

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

RAFAEL LESENDE,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 2D18-2252

Opinion filed January 22, 2020.

Appeal from the Circuit Court for Collier
County; Christine Greider, Judge.

Lee Hollander of Law Offices of
Hollander and Hanuka, Naples, for
Appellant.

Ashley Moody, Attorney General,
Tallahassee, and David Campbell,
Assistant Attorney General, Tampa, for
Appellee.

ATKINSON, Judge.

Rafael Lesende appeals the orders denying his motion for clarification and his motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800. For the reasons that follow, we dismiss the appeal of the latter and reverse the former.

Lesende was convicted of one count of perjury under section 837.02(1), Florida Statutes (2016), a third-degree felony, and two counts under section 328.07(4)(b), Florida Statutes (2016), also third-degree felonies, after a jury trial. He filed a direct appeal of the judgment and sentence on October 10, 2017. An order of probation, withholding imposition of the sentence and placing him on probation for a period of five years, was entered on September 22, 2017, and filed on October 30, 2017. On October 22, 2017, and October 29, 2017, respectively, he filed a motion to correct sentence and a motion to clarify sentence.

In the motion to correct sentence, Lesende argued that his sentence did not give him credit for any of the time that he had served pending trial. The lower court did not rule on this motion within sixty days, so on April 6, 2018, it entered an order indicating that the motion was deemed denied under rule 3.800(b)(2)(B).

In his motion to clarify sentence, Lesende sought clarification that his five-year probation sentence began "on the day of pronouncement, September 22, 2017," and that Lesende "is therefore presently on probation." The lower court denied the motion, holding that Lesende's "probationary sentence in the present case is tolled until he is released from custody."

Although the supplemental record in the direct appeal included the motion to correct sentence, Lesende's appellate counsel did not specifically file a notice of that motion or argue the merits of the sentencing issue in his briefs. The judgment and sentence were affirmed per curiam on November 14, 2018. See Lesende v. State, 258 So. 3d 564 (Fla. 2d DCA 2018).

We do not have jurisdiction to consider the denial of the motion to correct sentence under rule 3.800(b) outside of the direct appeal. See Perry v. State, 849 So. 2d 324, 325 (Fla. 2d DCA 2003) ("[R]ule 3.800(b), as a whole, is structured to apply only to a direct appeal of a sentence."); see also Fla. R. App. P. 9.141(b) (governing "Appeals from Postconviction Proceedings Under Florida Rules of Criminal Procedure 3.800(a), 3.801, 3.802, 3.850, or 3.853" but not 3.800(b)). While Perry involved a rule 3.800(b) motion filed after the mandate in the direct appeal, its reasoning is equally applicable here. "Regardless of the timing of the motion, the procedure established by rule 3.800(b) was meant to be used only in a direct appeal." Cooper v. State, 919 So. 2d 516, 519 (Fla. 1st DCA 2005).

Lesende contends that the lower court erred by denying his motion for clarification wherein he sought a determination that his term of probation began upon the pronouncement of his sentence. Lesende's motion is essentially a motion to correct sentence under 3.800(a). See Ruiz v. State, 927 So. 2d 162, 163 (Fla. 3d DCA 2006) ("[T]he defendant's motion for clarification is, in essence, a motion to correct an illegal sentence and award credit for time served pursuant to Florida Rule of Criminal Procedure 3.800(a)."); Nelson v. State, 720 So. 2d 1104, 1105 (Fla. 1st DCA 1998) (treating motion to clarify as a rule 3.800(a) motion and reversing because a clear discrepancy in the jail credit appeared in the record). The court's order was procedurally improper. The trial court lacked jurisdiction to rule on the motion because it was filed during the pendency of the direct appeal. See Smart v. State, 200 So. 3d 1285, 1285 (Fla. 5th DCA 2016) ("Because the trial court lacked jurisdiction to rule on

Smart's motion to correct illegal sentence [under rule 3.800(a)] during the pendency of his direct appeal, we reverse the order denying the motion.").¹

This court lacks jurisdiction to review the denial of Lesende's rule 3.800(b) motion outside of the direct appeal because it is not an appealable order under Florida Rule of Appellate Procedure 9.141. As a result, we dismiss it without prejudice to any right that Lesende might have to challenge the illegal sentence by filing a timely motion under rule 3.800(a). The trial court lacked jurisdiction to deny the motion for clarification during the pendency of the appeal because it is effectively a motion under rule 3.800(a). Therefore, we reverse the order denying the motion for clarification.

Dismissed in part; reversed in part.

VILLANTI and SMITH, JJ., Concur.

¹While a court may "treat prisoner petitions as if the proper remedy were sought if it would be in the interest of justice to do so," Fenter v. State, 632 So. 2d 685, 686 n.1 (Fla. 2d DCA 1994), Lesende's motion cannot be considered as a motion under rule 3.800(a) because it was filed during the pendency of his direct appeal, see Fla. R. Crim. P. 3.800(a)(1) ("[A] party may not file a motion to correct an illegal sentence under this subdivision during the time allowed for the filing of a motion under subdivision (b)(1) or during the pendency of a direct appeal."). We do not reach the merits of Lesende's claim that the trial court improperly failed to award him credit for time served. However, we note that such a claim could now be asserted under rule 3.800(a) since the mandate from his direct appeal has issued. See State v. Mancino, 714 So. 2d 429, 433 (Fla. 1998) (agreeing that "a sentence that does not mandate credit for time served would be illegal since a trial court has no discretion to impose a sentence without crediting a defendant with time served" and is the proper subject of a rule 3.800(a) motion).