

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ROBERT D. ASWELL,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
_____)

Case No. 2D19-2854

Opinion filed May 29, 2020.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court
for Pasco County; Kemba Johnson Lewis,
Judge.

Robert D. Aswell, pro se.

NORTHCUTT, Judge.

Robert D. Aswell challenges the postconviction court's summary denial of his motion for relief from judgment, which stated that it was filed pursuant to Florida Rule of Civil Procedure 1.540(b). Although the motion was filed under the wrong rule, the court erred by denying the motion outright. Accordingly, we reverse.

In his motion, Aswell raised three claims generally seeking collateral relief. The postconviction court determined that it was unable to address Aswell's motion because it "failed to cite to any rules of criminal procedure or statutes, which might

support the relief Defendant seeks." The court reasoned that "[a]s such, no relief is warranted." This was incorrect.

Addressing a materially similar situation, the Florida Supreme Court has determined that the correct approach is to treat the motion as though it were filed under the correct rule.

By its own terms, rule 1.540 applies only to civil causes, not to collateral claims associated with a criminal conviction. However, the court below should have treated this as a 3.850 motion, which would not be barred as untimely or successive if "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.850(b)(1); see also art. V, § 2(a), Fla. Const. ("no cause shall be dismissed because an improper remedy has been sought").

Steinhorst v. State, 636 So. 2d 498, 500 (Fla. 1994).

Thus, the court below should have treated Aswell's motion for relief from judgment as a rule 3.850 motion. To the extent that Aswell failed to allege facially sufficient claims under that rule, the court should have stricken the motion and granted him an opportunity to amend. See Fla. R. Crim. P. 3.850(f)(2); Spera v. State, 971 So. 2d 754, 761 (Fla. 2007) ("[W]hen a defendant's initial rule 3.850 motion for postconviction relief is determined to be legally insufficient for failure to meet either the rule's or other pleading requirements, the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion."). Therefore, we reverse and remand for the postconviction court to treat Aswell's rule 1.540(b) motion as a rule 3.850 motion. If necessary, the court shall strike the motion as insufficient and grant Aswell an opportunity to file a facially sufficient motion if such a motion can be filed in good faith.

Affirmed in part, reversed in part, and remanded.

LUCAS and ROTHSTEIN-YOUAKIM, JJ., Concur.