

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

GARY RAYMOND SULT,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 2D10-272

Opinion filed August 13, 2010.

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

Loren D. Rhoton of Loren Rhoton, P.A.,
Tampa, for Appellant.

Bill McCollum, Attorney General,
Tallahassee and Helene S. Parnes,
Assistant Attorney General, Tampa,
for Appellee.

MORRIS, Judge.

Gary Raymond Sult appeals the denial of his motion for postconviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.800(a). Sult argues that his habitual offender sentence is illegal pursuant to Hale v. State, 630 So. 2d 521 (Fla.

1993). The postconviction court found that the instant motion was successive because the Hale issue had been previously raised and denied by orders entered in 1997 and 2008. We conclude that the procedural bar was improperly applied and reverse for the postconviction court to address the claim on its merits.

Sult was tried by a jury and found guilty of burglary of a dwelling, grand theft, and carrying a concealed firearm. After trial, he entered a plea to possession of a firearm by a convicted felon. That offense was included in the information but had been severed for trial. All offenses occurred in May 1991. In May 1992, he was sentenced to thirty years in prison for the burglary in count one. For each of the other counts, he received a term of ten years' probation consecutive to count one but concurrent with each other. He was sentenced as a habitual felony offender as to all counts.

The supreme court decided Hale in 1993, establishing that habitual offender sentences for multiple crimes committed during a single criminal episode could not be ordered to run consecutively. 630 So. 2d at 525. Sult filed a motion to correct an illegal sentence in June 1997, raising the Hale issue. The postconviction court treated it as a rule 3.850 motion and denied it as untimely in July 1997, citing State v. Callaway, 658 So. 2d 983 (Fla. 1995), and Lock v. State, 668 So. 2d 1081 (Fla. 2d DCA 1996), and explaining that the window for filing a Hale claim closed on February 9, 1996. Sult filed a second motion to correct illegal sentence in September 2008. The postconviction court denied this motion as successive.

The present motion to correct illegal sentence was filed in October 2009, and in it Sult contends that the Florida Supreme Court in Dixon v. State, 730 So. 2d 265 (Fla. 1999), extended the time to file a Hale claim, which rendered timely his first motion

filed in June 1997. Sult argues on appeal that the postconviction court's application of the procedural bar results in a manifest injustice because his claim was timely initially but was never addressed on the merits. He asserts that his claim is cognizable in a rule 3.800(a) motion because an examination of the record will show that the offenses were committed during a single criminal episode.

In response, the State acknowledges that Sult's first motion raising the Hale claim was timely under rule 3.850 pursuant to the window period established by Dixon. The State concedes that the order should be reversed and that on remand the postconviction court should determine whether the available trial record demonstrates that the offenses were committed during a single criminal episode.

Dixon held that a Hale claim was preserved if it was filed within two years of the issuance of the mandate in Callaway on August 16, 1995. Dixon, 730 So. 2d at 265-66. The postconviction court did not have the benefit of Dixon when it decided Sult's first motion in July 1997. Because Dixon changed the law on the Hale window period and Sult's original motion was timely under Dixon, the successiveness doctrine will not bar reconsideration of the claim. See Crotts v. State, 795 So. 2d 1020, 1021 (Fla. 2d DCA 2001).

Sult may be entitled to resentencing pursuant to Hale if the record in the trial court demonstrates that the offenses were committed during a single criminal episode. See West v. State, 790 So. 2d 513, 515 (Fla. 5th DCA 2001) (finding a Hale violation on the face of the record and vacating probationary sentence that had been imposed consecutively to prison term). The postconviction court must determine if the record demonstrates that the offenses arose from a single criminal episode. Sult has

identified in his motion those portions of the record, including the trial transcripts, that will support a finding that the offenses were committed during a single criminal episode. Accordingly, we reverse the order denying Sult's motion and remand for the postconviction court to address the claim.

Reversed and remanded.

KELLY and WALLACE, JJ., Concur.