

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

BRYAN RICHARD CHERRY,

Appellant,

v.

Case No. 5D19-2287

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed December 13, 2019

3.850 Appeal from the Circuit Court
for Sumter County,
William H. Hallman, III, Judge.

Bryan Richard Cherry, Bristol, pro se.

Ashley Moody, Attorney General,
Tallahassee, and Deborah A. Chance,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

Bryan Richard Cherry appeals the postconviction court's order summarily denying his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. For the reasons that follow, we reverse the order and remand with directions to allow Cherry to file an amended postconviction motion.

Cherry's motion for postconviction relief was sparsely, and somewhat disjointedly, pleaded. At best, Cherry apparently tendered a no contest plea to certain charges and received lengthy prison sentences, but he contends that his trial counsel failed him by not pursuing a dismissal of the charges prior to his plea.

To successfully argue an ineffective assistance of counsel claim in a rule 3.850 motion, a defendant must allege that counsel's performance was deficient and that he or she was prejudiced as a result. *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Cherry's motion here was insufficiently pleaded as he failed to allege specific claims of deficiency in counsel's performance or that he was prejudiced. See *Grosvenor v. State*, 874 So. 2d 1176, 1179 (Fla. 2004) (holding that to establish the requisite prejudice for relief under rule 3.850 when a defendant has entered a plea, the defendant must demonstrate "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial" (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985))).

The postconviction court's first task should have been to analyze and address the facial sufficiency of Cherry's motion. See Fla. R. Crim. P. 3.850(f)(2) ("If the [rule 3.850] motion is insufficient on its face, and the motion is timely filed under this rule, the court shall enter a nonfinal, nonappealable order allowing the defendant 60 days to amend the motion."). Because it apparently did not do so, and as Cherry has not previously been given an opportunity to amend, we reverse the summary denial of his motion and remand with directions that the postconviction court provide Cherry with the opportunity to file a facially-sufficient amended motion for postconviction relief within sixty days, if he can do

so in good faith. See Fla. R. Crim. P. 3.850(f)(2); *Spera v. State*, 971 So. 2d 754, 761–62 (Fla. 2007).¹

REVERSED and REMANDED, with directions.

COHEN, WALLIS, and LAMBERT, JJ., concur.

¹ If Cherry timely files a facially-sufficient amended motion, the postconviction court must either grant an evidentiary hearing or attach portions of the record that conclusively refute the claims raised. See Fla. R. Crim. P. 3.850(f); *Delice v. State*, 103 So. 3d 262, 263 (Fla. 5th DCA 2012). We note that the present order under review summarily denying Cherry's motion had no record attachments.