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

STATE OF FLORIDA,

Appellant,

v. Case No. 5D20-831

KAREN HAYES DECKER,

Appellee.

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Opinion filed January 29, 2021

Appeal from the Circuit Court
for Seminole County,
Jessica J. Recksiedler, Judge.

Ashley Moody, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellant.

Matthew J. Metz, Public Defender, and George D.E. Burden, Assistant Public Defender, Daytona Beach, for Appellee.

TRAVER, J.

The State appeals the postconviction court's order setting aside Karen Decker's plea and vacating her sentence. In 2014, Decker pled no contest to a lesser-included charge of misdemeanor battery against her seventy-two-year-old mother. Five years later—after unsuccessfully attempting to seal her criminal record—Decker moved under

Florida Rule of Criminal Procedure 3.850 to set aside her plea, alleging that her lawyer's misadvice about her eligibility for a seal rendered her plea involuntary. But because Decker admits conducting no due diligence on her ability to seal her criminal record during the two years after her judgment and sentence became final, her Rule 3.850 motion is time-barred. We therefore reverse.

Decker's sentence of a withhold of adjudication and twelve months' probation became final in June 2014. Decker took no action to seal her criminal record until May 2017, when an apartment complex denied her residency because of her criminal record. In 2018, the Florida Department of Law Enforcement certified Decker's eligibility to petition the court to seal her criminal record, subject to any statutory disqualifiers. Shortly thereafter, Decker petitioned to seal her record. The State did not object, and the court promptly entered an order sealing Decker's record.

Two months later, the State moved to set aside the order after FDLE advised Decker's offense was statutorily ineligible for sealing because the offense qualified as an "act of domestic violence."[1] The court then vacated its order.

In August 2019, Decker moved to vacate her sentence, alleging that she involuntarily entered her plea because her lawyer misadvised her that she could later seal

[1] The parties agree that Decker's record is statutorily ineligible for sealing. *See* § 943.059, Fla. Stat. (2019) ("A criminal history record that relates to . . . a violation enumerated in s. 907.041 . . . may not be sealed, without regard to whether adjudication was withheld, if the defendant was found guilty of or pled guilty or nolo contendre to the offense . . . ."); § 907.041(4)(18), Fla. Stat. (2019) (listing as a "dangerous crime" an "[a]ct of domestic violence as defined in s. 741.28"); § 741.28(2), Fla. Stat. (2020) (defining "domestic violence" to include a "battery . . . of one family or household member by another family or household member"). FDLE had to notify the postconviction court that it erroneously sealed Decker's record. *See* § 943.059(3)(d), Fla. Stat. (2018).

her record. *See* Fla. R. Crim. P. 3.850(a)(5). After rejecting the State's request to summarily deny Decker's motion as untimely, the postconviction court conducted an evidentiary hearing. Decker testified that she spoke to her lawyer about sealing her record during their first meeting and that a seal was important because she worked in the insurance industry and had three children.

The postconviction court granted Decker's Rule 3.850 motion. It acknowledged the two-year time limit to file for postconviction relief under Rule 3.850(b), but nevertheless concluded Decker filed a timely motion due to the "unusual circumstances of this case." The court first found that because Decker could not seal her record until she completed probation, she had only one year to investigate the issue. It also found that Decker's attorney, the FDLE, the State, and the court had each "misled" Decker during the sealing process. The court observed that the Florida Statutes contain no deadline by which an applicant must petition to seal her criminal record. And the postconviction court concluded that Decker exercised due diligence by filing her motion within two years of when Decker first learned of her attorney's misadvice.

A movant has two years from the time her judgment and sentence become final to file a motion to vacate. *See* Fla. R. Crim. P. 3.850(b). An exception exists when the facts on which the motion is predicated were unknown to the movant and "could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.850(b)(1). In this situation, a movant must file her motion within two years of when she discovered the new facts or could have discovered them with the exercise of due diligence. *Id*.

A public criminal record is a collateral consequence of a criminal sentence. Like other collateral consequences, Decker could identify the legal impact of her plea at the

time of entry. *See Ey v. State*, 982 So. 2d 618, 624–25 (Fla. 2008) (potential sentencing enhancement); *State v. Green*, 944 So. 2d 208, 217–18 (Fla. 2006) (immigration consequence); *Tisdale v. State*, 282 So. 3d 998, 1000–01 (Fla. 3d DCA 2019) (sex offender registration); *Marshall v. State*, 983 So. 2d 680, 682–83 (Fla. 4th DCA 2008) (en banc) (existence of criminal record).

For example, in *Green*, the Florida Supreme Court addressed deportation, a collateral consequence far more serious than a criminal record. *See* 944 So. 2d at 210. Receding from precedent allowing defendants two years to file for postconviction relief from the time they are threatened with deportation, the court opined that "[w]hether the plea subjects the defendant to deportation is an existent fact on the date of the plea which is either known or ascertainable by the defendant." *Id.* at 217–18, receding from *Peart v. State*, 756 So. 2d 42 (Fla. 2000). Similarly, in *Marshall*, our sister court reasoned that "[i]f a collateral consequence of a plea, such as the impact on professional licensing, is of such import that it would cause a defendant to not enter a plea and insist on proceeding to trial, then it should be discovered with the exercise of due diligence within two years of the conviction becoming final." 983 So. 2d at 682.

Decker cites no authority explaining why her situation is different than those in *Green* or *Marshall*. Instead, she argues that she could not have discovered her attorney's misadvice even with due diligence. We are unpersuaded. Decker's statutory ineligibility for sealing is a legal consequence of her plea that was always readily discoverable. *See id.* at 683 (declining to hold that the two-year limit commences when the defendant "discovers the law"); *see also Finfrock v. State*, 27 So. 3d 191, 192 (Fla. 5th DCA 2010)

(Cohen, J., concurring) ("[P]ublication of law and statutes of Florida gives all citizens constructive notice of the consequences of their actions.").

In sum, Decker could have investigated the sealing of her criminal record after the imposition of her sentence and quickly learned that she was statutorily ineligible. The undisputed record shows that Decker instead waited nearly three years after her sentence became final. On these facts, the postconviction court erred in finding due diligence, and Decker's Rule 3.850 motion is time-barred. We therefore reverse for the postconviction court to vacate its final order and deny as untimely Decker's Rule 3.850 motion.

REVERSED and REMANDED with INSTRUCTIONS.

ORFINGER and LAMBERT, JJ., concur.