

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

AARON H. IRIARTE,)	
)	
Appellant,)	
)	
v.)	Case No. 2D12-4978
)	
STATE OF FLORIDA,)	
)	
Appellee.)	
_____)	

Opinion filed August 16, 2013.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court for
Lee County; Mark A. Steinbeck, Judge.

PER CURIAM.

Aaron H. Iriarte appeals the summary dismissal of his motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.850. We reverse the circuit court's order and remand for further proceedings.

On January 12, 2010, Iriarte pleaded nolo contendere to aggravated battery with a deadly weapon (count one), burglary of an unoccupied structure (count two), and damage of property (count three); he was sentenced to a total of six years' imprisonment. Iriarte did not file a direct appeal. On August 3, 2012, Iriarte filed the current motion for postconviction relief.

The circuit court dismissed Iriarte's motion as untimely, finding that because he did not file a direct appeal, his judgment and sentence became final on or about February 9, 2010, thirty days after sentencing. According to the court, Iriarte's motion, filed in August of 2012, was outside the two-year time limit of rule 3.850(b). The court also noted that although Iriarte filed a timely motion to withdraw plea after sentencing, he admitted in his rule 3.850 motion that he later voluntarily dismissed it. The court delved no further into this issue despite the fact that a motion to withdraw plea under Florida Rule of Criminal Procedure 3.170(l) "delays rendition of the judgment and sentence until the court files a signed, written order disposing of the motion." Haber v. State, 961 So. 2d 1098, 1099 (Fla. 2d DCA 2007). Because the court failed to further address Iriarte's motion to withdraw plea or attach any order disposing of it—such as an order demonstrating that the motion had been voluntarily dismissed—the date his judgment and sentence became final cannot be determined from the record, and the timeliness of his current rule 3.850 motion remains unclear.

Accordingly, we reverse the circuit court's dismissal and remand for the court to attach portions of the record establishing the finality of Iriarte's judgment and sentence, reevaluate the timeliness of Iriarte's rule 3.850 motion, and if necessary address his claims on the merits. If the motion to withdraw plea *has not* been formally disposed of, the court shall again dismiss Iriarte's rule 3.850 motion—as his judgment and sentence never became final—and rule upon the motion to withdraw plea. See id.

Reversed and remanded.

CRENSHAW and MORRIS, JJ., Concur.
ALTENBERND, J., Concurrs specially.

ALTENBERND, Judge, Specially concurring.

I concur in this decision to remand the case to the trial court for further proceedings. Mr. Iriarte's postconviction motion claims that he filed a motion to withdraw plea, "which was voluntarily dismissed." He does not state when it was voluntarily dismissed. The trial court's order recites Mr. Iriarte's claim, but it does not confirm that a notice of dismissal or a motion to voluntarily dismiss was ever filed by Mr. Iriarte or the attorney who presumably is representing him concerning that motion.

The trial court treated the motion pursuant to Florida Rule of Criminal Procedure 3.170(*l*) as a postconviction motion and cited Joseph v. State, 835 So. 2d 1221 (Fla. 5th DCA 2003), for the proposition that another collateral proceeding does not toll the time for a motion under rule 3.850. The trial court erred because a motion under rule 3.170(*l*) is not a collateral proceeding. In many ways it looks like a collateral proceeding, but it is a motion filed within thirty days of rendition of the sentence. The motion presents and preserves an issue so that it may be addressed on direct appeal, not on collateral review.

Implicit within our opinion is the suggestion that the time to file a motion under rule 3.850 is tolled until a date related to the defendant's decision to voluntarily withdraw his earlier motion to withdraw plea under rule 3.170(*l*). That is probably a correct suggestion. His sentence could not even be reviewed on direct appeal until that motion was resolved.¹ In a somewhat similar context, when a defendant voluntarily dismisses a direct appeal, we measure the two-year period from the date of our order

¹Unless Mr. Iriarte or his attorney actually filed a notice of abandonment of this motion, it is not clear to me that his time to file a direct appeal has even expired.

granting a voluntary dismissal. See Cabrera v. State, 721 So. 2d 1190, 1191 (Fla. 2d DCA 1998).

Assuming that our suggestion is correct—the law provides a defendant with a tolling period that expands the time for the filing of a postconviction motion when an earlier filed motion pursuant to rule 3.170(l) is pending but is ultimately abandoned—it is unclear to me when that period would end. Florida Rule of Appellate Procedure 9.020(h)(3) provides that an appeal is "held in abeyance" until the filing of a written order disposing of such a motion. The rule understandably does not address the rare defendant that abandons the motion. I would assume that the thirty-day period to file the direct appeal commences on the filing of the notice of abandonment even if no order is entered on the notice. If that is true, then the two-year period for the filing of a motion under rule 3.850 would run from the time the judgment and sentence became final by the expiration of the time to file a direct appeal. I do not believe there is precedent on this point, and I write this concurrence to emphasize that our opinion today does not decide this issue.