

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERT MYERS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D20-3075

June 30, 2021

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

BLACK, Judge.

Robert Myers appeals from the order denying his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief.

Because the postconviction court erred in summarily denying ground two of Myers's motion as facially insufficient without first

granting him the opportunity to amend, we reverse the order in part. We affirm the order to the extent that it denied ground one of Myers's motion without comment.

In December 2019, Myers pleaded guilty to lewd or lascivious exhibition and was sentenced to eighteen months in prison followed by ten years of sex offender probation. Myers did not file a direct appeal.

A short time after the entry of the judgment and sentence, Myers filed his motion for postconviction relief. In ground two of the motion, Myers alleged that trial counsel had rendered ineffective assistance by refusing to properly investigate the case, by refusing to "acknowledge any counter offers to plea bargain," and by refusing to depose witnesses. The postconviction court denied Myers's claim without leave to amend because Myers had failed to allege that but for counsel's ineffectiveness he would not have entered the plea and would have insisted on going to trial. *See Nelson v. State*, 996 So. 2d 950, 952 (Fla. 2d DCA 2008) (holding that where a case involves a plea, in order to establish the prejudice prong of a claim of ineffective assistance of counsel "the defendant must show that there is a reasonable probability that, but for counsel's errors, he

would not have pleaded guilty and would have insisted on going to trial" (quoting *Zakrzewski v. State*, 866 So. 2d 688, 694 (Fla. 2003))). This was error.

Because Myers failed to adequately allege prejudice and thus did not state a facially sufficient claim for postconviction relief based on ineffective assistance of counsel, the postconviction court should have stricken the motion in part and granted Myers leave to amend ground two within sixty days. See Fla. R. Crim. P. 3.850(f)(3) (providing that a court shall grant a defendant sixty days to amend insufficient claims); see also *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007). Accordingly, we reverse in part the postconviction court's order summarily denying Myers's rule 3.850 motion and remand with instructions that the court allow Myers sixty days to amend ground two. See *Coursey v. State*, 164 So. 3d 119, 120 (Fla. 2d DCA 2015). The postconviction court's order is otherwise affirmed.

Affirmed in part; reversed in part; remanded.

KELLY and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.