

Third District Court of Appeal

State of Florida, January Term, A.D. 2009

Opinion filed March 11, 2009.

Not final until disposition of timely filed motion for rehearing.

No. 3D07-1464

Lower Tribunal No. 01-21302

Ismael Grillo Perera,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Carlos J. Martinez, Public Defender, and Maria E. Lauredo, Assistant Public Defender.

Bill McCollum, Attorney General, and Ansley B. Peacock, Assistant Attorney General, for appellee.

Before GERSTEN, C.J., and RAMIREZ, and SUAREZ, JJ.

SUAREZ, J.

Defendant, Ismael Perera ("Perera"), appeals from the trial court's denial of his postconviction relief petition filed pursuant to Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of trial counsel. We reverse and remand with instructions.

Perera was charged with twenty-nine counts of sexual battery. He was found guilty as charged of twenty-two of those counts and received life in prison on each count to run consecutively. His appeal was affirmed by this Court. Perera v. State, 873 So. 2d 389 (Fla. 3d DCA 2004). He then filed a petition for writ of habeas corpus, which was denied. Perera then filed the present rule 3.850 petition raising ten issues. Pursuant to an evidentiary hearing, the trial court denied all issues and also denied Perera's motion for rehearing.

In issue 9 of his 3.850 motion, Perera alleged that his trial counsel was ineffective for failing to object to the trial court's erroneous jury instruction on sexual battery in counts 7, 11, 15 and 19, which he claims is fundamental error. The information against him alleged sexual battery by penetration. The trial court instructed the jury that Perera could be found guilty of sexual battery if he committed an act of penetration or union. Perera's defense counsel did not object to this instruction. At the 3.850 hearing, the trial court did not reach the merits of this issue as the trial court found that the issue was procedurally barred because it could have been raised on direct appeal. We disagree with the trial court, as this

type of error can be raised in a 3.850 petition and not just on direct appeal. See Bruno v. State, 807 So. 2d (Fla. 2001). We therefore reverse and remand to the trial court with directions to hold an evidentiary hearing and to make a determination on the merits of issue 9. See Weaver v. State, 957 So. 2d 586 (Fla. 2007); Jomolla v. State, 990 So. 2d 1234 (Fla. 3d DCA 2008); Beasley v. State, 971 So. 2d 228 (Fla. 4th DCA 2008).

Reversed and remanded with instructions.