

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CALVIN POWELL,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
)
 _____)

Case No. 2D08-3426

Opinion filed July 8, 2009.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court for
Manatee County; Debra Johnes Riva,
Judge.

KHOUZAM, Judge.

Calvin Powell appeals the summary denial of his motion for postconviction DNA testing filed pursuant to Florida Rule of Criminal Procedure 3.853. Because the postconviction court correctly denied Powell's motion as facially insufficient, we affirm.

We note, however, that the court also sought to deny the motion on its merits by attaching record excerpts to refute Powell's assertion that identification was a genuinely disputed issue in his case. This was error.

Rule 3.853(c)(2) states that upon receipt of the motion, the court shall review the motion and deny it if it is facially insufficient. A court may not summarily deny a rule 3.853 motion even when the record conclusively shows that the defendant is not entitled to relief. Zollman v. State, 820 So. 2d 1059, 1063 n.2 (Fla. 2d DCA 2002). If the motion is facially sufficient, the court must order a response. Id. Once the response is received, the court may enter an order on the merits of the motion or set the motion for hearing. Id.

Accordingly, we affirm the postconviction court's denial of the motion because it is facially insufficient. Our affirmance is without prejudice to Powell's right to file a facially sufficient rule 3.853 motion. See, e.g., Murray v. State, 978 So. 2d 176 (Fla. 2d DCA 2007); Harvey v. State, 925 So. 2d 1111 (Fla. 2d DCA 2006); Scarborough v. State, 906 So. 2d 379 (Fla. 2d DCA 2005).

Affirmed.

WALLACE and CRENSHAW, JJ., Concur.