

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

GARY LEE NORMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D22-1912

November 16, 2022

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

Gary Lee Norman, pro se.

SILBERMAN, Judge.

Gary Lee Norman appeals from the order summarily denying his "motion for clarification." We reverse and remand for proceedings consistent with this opinion.

After a jury found Mr. Norman guilty of burglary of a dwelling, grand theft, and possession of methamphetamine, the trial court

sentenced him as a prison releasee reoffender and a habitual felony offender to thirty years' imprisonment for the burglary conviction and to terms of five years' imprisonment for the grand theft and possession of methamphetamine convictions. This court affirmed Mr. Norman's judgment and sentences. *Norman v. State*, 294 So. 3d 879 (Fla. 2d DCA 2020) (table decision). The mandate issued on April 16, 2020.

On December 17, 2021, Mr. Norman filed a "motion for clarification." He asserted that the trial court orally pronounced that his sentences would run concurrently with sentences it had imposed in case number 2017-CF-2268, but instead, his sentences are running consecutively to those sentences. He asked the postconviction court to "fix" his sentences to conform to the oral pronouncement.

The postconviction court issued an order to show cause, noting, "After review of the ECR recording of the sentencing, and after review of the sentencing transcript, the Court cannot say for sure what the Court's ruling was in regard to concurrent/consecutive sentencing."

In response, the State informed the postconviction court that the transcript of the trial court's ruling is "ambiguous" and that the written judgment does not state whether the sentences are to be served concurrently with or consecutively to the sentences in case number 2017-CF-2268. It asserted that pursuant to section 921.16(1), Florida Statutes (2017),¹ the sentences are presumed to run consecutively to those in case number 2017-CF-2268 and that "[o]ne should not go beneath the [trial court's] words actually used to attempt to divine meaning." The portion of the sentencing transcript that the State attached to its response reflects that the trial court stated, "And I will request your wanting to have him have a concurrent sentence with the other case."

The postconviction court adopted and incorporated the State's response and summarily denied Mr. Norman's motion.

This court has long held that when a person inaccurately titles a motion seeking to collaterally attack his or her judgment or sentence, the postconviction court should treat the motion as filed

¹ "Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently." § 921.16(1).

under the appropriate rule of criminal procedure. *See Watts v. State*, 985 So. 2d 21, 22 (Fla. 2d DCA 2008) (holding that the postconviction court should have treated a petition for writ of habeas corpus as a postconviction motion and noting that the petition appeared to have been timely filed under Florida Rule of Criminal Procedure 3.850). Although his motion was facially insufficient,² Mr. Norman filed his motion within the time afforded by rule 3.850(b) and he pleaded a claim based on the alleged discrepancy between the oral pronouncement and the written sentence that is not conclusively refuted by the transcription of the trial court's oral pronouncement. *See Williams v. State*, 957 So. 2d 600, 603 (Fla. 2007) ("[T]he oral pronouncement controls and constitutes the legal sentence imposed."); *see also Nielson v. State*, 984 So. 2d 587, 588–89 (Fla. 2d DCA 2008) (holding that a claim which "involves a factual dispute" regarding the oral pronouncement of sentence "must be made in a timely motion for postconviction relief pursuant to Florida Rule of Criminal Procedure

² Mr. Norman's motion was not filed under oath as required by Florida Rule of Criminal Procedure 3.850(c) and lacked the certification required by rule 3.850(n)(2).

3.850"). Accordingly, we reverse the postconviction court's order and remand for the postconviction court to treat Mr. Norman's "motion for clarification" as filed under rule 3.850 and to enter a nonfinal, nonappealable order allowing Mr. Norman sixty days to file an amended motion pursuant to rule 3.850(f)(2).

Reversed and remanded.

BLACK and LUCAS, JJ., Concur.

Opinion subject to revision prior to official publication.