

Third District Court of Appeal

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

Opinion filed August 12, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D08-1639
Lower Tribunal No. 01-27277

Tyrone Hutchinson,
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, Marisa Tinkler-Mendez, Judge.

Tyrone Hutchinson, in proper person.

Bill McCollum, Attorney General, and Michael C. Greenberg, Assistant Attorney General, for appellee.

Before ROTHENBERG, LAGOA, and SALTER, JJ.

ROTHENBERG, J.

Tyrone Hutchinson (“the defendant”) appeals from an order denying his motion to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800. Although we affirm, we do so without prejudice to the defendant’s right to pursue the remedy he seeks through an alternate means.

In October 2001, the defendant entered a plea of guilty to the charge of robbery while armed with a weapon. The defendant was sentenced as a youthful offender to one year of community control followed by thirty months of probation. As a result of the plea agreement, the trial court’s supervision order unambiguously provided that a violation of its terms would result in a **five-year prison sentence**.

In December 2001, an affidavit of violation of community control was filed against the defendant when he absconded from his supervision and his whereabouts became unknown. A warrant was issued for the defendant’s arrest, although he was not immediately apprehended. In July 2002, the defendant was convicted of three counts of burglary in Illinois.

In September 2005, the defendant returned to the Florida trial court, where he entered a guilty plea to the community control violations alleged in the affidavit. Inexplicably, and despite the unambiguous provision for a **five-year sentence** contained in the October 2001 plea agreement and supervision order, the

trial court sentenced the defendant to **ten years in prison**, a sentence he and his attorney agreed to.

In July 2007, and within two years from the date his sentence became final, the defendant filed a motion to correct illegal sentence pursuant to rule 3.800, arguing that he should have been sentenced to five years in prison in accordance with his October 2001 plea agreement and supervision order. The trial court denied the motion as legally insufficient. The defendant did not appeal that order.

In October 2007, the defendant filed a second motion to correct his sentence pursuant to rule 3.800. Approximately two months later, the trial court denied the motion upon the same grounds as the first (July 2007) motion. Again, the defendant did not appeal the trial court's order.

In March 2008, the defendant filed the instant motion to correct illegal sentence pursuant to rule 3.800. Once again, the trial court denied the motion. The defendant appeals from that decision.

The defendant's argument—that he was impermissibly sentenced to a prison term that did not comport with his 2001 plea agreement—is, however, not cognizable as a rule 3.800 motion to correct illegal sentence. See Hettick v. State, 977 So. 2d 797, 798 (Fla. 2d DCA 2008) (holding that because the thrust of the defendant's claim was that the trial court's order violated the terms of the negotiated plea agreement, his claim was not cognizable under rule 3.800(a), and,

instead, should have been filed pursuant to rule 3.850); Dellofano v. State, 946 So. 2d 127, 129 (Fla. 5th DCA 2007) (Lawson, J., concurring specially) (observing that because there is no provision in the Florida Rules of Criminal Procedure for a “motion to enforce plea agreement,” the only avenue available to the defendant is to file a claim pursuant to rule 3.850); Cichoski v. State, 874 So. 2d 695 (Fla. 4th DCA 2004) (holding that where, upon a violation of the defendant’s probation, the sentencing judge failed to impose the sentence the initial sentencing judge agreed would be imposed upon a violation of the defendant’s probation, the proper remedy was to seek relief pursuant to rule 3.850); Graham v. State, 641 So. 2d 511, 511-12 (Fla. 5th DCA 1994) (concluding that the trial court correctly denied the defendant’s rule 3.800(a) motion, where the claim was that the sentence was illegal because it exceeded the sentence agreed to under the defendant’s plea agreement; and finding that the proper remedy was to file a 3.850 motion asserting that the plea should be set aside because the sentence imposed was not in conformity with the terms of the plea agreement).

Based upon the authority of these cases, we conclude, as the Second, Fourth, and Fifth District Courts have concluded, that where the claim is that the sentence

imposed does not comport with the sentence “**bargained for**,” the proper remedy is to seek postconviction relief under rule 3.850.¹

Unfortunately, the defendant sought relief by filing motions pursuant to rule 3.800(a), and when denied by the trial court, the defendant failed to seek appellate review, where the error could have been remedied. Had the defendant appealed the denial of his July 2007 3.800 motion, because it was filed within the time limitations for a properly filed rule 3.850 motion, this Court could have treated the motion as properly filed pursuant to rule 3.850 and have remanded the motion to the trial court for its consideration of the motion. See Pifer v. State, 8 So. 3d 1154 (Fla. 2d DCA 2009); Hettick, 977 So. 2d at 797; Riviere v. State, 965 So. 2d 845 (Fla. 2d DCA 2007). However, because the defendant’s motion, which we now treat as a motion for postconviction relief filed pursuant to rule 3.850, was filed after the two-year deadline for the filing of a rule 3.850 motion, we are compelled to affirm the trial court’s order denying the defendant relief.

Luckily for the defendant, however, he may not be without a remedy. Although the two-year deadline for filing a rule 3.850 motion for postconviction relief has passed, our decision is without prejudice to the defendant’s right to move

¹ We distinguish this case from those cases where the claim is that there is a discrepancy between the sentence orally pronounced and the written judgment. Such a claim is clearly cognizable under rule 3.800(a). See William v. State, 957 So. 2d 600, 603 (Fla. 2007) (agreeing with the First, Second, Third, and Fifth District Courts of Appeal that a motion alleging a discrepancy between the oral and written sentences should be cognizable in a rule 3.800(a) proceeding).

for a rule 3.050(2) extension of time to file a motion for postconviction relief under rule 3.850. See Suarez v. State, 8 So. 3d 1226 (Fla. 3d DCA 2009) (holding that where a defendant is able to demonstrate good cause and excusable neglect, he or she may file, and have granted, a rule 3.050(2) motion for an extension of time within which to file a rule 3.850 motion for postconviction relief, **even after the passing of the rule 3.850 two-year deadline**).

In this case, the State and the trial court promised the defendant, in exchange for his guilty plea, that a violation of his supervision order would result in a five-year term of imprisonment. As it happened, the defendant did violate the conditions of the supervision order. However, he was sentenced to ten years in prison despite the binding agreement entered into by all parties in 2001.

The importance of the availability of plea agreements (to defendants, the State, the courts, and our system of justice) cannot be overstated. All parties to a plea negotiation must be held to the terms of the finalized agreement. Thus, although the issue must be determined by the trial court, under the facts and circumstances of this case, it appears that the defendant has demonstrated good cause to request and be granted an extension of time to file a motion for postconviction relief pursuant to rule 3.850 if he can demonstrate that his failure to timely file his rule 3.850 motion was the result of excusable neglect. Fla. R. Crim. P. 3.050(2); Suarez, 8 So. 3d at 1226.

We pause to express our concern regarding the handling of this case. At every stage of the post-plea proceedings, the system appears to have failed the proper administration of justice. Although the defendant violated the terms of his plea agreement and deserves to be punished, he equally deserves to be treated fairly by the system. It appears the defendant's lawyer failed the defendant when he allowed the defendant to accept a plea with a sentence that exceeded the sentence all of the parties, including the trial court, agreed would be imposed upon a violation of community control. Nevertheless, at some point, the State and the trial court should have recognized the legitimacy of the defendant's claim, corrected the error, treated his rule 3.800(a) motion as a rule 3.850 motion, or have directed the defendant in how to pursue the appropriate remedy. We are all guardians of the system, and as such, we have an obligation to ensure that a legitimate claim is not thwarted by the inexperience of a pro se litigant.

In conclusion, although we are compelled to affirm the order now on appeal, our decision is without prejudice to the defendant's right to file a rule 3.050(2) motion for an extension of time to file a motion for postconviction relief pursuant to rule 3.850(a). The trial court is instructed to consider any such motion in a manner consistent with this opinion.

Due to the novelty and complexity of the issues involved in this appeal, we hereby appoint the Public Defender's Office to represent the defendant and pursue

the appropriate relief at the trial level and at the appellate level, if an appeal is taken.

Affirmed with instructions.