

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2005

TORIANO ROBERTS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Nos. 4D05-2876 & 4D05-2879

[November 16, 2005]

PER CURIAM.

Toriano Roberts (Defendant) appeals from an order summarily denying as untimely his motion for postconviction relief, filed pursuant to rule 3.850, Florida Rules of Criminal Procedure, in two consolidated cases. The trial court's order of denial counted the two-year period for filing the motion, *see Fla. R. Crim. P. 3.850(b)*, without reference to Defendant's direct appeal, erroneously concluding that Defendant did not file a direct appeal in either case. However, this court's own records reflect that Defendant **did** file a direct appeal with respect to both cases. *See Roberts v. State*, 856 So.2d 1151 (Fla. 4th DCA 2003), *rev. denied*, 879 So.2d 623 (Fla. 2004). Taking the appeal into account, the motion was not untimely and should have been considered on the merits. Accordingly, we reverse the order of denial and remand the case to the trial court for the attachment of record portions conclusively showing Defendant is not entitled to relief, or for an evidentiary hearing.

Reversed and Remanded.

GUNTHER, POLEN and MAY, JJ., concur.

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Consolidated appeals from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Burton C. Conner, Judge; L.T. Case Nos. 562001CF000998A & 562001CF001349A.

Toriano Roberts, Indiantown, pro se.

Charles J. Crist, Attorney General, Tallahassee, and Richard Valuntas, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.