

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CALVIN SWAIN a/k/a KELVIN SWAIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D19-4529

December 8, 2021

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Pinellas County; Philip J. Federico, Judge.

Calvin Swain a/k/a Kelvin Swain, pro se.

KHOUZAM, Judge.

Calvin Swain appeals from the order summarily dismissing his motion filed under Florida Rule of Criminal Procedure 3.850. We reverse.

On March 27, 2013, Mr. Swain entered negotiated guilty pleas in three different cases. He filed the rule 3.850 motion at issue on March 14, 2018,¹ asking the court to accept the motion as timely filed pursuant to *Demps v. State*, 696 So. 2d 1296 (Fla. 3d DCA 1997). In *Demps*, the Third District held "that the two-year time period provided for in rule 3.850 within which Demps had to file his motion was tolled for that period of time that he was deprived of access to Florida courts." *Id.* at 1299. Mr. Swain argued that his deadline to file a rule 3.850 motion was similarly tolled because he completed a federal sentence on December 22, 2017, and lacked access to Florida law and legal materials before then.

The postconviction court ruled that Mr. Swain's motion was untimely under rule 3.850(b). *See* Fla. R. Crim. P. 3.850(b) (providing that, with three exceptions, a motion challenging a conviction shall not be "filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final"). The postconviction court found that Mr. Swain's case was distinguishable from *Demps* and the cases that followed because

¹ Mr. Swain challenged only his lewd or lascivious conduct conviction in case number 2010-CF-26605.

Mr. Swain's filings show that he was incarcerated at a federal correctional institution in Florida and that he had access to Florida legal materials. It attached to its order motions for transcription, requests for documents, and a rule 3.850 motion that Mr. Swain filed in 2014 and 2015.

The postconviction court's record attachments demonstrate that Mr. Swain had the ability to write to the court within the time afforded by rule 3.850(b). However, Mr. Swain cited no Florida statutes, rules, or caselaw in his motions for transcription. Mr. Swain's 2015 rule 3.850 motion was an untimely and incomplete five-page, fill-in-the-blank form motion that is not clearly applicable to Mr. Swain's circumstances. The motions do not evince access to Florida legal materials similar to the access in a state correctional facility² or the access contemplated by this court in *Ramsey v.*

² See Fla. Admin. Code. R. 33-501.301(2)(i) (requiring the Department of Corrections to provide libraries that contain "the Florida Constitution and Florida Statutes; the U.S. Constitution and U.S. Code; Florida court decisions; U.S. Supreme Court, federal circuit court, and federal district court decisions; Florida and federal practice digests; forms manuals; and secondary source materials providing research guidance in the areas of federal habeas corpus, Florida post-conviction and post-sentence remedies, and prisoner's rights").

State, 965 So. 2d 854, 855 (Fla. 2d DCA 2007), when we held based on *Demps* "that an uncounseled prisoner held in an out-of-state jurisdiction who is not represented by counsel and who does not have access to Florida statutes, rules, and forms has been deprived of meaningful access to the Florida courts."

Although advances in technology have the potential to provide an incarcerated person access to Florida materials when incarcerated by a different jurisdiction, "[f]ederal authorities are not responsible for providing state legal materials in federal penal institutions." *Brown v. Smith*, 580 F. Supp. 1576, 1578 (M.D. Pa. 1984). We cannot discern simply from the record attachments that Mr. Swain had "meaningful access to the Florida courts" during his period of federal incarceration as discussed in *Ramsey*.

Accordingly, we reverse the postconviction court's order dismissing Mr. Swain's motion, and we remand for the postconviction court to allow Mr. Swain the opportunity to establish predicate facts to avoid the time bar in rule 3.850(b). *See Ramsey*, 965 So. 2d at 856; *Hightower v. State*, 324 So. 3d 58, 59-60 (Fla. 1st DCA 2021); *Piggott v. State*, 14 So. 3d 298, 299 (Fla. 4th DCA 2009).

Reversed and remanded.

NORTHCUTT and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.