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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAMES EARL DOWNS, DOC #762100,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-2323

Opinion filed June 17, 2020.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Highlands County; Michael P. McDaniel, Judge.

LaROSE, Judge.

James Earl Downs appeals the postconviction court's order denying his motion to correct illegal sentence. See Fla. R. Crim. P. 3.800(a). We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). We affirm, but on a rationale different than that used by the postconviction court. See City of Clearwater v. Sch. Bd. of Pinellas Cty., 905 So. 2d 1051, 1057 (Fla. 2d DCA 2005) ("[T]he 'tipsy coachman' doctrine . . . allows an appellate court to affirm a trial court decision that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the

record.' " (quoting Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999))). We write to explain.

Background

The State charged Mr. Downs with battery on a law enforcement officer (count 1), kidnapping (count 2), and escape (count 3). The offenses occurred in 1992. A jury found him guilty as charged on counts 1 and 3, and guilty on count 2 of false imprisonment, a lesser included offense. The trial court sentenced Mr. Downs as a habitual felony offender (HFO) to ten years' imprisonment on counts 1 and 2, and thirty years' imprisonment on count 3, with all counts to run consecutively.

Mr. Downs raised a single claim in his 2015 rule 3.800(a) motion. Specifically, he complained that his sentences are illegal because he received consecutive HFO sentences for offenses arising from the same criminal episode. See Claycomb v. State, 142 So. 3d 916, 917 (Fla. 4th DCA 2014) ("[O]nce a defendant's sentences for multiple crimes committed during a single criminal episode [are] enhanced through habitual felony offender statutes, the total penalty [can]not be further increased by ordering that the sentences run consecutively." (citing Hale v. State, 630 So. 2d 521 (Fla. 1993))). Mr. Downs insisted that the exhibits attached to his motion demonstrated his entitlement to relief. The exhibits included the written judgment and sentences, as well as several amended informations. Mr. Downs submitted no trial transcripts or other record evidence.

The postconviction court denied the motion. It concluded that Mr. Downs' Hale claim was untimely; it "should have been filed within two years of issuance of the mandate in State v. Callaway, 658 S[o]. 2d 983 (Fla. 1995)." See Dixon v. State, 730 So. 2d 265, 265-66, 269 (Fla. 1999) (holding that a Hale claim was preserved if it was

filed by July 20, 1997, such date being two years from issuance of the mandate in State v. Callaway, 658 So. 2d 983 (Fla. 1995), in which the court held that Hale had retroactive effect). Mr. Downs filed a timely rehearing motion, which the postconviction court dismissed as unauthorized, while also denying relief on the merits.

Analysis

"We review the denial of a rule 3.800(a) motion de novo." Williams v. State, 244 So. 3d 1173, 1175 (Fla. 2d DCA 2018).

At the outset, we point out that Mr. Downs' rehearing motion was authorized. See Fla. R. Crim. P. 3.800(b)(1)(B) (authorizing rehearing of orders denying relief under rule 3.800(a)); Bamber v. State, 995 So. 2d 624, 624 (Fla. 2d DCA 2008) ("We reverse and remand for reconsideration of Bamber's motion for rehearing [of the postconviction court's order denying his rule 3.800(a) motion] because the court erroneously determined that it was unauthorized."). This observation is of no consequence because the postconviction court also denied rehearing on the merits.

As to the merits of Mr. Downs' claim, a postconviction motion alleging a Hale claim must have been filed by August 16, 1997. Dixon, 730 So. 2d at 269 ("Our decision renders Dixon's renewed 3.850 motion timely because it was filed within two years of August 16, 1995, the date of our mandate in Callaway."). However, Callaway does not "irretrievably foreclose relief from consecutively-imposed habitual offender sentences growing out of the same criminal episode by means of rule 3.800[(a)]." Adams v. State, 755 So. 2d 678, 680 (Fla. 2d DCA 1999).

The postconviction court overlooked the case law from this court, and others, recognizing a Hale claim, not only in the context of rule 3.850, but also when relief is sought pursuant to rule 3.800(a), under which redress may be pursued at any

time. See Fla. R. Crim. P. 3.800(a) ("A court may at any time correct an illegal sentence imposed by it . . . when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief . . . ."); Cappelletti v. State, 189 So. 3d 1052, 1053 n.1 (Fla. 2d DCA 2016) ("[A] Hale claim is not cognizable in a rule 3.801 motion; it may be raised in a facially sufficient rule 3.800(a) motion."); Sult v. State, 42 So. 3d 867, 869 (Fla. 2d DCA 2010) ("Sult has identified in his motion those portions of the record, including the trial transcripts, that will support a finding that the offenses were committed during a single criminal episode. Accordingly, we reverse the order denying Sult's [rule 3.800(a)] motion and remand for the postconviction court to address the claim."); Harris v. State, 875 So. 2d 735, 736 (Fla. 2d DCA 2004) ("The trial court denied this claim finding that it can only be raised pursuant to Florida Rule of Criminal Procedure 3.850. The trial court is incorrect. . . . The trial court had the benefit of this court's opinion in Harris[v. State, 845 So. 2d 250 (Fla. 2d DCA 2003),] when [the trial court erroneously] found that a Hale claim could not be raised pursuant to rule 3.800(a)."); Wachter v. State, 868 So. 2d 629, 630 (Fla. 2d DCA 2004) ("A claim that a trial court imposed consecutive habitual offender sentences in violation of Hale . . . is a cognizable rule 3.800(a) claim 'if the determination of whether the offenses were part of the same criminal episode can be made without resorting to extra-record facts.' " (quoting West v. State, 825 So. 2d 499 (Fla. 2d DCA 2002))); Davis v. State, 784 So. 2d 1205, 1205-06 (Fla. 2d DCA 2001) ("We write only to note that Davis may raise his claim that his consecutively imposed habitual violent felony offender sentences are in violation of Hale[, 630 So. 2d at 521], in a motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a), providing that he alleges that the claim may be determined from the face of the record."); Taylor v. State, 969 So. 2d 489, 490 (Fla. 5th DCA 2007)

("Generally, Hale claims must be brought in a proceeding under [rule 3.850] since a determination of whether the offenses for which the defendant has been sentenced arose out of a single criminal episode is not a pure question of law but, instead, often requires an evidentiary determination. However, the courts have carved out a limited exception to that rule when the trial court can rule on the motion based solely on nonhearsay record documents." (footnote omitted) (citation omitted)).

The postconviction court erred in denying Mr. Downs' claim as untimely. However, a criminal defendant "who files a 3.800(a) claim that his consecutive habitual offender sentences are in violation of Hale must not only allege that the claim is determinable from the face of the record, but must identify with particularity the record documents upon which he relies in seeking a determination of the claim." Wachter, 868 So. 2d at 630; Speas v. State, 887 So. 2d 416, 418 (Fla. 2d DCA 2004) ("To establish a facially sufficient rule 3.800(a) claim that his habitual offender sentences were imposed in violation of Hale, a defendant must identify with particularity the nonhearsay record documents upon which he relies."); see, e.g., Hollins v. State, 231 So. 3d 6, 7 (Fla. 4th DCA 2017) ("[T]he defendant's rule 3.800 motion here was facially insufficient. He failed to allege how the court records demonstrate that his crimes were committed during the same criminal episode."); see also Theophile v. State, 967 So. 2d 948, 949 (Fla. 1st DCA 2007) ("[A] person asserting a double jeopardy violation under Hale is required to allege with particularity both the non-hearsay record documents that show an error on the face of the record, and 'how and where' the record demonstrates the consecutive sentences were based on a single criminal episode." (quoting Lauramore v. State, 949 So. 2d 307, 308 (Fla. 1st DCA 2007))); Lauramore, 949 So. 2d at 308 ("A Hale claim is cognizable in a rule 3.800(a) motion if the motion is facially sufficient and

the issue can be resolved from the face of the record. In order to allege a facially sufficient rule 3.800(a) motion, the appellant must allege: (1) he is serving an illegal sentence; (2) the error appears on the face of the record; and (3) how and where the record demonstrates an entitlement to relief." (citation omitted)).

Mr. Downs' motion fails to satisfy the demanding standard required by the cases cited. Primarily, Mr. Downs does not explain how the exhibits submitted with his motion demonstrate that his crimes were committed in the same criminal episode. See Jackson v. State, 803 So. 2d 842, 844-45 (Fla. 1st DCA 2001) (holding that a Hale claim under rule 3.800(a) requires more than a general allegation, and claim must cite to facts based on court records that demonstrate on their face an entitlement to relief); Pullins v. State, 777 So. 2d 451, 451-52 (Fla. 1st DCA 2001) (affirming trial court's denial of Hale claim where the 3.800(a) motion failed to point to record facts demonstrating crimes were committed in a single episode). Although, "[a] defendant is not required to cite exact page numbers; he or she must . . . 'identify with particularity the nonhearsay record documents upon which he [or she] relies.' " Swanson v. State, 98 So. 3d 194, 195 (Fla. 2d DCA 2012) (second alteration in original) (quoting Speas, 887 So. 2d at 418)).

Moreover, the exhibits are not competent evidence. The Florida Supreme Court has held that a postconviction court may not rely upon hearsay, such as a police report, contained within the court file to evaluate a rule 3.800(a) Hale claim. See Burgess v. State, 831 So. 2d 137, 141 (Fla. 2002). Rather, "the trial court may rely on any portion of the trial court record that is not hearsay, such as a trial transcript." Wachter, 868 So. 2d at 630; see, e.g., Speas, 887 So. 2d at 418 ("The police arrest affidavit is not a nonhearsay document; neither is the factual basis for the offenses

which is provided at the time of the plea by the prosecutor to determine the accuracy of the plea and thereby enable the trial court to ensure that the facts of the case fit the offense or offenses with which the defendant is charged. In establishing a factual basis, the prosecutor is reporting facts obtained from the witnesses to the offense, and thus the prosecutor's statements constitute hearsay. 'Witness statements' may or may not constitute nonhearsay portions of the record. However, Speas has not identified those statements or where they are to be found in the record. Speas has, therefore, not established a facially sufficient rule 3.800(a) Hale claim." (citations omitted)).

The amended informations are nothing more than the State's allegations of any crimes with which the defendant is charged. And, the judgment and sentences tell us nothing of the facts underlying the crimes. Although the judgment, in conjunction with the information, informs us that the victim was the same in each and every count, we are unable to assess whether Mr. Downs' crimes occurred in the course of a single episode. Cf. Hartman v. State, 92 So. 3d 893, 895 (Fla. 5th DCA 2012) ("When determining whether the offenses arose from the same criminal episode, the court must consider '1) whether separate victims are involved; 2) whether the crimes occurred in separate locations; and 3) whether there has been a temporal break between the incidents.' " (quoting Teague v. State, 26 So. 3d 616, 618 (Fla. 1st DCA 2009))).

Conclusion

Although the postconviction court properly denied Mr. Downs' rule 3.800(a) motion, it did so for the wrong reason. As a result, the postconviction court's reasoning offered Mr. Downs the legally incorrect notion that he was forever foreclosed from bringing such a postconviction claim.

Thus, we affirm the postconviction court's order. Our affirmance is without prejudice to any right Mr. Downs may have to file a facially sufficient claim alleging that his HFO sentences were consecutively imposed when the offenses arose in a single criminal episode. As explained in this opinion, Mr. Downs would have to identify with particularity the nonhearsay record documents, and explain how, on their face, they show an entitlement to relief.

Any such motion that Mr. Downs may choose to file should not be considered successive; the postconviction court's disposition of Mr. Downs' 2015 motion was not a disposition on the merits. See Williams, 244 So. 3d at 1175 ("A postconviction court should not dismiss a claim as successive unless it was the specific issue raised by the prior motion and denied on the merits." (citing Fuston v. State, 764 So. 2d 779, 780 (Fla. 2d DCA 2000))).

Affirmed.

CASANUEVA and MORRIS, JJ., Concur.