

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

PAULINO GARCIA,)	
)	
Appellant,)	
)	
v.)	Case No. 2D08-3906
)	
STATE OF FLORIDA,)	
)	
Appellee.)	
_____)	

Opinion filed June 24, 2009.

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

SILBERMAN, Judge.

Paulino Garcia challenges the order of the postconviction court summarily denying ground two of his motion filed pursuant to Florida Rule of Criminal Procedure 3.850. This is the second time Garcia's motion is before this court. In Garcia v. State, 981 So. 2d 1263 (Fla. 2d DCA 2008), we reversed the summary denial of ground two of Garcia's motion and remanded with directions to the postconviction court to attach those portions of the record conclusively refuting the claim or, if the record does not refute the claim, to conduct an evidentiary hearing. Id. at 1264. The postconviction court did

neither. Accordingly, we reverse and remand for the postconviction court to conduct an evidentiary hearing on Garcia's claim that trial counsel was ineffective in advising him not to testify and in failing to call him as a witness.

Reversed and remanded.

WHATLEY and VILLANTI, JJ., Concur.