

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D20-1569

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TERRANCE HIGHTOWER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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On appeal from the Circuit Court for Duval County.  
Mark Borello, Judge.

August 12, 2021

WINOKUR, J.

Terrance Hightower appeals the order on his rule 3.850 motion for postconviction relief, which the trial court denied as untimely. We reverse and remand for an evidentiary hearing.

On January 16, 2013, the court convicted Hightower of two counts of robbery with a firearm and sentenced him to life in prison on both counts. After sentencing, he was returned to the New Jersey Department of Corrections. At some point prior to February 2018, Hightower was transported to back Florida to begin serving this sentence.

In February 2018, Hightower moved to have the two-year time limit for filing a rule 3.850 motion tolled for the period while he

was incarcerated out of state because he did not have access to Florida legal materials. *See Fla. R. Crim. P. 3.850(b)*. The trial court construed this as a motion for an extension of time and denied it because the two-year time period had already expired. Undeterred, Hightower filed in October 2019 a rule 3.850 motion, seventeen months after his tolling motion was denied. The trial court denied the rule 3.850 motion as untimely.

On appeal, Hightower argues that it was error for the trial court to deny his motion as untimely because during the time he was incarcerated in New Jersey, he was denied access to Florida's legal system. Hightower relies on *Demps v. State*, 696 So. 2d 1296, 1298–99 (Fla. 3d DCA 1997), which held that a defendant incarcerated in an out-of-state prison with no access to Florida legal materials was deprived of access to the Florida courts. In response, the State notes that *Demps* was decided in 1997, and technology has advanced considerably since that time. This view is consistent with *Piggott v. State*, 14 So. 3d 298, 299 (Fla. 4th DCA 2009), where the Fourth District expressly declined to adopt *Demps* as “still reliable” and questioned its validity due to the fact that advancing technology had resulted in increased access to legal materials and did not always require access to paper documents or physical records. During the intervening years since *Piggott*, technology has only continued to increase access to legal information, even in out-of-state prisons. We agree with the approach adopted by the Fourth District in *Piggott*, which remanded “for the trial court to allow defendant to establish predicate facts for his alleged avoidance of the limitations bar as in *Demps*.” *Id.* at 299.

Before the trial court addresses the access-to-courts matter, we note that the record does not clearly establish that Hightower's rule 3.850 motion was timely even if all of the time he was incarcerated in New Jersey tolled the limitation period. Even if the limitation period was tolled this entire time, Hightower would still be required to file a rule 3.850 motion within two years of his return to Florida. The record does not indicate when Appellant was returned to begin his Florida sentence, but he claims in this appeal that he was returned on October 28, 2017, two years to the date prior to the filing of the rule 3.850 motion. If in fact Hightower was

out of New Jersey custody prior to that date, then his rule 3.850 motion would be untimely regardless of tolling.

If the trial court finds that Hightower filed his rule 3.850 motion within two years from the date he was returned to Florida, it should determine whether all or any part of the time he was incarcerated in New Jersey tolled the limitation period. To do so, it should provide Hightower the opportunity to establish that he did not have access to Florida legal materials and systems while imprisoned in New Jersey before deciding whether any part of the two-year time period for filing rule 3.850 motions should be tolled. If enough time was tolled, it should address Hightower's claims; if not, it should dismiss his motion.

REVERSED and REMANDED with directions.

MAKAR and KELSEY, JJ., concur.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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Terrance Hightower, pro se, Appellant.

Ashley Moody, Attorney General, and Julian E. Markham, Assistant Attorney General, Tallahassee, for Appellee.