

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM A.D., 2005

DARWIN WARD,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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** CASE NO. 3D05-412

**

** LOWER

TRIBUNAL NO. 01-4943

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Opinion filed August 10, 2005.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2)
from the Circuit Court for Miami-Dade County, Julio Jimenez, Judge.

Kenneth P. Speiller, for appellant.

Charles J. Crist, Jr., Attorney General, and Jill K.
Traina, Assistant Attorney General, for appellee.

Before COPE, C.J., and SHEPHERD, and ROTHENBERG, JJ.

SHEPHERD, J.

Darwin Ward appeals the trial court's order denying his
motion to vacate his conviction and sentence and seeks a new

trial pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. We reverse and remand for further proceedings.

On direct appeal of the appellant's conviction for sale of cocaine, we affirmed stating that "the errors alleged were not fundamental and no timely objections were made during the proceedings." Ward v. State, 844 So. 2d 776, 777 (Fla. 3d DCA 2003). We also stated that our affirmance was without prejudice to appellant seeking post conviction relief. Appellant has now done so, contending that his trial counsel was ineffective for failing to make proper objections.

The state argued below that appellant's motion simply seeks to rephrase issues previously raised. The state is incorrect. On the direct appeal, appellant argued that the purported errors were fundamental entitling him to relief. The appellant now argues that his trial counsel was ineffective for not making the objections. We find that the record does not conclusively refute appellant's claim. Accordingly, we reverse the order denying defendant's motion for post conviction relief and remand with instructions to the trial court to either conduct an evidentiary hearing or to attach those record excerpts which conclusively refute the defendant's claim. See Fla. R. App. P. 9.141(b)(2)(D).

Reversed.