

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

JOSEPH RAYMOND FOLEY,

Appellant,

v.

Case No. 5D19-3600

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed July 2, 2020

3.850 Appeal from the Circuit
Court for Citrus County,
Richard A. Howard, Judge.

Matthew R. McLain, of McLain Law,
P.A., Longwood, for Appellant.

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

PER CURIAM.

Joseph Raymond Foley, Appellant, appeals the summary denial of his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief alleging both ineffective assistance of counsel and newly discovered evidence. We affirm the summary denial of Foley's ineffective assistance claims.

However, we reverse the summary denial as to Foley's newly discovered evidence claim alleging that one of the victims recanted a portion of her trial testimony. In his postconviction motion, Foley alleged that one of the victims made a statement after trial that contradicted her trial testimony. His motion alleged that this inconsistent statement qualifies as both a recantation and as impeachment evidence. He argues that the victim's new statement supports his theory of defense, and this evidence would produce a different result upon retrial.

However, Foley's motion was insufficient because he did not attach an affidavit from this witness, nor did he explain why the required affidavit could not be obtained. See Fla. R. Crim. P. 3.850(c). Therefore, the trial court erred when it summarily denied the claim without giving Foley an opportunity to amend. See Fla. R. Crim. P. 3.850(f)(3); *Good v. State*, 200 So. 3d 185, 185 (Fla. 5th DCA 2016).

AFFIRMED in part; REVERSED in part; and REMANDED.

EISNAUGLE, HARRIS, and TRAVER, JJ., concur.