

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

DAVID WEIKER,

Appellant,

v.

Case No. 5D19-2478

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed July 17, 2020

3.850 Appeal from the Circuit
Court for Lake County,
Mark J. Hill, Judge.

Mark H. Klein, of MHK Legal, PLLC, Coral
Springs, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Douglas T. Squire,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

David Weiker appeals the denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Weiker's motion asserted four grounds of ineffective assistance of counsel. We affirm the trial court's denial of Weiker's first claim without further discussion. The trial court failed to rule on Weiker's second and third claims as the State properly concedes. Accordingly, we reverse as to claims two

and three so that the trial court can rule on those claims. In his fourth claim, Weiker asserted that his trial counsel was ineffective for failing to object or stipulating to restitution in the amount of \$22,862,351.99. We agree and reverse for the trial court to conduct a restitution hearing.

Weiker's company, Platinum Properties, accepted millions of dollars in deposits from hundreds of homebuyers, but never built any homes. Apparently, Weiker spent a good bit of the money on personal expenses. As a result, Weiker was convicted of one count of organized fraud and 29 counts of communications fraud. He was sentenced to 12 years in prison and ordered to pay restitution. His convictions and sentences were affirmed on appeal. See Weiker v. State, 146 So. 3d 1205 (Fla. 5th DCA 2014).

In the fourth claim of his rule 3.850 motion, Weiker argued that his counsel was ineffective for failing to object or stipulating to the amount of restitution. The amount of restitution was apparently derived from the bankruptcy schedules of Platinum Properties. But there were many items on the bankruptcy schedules unrelated to Weiker's convictions, such as unpaid wages to workers, county, state, and federal taxes, and deposits for victims involved with charges that were abandoned by the State.

A claim that counsel was ineffective for failing to challenge the amount of restitution can be raised in a postconviction motion. See Butler v. State, 951 So. 2d 38, 40 (Fla. 2d DCA 2007). The trial court denied Weiker's claim because his counsel failed to object. However, that is the essence of Weiker's claim—that had counsel asked for a restitution hearing, the amount of restitution ordered would have been substantially less. We agree that Weiker is entitled to a new restitution hearing.

For these reasons, we affirm the denial of Weiker's first claim, reverse for consideration of Weiker's second and third claims, and a new restitution hearing as Weiker requests in his fourth claim.

AFFIRMED in part and REVERSED in part, and REMANDED.

EVANDER, C.J., ORFINGER and WALLIS, JJ., concur.