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

PHILIP MIRINO,

Appellant,

v.

Case No. 5D21-1754
LT Case Nos. 2016-101625-CFDL
2019-102266-CFDL

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed

3.800 Final Appeal from the Circuit Court
for Volusia County,
James R. Clayton, Judge.

Philip Mirino, Lawtey, pro se.

No Appearance for Appellee.

PER CURIAM.

Appellant, Philip Mirino, appeals the postconviction court's summary denial of his pro se correspondence, which was treated below as a motion to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). We reverse and remand for further proceedings.

In his January 15, 2021 correspondence to the postconviction court, Appellant requested a review of his sentence. Specifically, he alleged that he was sentenced pursuant to an incorrect scoresheet because it included a violation of probation during August of 2017 that he claims was invalid. Appellant stated that if the erroneous violation was removed, he "would be eligible for a re-sentence or downward departure due to my points being lowered." To support his claim, Appellant attached to his correspondence a record stating the alleged violations in August of 2017 had the following disposition: "Not in violation/No action." In response, the postconviction court issued an order summarily denying relief and attached three documents challenging Appellant's assertion that his scoresheet contained an erroneous violation.

Considering the conflict in the records produced by Appellant and the postconviction court, an evidentiary hearing is required to adjudicate Appellant's claim that his scoresheet contained an erroneous violation of probation without which he would be eligible for a resentence or downward departure. *Rollins v. State*, 298 So. 3d 703 (Fla. 5th DCA 2020). Because an evidentiary hearing is required, Appellant's claim is not cognizable under rule 3.800(a) but would be reviewable under rule 3.850. *Johnson v. State*, 60 So. 3d 1045, 1049–50 (Fla. 2011) ("Since 'no evidentiary hearing is

allowed' under rule 3.800(a), a claim of error that the petitioner can establish only by relying on facts that are not evident on the face of the record is a claim that cannot be adjudicated under that rule provision."). And because Appellant brought his claim within two years of the judgement and sentence becoming final, he should have been allowed a chance to amend and file a facially sufficient motion under rule 3.850. *Moore v. State*, No. 1D20-1414, 2021 WL 5102650, at *1 (Fla. 1st DCA Nov. 3, 2021). Accordingly, we reverse the order summarily denying Appellant's motion. Upon remand, Appellant's motion shall be stricken as facially insufficient under rule 3.850, and Appellant should be allowed sixty days to amend his motion to comply with rule 3.850, provided that he can do so in good faith. *See Fla. R. Crim. P.* 3.850(f)(2); *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007); *see also Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005) (holding that when an initial motion is stricken with leave to amend, a subsequent amended motion relates back to the date of the original filing).

REVERSED and REMANDED, with instructions.

EVANDER, WALLIS and NARDELLA, JJ., concur