

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

ANTHONY McMILLAN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D09-3424

[August 4, 2010]

PER CURIAM.

The trial court dismissed Anthony McMillan's third Florida Rule of Criminal Procedure 3.800(a) motion as impermissibly successive and an abuse of procedure. We agree with the trial court that most of McMillan's third rule 3.800(a) motion is successive. We discern, however, one argument in the instant motion not previously raised. Here, he asserted that, at sentencing, the trial court stated the imposition of a life sentence as a habitual violent felony offender was mandatory, when, in fact, such a sentence was permissive. We agree with McMillan that the life sentence was permissive, not mandatory, but find the error harmless as a matter of law since McMillan was eligible for a life sentence. *See Brooks v. State*, 969 So. 2d 238, 239 (Fla. 2007) (adopting "could-have-been-imposed harmless error test" for rule 3.800(a) motions). Nonetheless, because this argument was raised for the first time in the instant motion, we are compelled to deny it on the merits.

Affirmed.

GROSS, C.J., STEVENSON and CIKLIN, JJ., concur.

* * *

Appeal of order denying rule 3.800 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Paul L. Backman, Judge; L.T. Case No. 97-14264 CF10A.

Anthony McMillan, Florida City, pro se.

Bill McCollum, Attorney General, Tallahassee, and Daniel P. Hyndman, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.