NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

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| BARRON THOMPSON,<br><br>Appellant,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>Appellee. | ) | Case No. 2D10-3918 |

Opinion filed May 6, 2011.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Lee County; Edward J. Volz, Jr., Judge.

Barron Thompson, pro se.

KHOUZAM, Judge.

We reverse the denial of Barron Thompson's motion for postconviction relief that he filed pursuant to Florida Rule of Criminal Procedure 3.850 because it was neither untimely nor successive, as found by the postconviction court.

The two-year period for Thompson to file his rule 3.850 motion expired on May 15, 2010. Thompson certified that he placed his motion in the hands of prison

officials on May 12, 2010; however, the motion was not stamped filed by the clerk of the circuit court until June 16, 2010. The postconviction court erred when it ruled the motion as untimely.

> [A] legal document submitted by an inmate is timely filed if it contains a certificate of service showing that the pleading was placed in the hands of prison or jail officials for mailing on a particular date, if . . . the pleading would be timely filed if it had been received and file-stamped by the Court on that particular date.

Thompson v. State, 761 So. 2d 324, 326 (Fla. 2000). Because the certificate of service indicates a filing date of May 12, 2010, three days before the expiration of the two-year time limit of rule 3.850(b), Thompson's motion was timely filed.

The postconviction court also erred by finding successive Thompson's claims that (1) his counsel was ineffective for failure to advise him to have his bond canceled while he was in jail, which resulted in a loss of jail credit, and (2) his plea was involuntary because his attorney and the court misadvised him that his jail credit would apply to all cases. Even though Thompson had previously filed an unsuccessful jail credit claim pursuant to Florida Rule of Criminal Procedure 3.800(a), which was denied in 2008, this would not preclude Thompson from raising jail credit issues under rule 3.850 if he is able to demonstrate that the credit was not awarded due to counsel's ineffectiveness. See, e.g., Edmondson v. State, 854 So. 2d 751, 751 (Fla. 2d DCA 2003) (affirming the denial of a rule 3.800(a) motion because the record indicated that the defendant was not entitled to the jail credit but observing that the defendant might have "a meritorious claim of ineffective assistance of counsel"); see also Blake v. State, 807 So. 2d 772, 773 (Fla. 2d DCA 2002) ("Jail credit issues are appropriately brought in a rule 3.850 motion . . . .").

Accordingly, we reverse and remand for the postconviction court to consider the merits of Thompson's claims.

Reversed and remanded.

MORRIS, J., Concurs.
VILLANTI, J., Concurs with opinion.

VILLANTI, Judge.

I fully concur in this opinion but write to address a burden of proof issue that arises from the supreme court's decision in Thompson. The premise of Thompson is that the timeliness of prisoner mailings is determined based on the date the prisoner places the petition or other notice in the hands of prison officials for mailing. 761 So. 2d at 326. That date is determined solely from the date alleged in the prisoner's sworn certificate of service and not from the date those officials actually forward that mail to the clerk of court. Id. This presumption arises because prisoners have no control over the actual transmittal of their mail and must rely on prison officials to timely do so. Id.; see also Haag v. State, 591 So. 2d 614, 617 (Fla. 1992) (holding that a petition or notice of appeal "is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state").

I note however that this presumption is rebuttable, and the State has the right to present evidence "to prove that the document was not timely placed in prison officials' hands for mailing." Thompson, 761 So. 2d at 326. The State in this case chose not to contest Thompson's possibly self-serving assertion that he placed his

motion in the hands of prison officials on May 12, 2010, even though the postmark is more than thirty days later.[1] Thompson should be aware that " 'penalties for direct contempt of court or perjury may be imposed when movants are untruthful in postconviction proceedings.' " Whitty v. State, 5 So. 3d 724, 725 (Fla. 2d DCA 2009) (quoting Oquendo v. State, 2 So. 3d 1001, 1006 (Fla. 4th DCA 2008)). If the State researches this point and uncovers a prison mail log rebutting Thompson's claim of timeliness, it may wish to consider whether pursuing contempt proceedings or initiating a perjury[2] prosecution would be appropriate. While Thompson established a broad application of the mailbox rule for prisoners, it did not condone its application by artifice.

[1]The certificate of service signed by Thompson reflects that he placed his petition in the hands of prison officials for mailing on May 12, 2010; however, the postmark on the envelope reflects a date of June 14.

[2]I note that while Thompson specifically signed his motion "[u]nder penalties of perjury," his certificate of service is below his signature on the oath and merely "certifies" that he has placed his mail in the hands of prison officials on a specific date. I express no opinion on the ramifications of such a "certification" on either a contempt proceeding or perjury prosecution but instead leave that issue for the State's consideration should it determine that the "certification" was false.