

DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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ROBERT DeCOLA, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D22-817

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August 12, 2022

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Sarasota County; Donna Marie Padar, Judge.

Robert DeCola, Jr., pro se.

PER CURIAM.

Robert DeCola, Jr., appeals the postconviction court's February 23, 2022, order denying his amended motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm the order insofar as it found the first

four claims to be impermissibly successive. However, because the postconviction court lacked jurisdiction to deny the fifth claim, we reverse in part and remand.

DeCola filed a timely motion for postconviction relief raising four grounds for relief. The postconviction court summarily denied the motion on February 7, 2022. Two days later, DeCola filed an amended motion for postconviction relief, which included the four previously raised claims and one newly raised claim of cumulative error.<sup>1</sup> DeCola then filed a notice of appeal of the February 7, 2022, order.<sup>2</sup> One week later, on February 23, 2022, the postconviction court summarily denied the amended motion, finding that the first four claims were successive and that, because the underlying claims lacked merit, the cumulative error claim lacked merit. This timely appeal followed.

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<sup>1</sup> DeCola mailed the amended motion on February 9, 2022. See *Westley v. State*, 903 So. 2d 312, 313 (Fla. 2d DCA 2005) ("A motion is deemed filed the moment a pro se inmate places the motion in a prison official's hands." (citing *Haag v. State*, 591 So. 2d 614, 617 (Fla. 1992))). It seems he filed the amended motion before he received the order.

<sup>2</sup> That appeal was assigned case number 2D22-0694.

"[A] trial court has authority to consider . . . a subsequently filed postconviction motion that raises unrelated issues notwithstanding the pendency of an appeal of an order on a previously filed postconviction motion." *Jackman v. State*, 88 So. 3d 325, 327 (Fla. 4th DCA 2012). However, "if the subsequent motion raises the same or related issues to those on appeal, the trial court may not consider the merits while the related appeal is pending." *Id.* Nevertheless, "[t]he trial court . . . has authority to determine that the motion is procedurally barred and may dismiss the motion as successive or untimely." *Id.*; see also *Smith v. State*, 34 So. 3d 818, 818 (Fla. 2d DCA 2010) ("If the grounds are the same, Smith's motion may be subject to dismissal as successive.").

In relevant part, rule 3.850 permits a court to dismiss a second or successive postconviction motion if the motion raises claims that have already been decided on the merits in a prior proceeding. See Fla. R. Crim. P. 3.850(h)(2). Here, because it had previously denied the first four grounds for relief on the merits in its February 7, 2022, order, the postconviction court correctly concluded that "any further supplements on those particular claims [were] successive," and correctly denied the first four claims as

such. *See Hempstead v. State*, 980 So. 2d 1254, 1258 (Fla. 2d DCA 2008).

The fifth claim of cumulative error was neither untimely nor successive. The postconviction court denied the claim, finding that because it had previously determined that none of the underlying claims had any merit, the cumulative error claim also lacked merit. However, the cumulative error claim was related to the underlying claims of error, which were on appeal at the time the postconviction court denied the cumulative error claim. *See Pham v. State*, 177 So. 3d 955, 962 (Fla. 2015) (discussing that underlying claims of error "all relat[e] to cumulative error" claim); *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) (discussing the relationship between cumulative error and underlying claims). Therefore, the postconviction court did not have authority to rule upon the new claim of cumulative error. *See Jackman*, 88 So. 3d at 327.

Accordingly, we affirm the order denying DeCola's amended motion for postconviction relief in part, reverse in part, and remand for the postconviction court to consider the cumulative error claim once it regains jurisdiction upon conclusion of the appeal of the

order denying the original postconviction motion in case number 2D22-0694.

Affirmed in part, reversed in part, and remanded.

KELLY, LUCAS, and ATKINSON, JJ., Concur.

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Opinion subject to revision prior to official publication.