, it did so "on the merits" of the same ineffective assistance of counsel claims raised in the instant "limited" motion. See *Smith*, 29 So.3d 295. Consequently, the specific claims raised in the "limited" motion are barred by the doctrine of *res judicata*, and thus this Court lacks authority to rule on those claims. See *Mitchell v. State*, 203 So. 2d 676, 677 (Fla. 1st DCA 1967); *Mapp v. State*, 224 So. 2d 431, 433 (Fla. 1st DCA 1969). As such, this motion is due to he dismissed without prejudice to file a single, facially sufficient motion for postconviction relief pursuant to Rule 3.850.

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Smith filed a timely notice of appeal of that order and this appeal has proceeded in a timely manner thereafter. [R-43-45]

STANDARD OF REVIEW

Denial of 3.850 Motion Without Evidentiary Hearing

When a 3.850 motion is summarily denied without an evidentiary hearing, the order shall be reversed and the cause remanded for an evidentiary hearing unless the record conclusively shows that the appellant is entitled to no relief. Fla. R. App. P. 9.140(i), "Rule 3.850 explicitly requires that the record 'conclusively' rebut an otherwise cognizable claim if it is to be denied without a hearing." *State v. Leroux,* 689 So.2d 235, 237 (Fla. 1996). To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. *See* Fla. R. Crim. P. 3.850(d). Further, where no evidentiary hearing is held below, the appellate court must accept the defendant's factual allegations to the extent they are not refuted by the record. *See Lightbourne v. Dugger,* 549 So.2d 1364, 1365 (Fla.1989). Rule 3.850 requires defendants to allege "a brief statement of the facts (and other conditions) relied on in support of the motion." Fla. R. Crim. P. 3.850(c)(6). Although mere conclusory statements alleging ineffectiveness are insufficient, *see, e.g., Kennedy v. Singletary,* 599 So.2d 991 (Fla. 1992), petitioners are not required to allege the witnesses who are available to testify at the evidentiary hearing. *See, e.g., Valle v. State,* 705 So.2d 1331, 1333 (Fla. 1997), *Peede v. State*, 748 So. 2d 253 (Fla. 1999). The Florida Supreme Court has recently

reiterated the applicable standards in *McLin v. State*, 827 So.2d 948 (Fla. 2002):

> We begin with the legal principles governing when a trial court may properly deny a motion for postconviction relief without an evidentiary hearing. This Court has explained that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." *Anderson v. State,* 627 So.2d 1170, 1171 (Fla.1993). This requirement is embodied in Florida Rule of Criminal Procedure 3.850(d), which permits summary denial only if the "motion, files and records in the case conclusively show that the movant is entitled to no relief." Further, the rule requires that "when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records should be attached to the order." Fla. R.Crim. P. 3.850(d). [footnote omitted]

SUMMARY OF ARGUMENT

I. THE LOWER COURT ERRED IN SUMMARILY DENYING RELIEF ON *RES JUDICATA* GROUNDS BECAUSE THE DENIAL OF SMITH'S PRIOR HABEAS FOR INEFFECTIVE ASSISTANCE OF *APPELLATE COUNSEL* DID NOT DECIDE THE SAME ISSUE AS HIS 3.850 CLAIM OF INEFFECTIVE ASSISTANCE OF *TRIAL COUNSEL,* AND RULE 3.850 WAS THE PROPER VEHICLE TO SEEK A BELATED APPEAL WHEN THE PRIOR DIRECT APPEAL WAS DISMISSED BECAUSE THE NOTICE OF APPEAL WAS UNTIMELY FILED BECAUSE THE PRECEDING MOTION FOR NEW TRIAL WAS UNTIMELY, WHICH ON THE FACE OF THE RECORD ESTABLISHES A 3.850 CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ENTITLING SMITH TO A BELATED APPEAL.

The lower Court erred in summarily denying relief on the basis that this Court's prior denial of a habeas for ineffective assistance of *appellate* counsel constituted *res judicata* of a claim of denial of assistance of *trial counsel*. There was no identity of issues, therefore *res judicata* did not apply. *Corzo v. State* explained that the failure of trial counsel to file a *timely motion for new trial* stated a claim of ineffective assistance of *trial counsel* cognizable in 3.850, even if the very same motion for new trial had been denied on direct appeal. The direct appeal decision did not bar an ineffective assistance of *trial counsel* under Rule 3.850. That principle applies as well to a denial of a habeas for ineffective assistance of *appellate counsel*. Appellate counsel was arguably not ineffective - - the notice of appeal was simply filed too late

because trial counsel had filed the underlying motion for new trial too late.

The proper procedure for challenging counsel's filing of a late notice of appeal when that notice was late because it in turn was late due to trial counsel having filed an untimely motion for new trial, is to raise the claim as a claim of ineffective assistance of *trial counsel* under Rule 3.850. *Stephenson v. State*, 640 So.2d 117 (Fla. 2nd DCA 1994).

This Court should remand the matter to the trial court with directions that the lower court grant Smith a belated appeal.

ARGUMENT

I. THE LOWER COURT ERRED IN SUMMARILY DENYING RELIEF ON *RES JUDICATA* GROUNDS BECAUSE THE DENIAL OF SMITH'S PRIOR HABEAS FOR INEFFECTIVE ASSISTANCE OF *APPELLATE COUNSEL* DID NOT DECIDE THE SAME ISSUE AS HIS 3.850 CLAIM OF INEFFECTIVE ASSISTANCE OF *TRIAL COUNSEL,* AND RULE 3.850 WAS THE PROPER VEHICLE TO SEEK A BELATED APPEAL WHEN THE PRIOR DIRECT APPEAL WAS DISMISSED BECAUSE THE NOTICE OF APPEAL WAS UNTIMELY FILED BECAUSE THE PRECEDING MOTION FOR NEW TRIAL WAS UNTIMELY, WHICH ON THE FACE OF THE RECORD ESTABLISHES A 3.850 CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ENTITLING SMITH TO A BELATED APPEAL.

In *Corzo v. State*, 806 So.2d 642, 643 (Fla. 2nd DCA 2002), the Second DCA explained that failure to file a *timely* motion for new trial was properly litigated as an ineffective assistance of *trial* counsel issue under Rule 3.850, and that the mandate of a direct appeal on denial of such motion did *not* bar litigation of the issue under Rule 3.850:

> After mandate issued in the direct appeal, Mr. Corzo filed this postconviction motion alleging ineffective assistance of counsel. Borrowing freely from the brief on direct appeal, Mr. Corzo alleges in detail a long list of statements and actions by his counsel that do seem quite unprofessional. He claims that his counsel's conduct prejudiced him and affected the outcome of his trial. The trial court summarily denied the motion, concluding that it was procedurally barred because the issue had been raised on direct appeal.
>
> We can understand the trial court's confusion concerning whether Mr.

Corzo's claim for ineffective assistance of counsel was procedurally barred. There are many precedents holding that a motion pursuant to rule 3.850 may not raise issues that were or could have been raised on direct appeal. See, e.g., *Robinson v. State*, 707 So.2d 688, 698 (Fla.1998); *Medina v. State*, 573 So.2d 293, 295 (Fla.1990); *State v. Waters*, 718 So.2d 225, 226 (Fla. 2d DCA 1998). These cases have sometimes further explained that an issue rejected on direct appeal may not simply be realleged as a claim of ineffective assistance of counsel. See, e.g., *Freeman v. State*, 761 So.2d 1055, 1067 (Fla.2000); *Medina*, 573 So.2d at 295; *Childers v. State*, 782 So.2d 946, 947 (Fla. 4th DCA 2001). There are a few cases in which appellate courts have reversed a conviction or sentence on direct appeal based upon ineffective assistance of counsel. See, e.g., *Stewart v. State*, 420 So.2d 862 (Fla.1982); *Ross v. State*, 726 So.2d 317 (Fla. 2d DCA 1998); *Rios v. State*, 730 So.2d 831 (Fla. 3d DCA 1999); *Gordon v. State*, 469 So.2d 795 (Fla. 4th DCA 1985). Logic might therefore suggest that when such an issue is raised on direct appeal, a subsequent postconviction motion raising the same issue is barred.

The policies behind the above-cited cases are designed to assure that direct appeal issues are considered only once, and matters that require inquiry beyond the face of the record are reviewed in a forum that is equipped to conduct the additional evidentiary inquiry. For example, a defendant may raise on direct appeal the issue of whether the trial court erred when it denied a motion for new trial. Because that issue may be raised on direct appeal, it may not be raised later in a motion under rule 3.850. Likewise, the defendant may not raise the same issue again merely by recasting it as a claim for ineffective assistance of counsel. Thus, in this hypothetical, the defendant could not argue in a postconviction motion that his lawyer was ineffective because the trial court denied the motion for new trial. In that situation, the postconviction allegation is simply adding the words "ineffective assistance of counsel" without adding any new facts or legal arguments.

On the other hand, the fact that a defendant unsuccessfully raised the denial of his motion for new trial on direct appeal would not bar a claim that his counsel was ineffective <u>because counsel filed an</u>

> ***untimely motion for new trial*** or because counsel omitted a critical ground when drafting and arguing that motion. ***In such a situation, unlike the previous hypothetical, the postconviction motion is not merely repeating the issue raised on direct appeal. Instead, it is raising a separate issue that is somewhat interrelated with the issue raised on direct appeal***. In such a case, the defendant often needs to allege and explain that his appellate counsel was unsuccessful on an issue during the direct appeal because his trial counsel was ineffective during the presentation of that issue in the trial court.

Corzo v. State, 806 So.2d 642, 643-645 (Fla. 2nd DCA 2002) (emphasis supplied).

The correct vehicle for raising this claim was a 3.850 motion. In a case on identical facts, the Second District Court of Appeal held in *Stephenson v. State*, 640 S.2d 114 (Fla. 2nd DCA 1994), that when a notice of appeal was untimely resulting in dismissal of the direct appeal, because the notice of appeal had followed an untimely motion for new trial (exactly the facts in the instant appeal), then the remedy is to file a claim of ineffective assistance of *trial counsel* under Rule 3.850:

> Edgar Stephenson challenges the trial court's judgments and sentences that require him to serve life in prison as a habitual violent felony offender with no eligibility for release for fifteen years. § 775.084(40(b) 1., Fla.Stat. (1991). We are compelled to dismiss this appeal because Stephenson's court-appointed trial counsel did not file a timely notice of appeal. In doing so, we certify a question of great public importance regarding our authority to grant a belated appeal when the record on direct appeal indisputably reflects ineffective assistance of counsel in filing an untimely notice of appeal.
>
> The sentencing orders that are the subject of this appeal were rendered on December 30, 1992. Fla.R.App.P. 9.020(g). Based on Florida Rule of Appellate Procedure 9.140(b)(2), the thirty-day time period for filing

a notice of appeal expired on Friday, January 29, 1993. The notice, however, was not filed with the clerk of the lower court until the following Monday, February 1st, more than thirty days after rendition. Thus, under the rule, the notice was untimely filed, and we must dismiss this appeal. *Lori v. State*, 482 So.2d 562 (Fla. 2d DCA 1986).

We have not overlooked the fact that a motion for new trial was filed. The trial court, however, correctly struck it as untimely. Therefore, "[b]ecause it was not timely filed, the motion for new trial did not delay rendition of the judgment[s] and sentence[s] for purposes of filing a notice of appeal." *Richardson v. State*, 540 So.2d 133, 134 (Fla. 5th DCA 1989).

We have also considered appellate counsel's argument in response to our order to show cause that we can conclude from the record that it is just as probable that the notice was filed with the clerk sometime on Friday but not stamped as filed until the following Monday. See *Sunshine Dodge, Inc. v. Ketchem*, 427 So.2d 819 (Fla. 5th DCA 1983). The record refutes this contention. The notice reflects that trial counsel executed the certificate of service on Monday, February 1st, and the clerk's stamp shows the notice was filed at 3:52 P.M. on that same day.

Our dismissal, however, is without prejudice to Stephenson's right to file a motion with the trial court pursuant to Florida Rule of Criminal Procedure 3.850 seeking a belated appeal because of the ineffective assistance of trial counsel in filing an untimely notice of appeal. State v. District Court of Appeal of Florida, First District, 569 So.2d 439 (Fla.1990). Based on this record, we can only conclude that such an omission was caused by neglect, inadvertence or error in miscalculating the time requirements for filing a notice of appeal and was ineffective assistance as a matter of law, see *State v. Meyer*, 430 So.2d 440, 443 (Fla.1983), resulting in a frustration of Stephenson's right to a direct appeal under Florida law. See *Lake v. Lake*, 103 So.2d 639, 642 (Fla.1958); Art. V, § 4(b)(1), Fla. Const.; Fla.R.App.P. 9.140(b).

Accordingly, if Stephenson files a legally sufficient motion, we direct the trial court to grant it without the necessity of an evidentiary hearing

> and afford him a belated appeal, regardless of the merits of the appeal. *Iglesias v. State*, 598 So.2d 210 (Fla. 2d DCA 1992). Accord *Short v. State*, 596 So.2d 502 (Fla. 1st DCA 1992). We also direct the trial court to re-appoint Stephenson's appellate counsel in this case to represent Stephenson on his belated appeal.

Stephenson v. State, 640 So.2d 117, 118 (Fla. 2nd DCA 1994), *approved*, *Stephenson v. State*, 655 So.2d 86 (Fla. 1995) (Supreme Court held that District Court of Appeal does not have authority to grant belated appeal in criminal case when it is claimed that trial counsel, through neglect, filed untimely notice of appeal and, hence, rendered ineffective assistance as matter of law).

Thus the question decided by the First District Court of Appeal did not bar raising the question in a 3.850 motion, as was done in this case, and the lower court erred in denying the 3.850 motion on the basis of *res judicata*.

CONCLUSION

Smith requests this honorable Court vacate the order denying his 3.850 motion and remand the case with directions to the lower court that it grant Smith a belated appeal.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

WILLIAM MALLORY KENT
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
(904) 398-8000 Telephone
(904) 348-3124 Facsimile
kent@williamkent.com

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Time New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, by United States Mail, First Class postage prepaid, this May 9, 2011.

_____
William Mallory Kent