

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ROBERT E. SMITH,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 2D09-4215

Opinion filed May 21, 2010.

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

Robert E. Smith, pro se.

KHOUZAM, Judge.

Robert E. Smith appeals the dismissal of his postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850. We reverse the dismissal and remand for the trial court to consider Smith's motion.

At the time that the trial court dismissed the motion at issue here, Smith had a pending appeal in this court in case number 2D08-5917 challenging the denial of a prior postconviction motion. Our record does not reveal whether the issues pending

in case number 2D08-5917 involved the same or similar issues presented in the motion that is now pending on appeal. If the grounds are the same, Smith's motion may be subject to dismissal as successive. See Fla. R. Crim. P. 3.850(f). However, the postconviction court erred in dismissing for lack of jurisdiction solely due to the pending appeal in 2D08-5917. "A trial court has concurrent jurisdiction during the pendency of an appeal of a postconviction order to consider a second postconviction motion that raises new issues unrelated to the issues presented in the motion that is pending on appeal." Brinson v. State, 25 So. 3d 1255, 1256 (Fla. 2d DCA 2010) (citing Wheeler v. State, 918 So. 2d 369 (Fla. 1st DCA 2005)).

Reversed and remanded.

ALTENBERND and WALLACE, JJ., Concur.