

Third District Court of Appeal

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

Opinion filed April 22, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-253
Lower Tribunal No. 01-1762

Vincent Rydell Johnson,
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, Bertila Soto, Judge.

Vincent Rydell Johnson, in proper person.

Bill McCollum, Attorney General, for appellee.

Before COPE, SHEPHERD, and SUAREZ, JJ.

PER CURIAM.

Affirmed.

COPE, J. (concurring).

Defendant-appellant Johnson appeals an order denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. This particular motion was filed by counsel but was filed two days late.* The trial court denied the motion as untimely and successive.

Defendant-appellant Johnson may have a basis to refile the motion under Florida Rule of Criminal Procedure 3.850(b)(3) which excuses the time bar where “the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.” As the motion was untimely filed, this portion of the rule may excuse the time bar. See De La Rosa v. State, 979 So. 2d 1089, 1089-90 (Fla. 3d DCA 2008). However, to refile the motion the defendant must also have a good faith basis to avoid the bar of successiveness. See Fla. R. Crim. P. 3.850(f).

* The mandate issued in the defendant’s direct appeal on October 17, 2005, so the deadline for filing the rule 3.850 motion was October 17, 2007.