

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

EDUARDO MOLINA BRACERO,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 2D11-4967

Opinion filed June 27, 2012.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court for Polk
County; Marcus J. Ezelle, Judge.

Eduardo M. Bracero, pro se.

BLACK, Judge.

Eduardo Molina Bracero appeals the summary denial of his motion for postconviction relief filed May 18, 2011. The Florida Supreme Court transferred the motion to the Tenth Judicial Circuit Court in and for Polk County for consideration as a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. The postconviction court denied the motion as untimely. We reverse.

After his direct appeal, this court remanded the case and ordered that Bracero be resentenced. See Bracero v. State, 10 So. 3d 664, 665 (Fla. 2d DCA 2009). In his motion, Bracero alleged that the court resentenced him on October 1, 2009. Based on this date, his judgment and sentence became final on October 31, 2009, and the two-year window for filing a rule 3.850 motion expired on October 31, 2011. Assuming his allegations are true, the motion filed on May 18, 2011, was timely. See Franqui v. State, 59 So. 3d 82, 95 (Fla. 2011) (holding that the court must accept the movant's factual allegations as true in a rule 3.850 motion to the extent they are not refuted by the record). The postconviction court has not attached portions of the record supporting its determination that Bracero's motion was untimely filed. Accordingly, we remand for further proceedings and if it becomes apparent on remand that the motion was timely filed then the court shall consider the merits of the motion.

Reversed and remanded.

NORTHCUTT and KHOUZAM, JJ., Concur.