

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

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

TERRY GARNTO, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

CASE NO. 2D02-2611

Opinion filed November 15, 2002.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court  
for Lee County;  
William J. Nelson, Judge.

GREEN, Judge.

Terry Garnto appeals the summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. In his motion, Garnto raises ten claims. We affirm the trial court's denial of all of his claims but write to comment on two of them.

Garnto claims that his defense counsel was ineffective for failing to call two exculpatory witnesses and for failing to protect Garnto's legal interests upon

becoming aware of a sleeping juror. In the sworn initial brief filed by Garnto in this court, he makes detailed allegations about the substance of these claims and the prejudice he suffered because of these failures. However, Garnto did not make the same allegations in either his rule 3.850 motion or the accompanying sworn memorandum of law. In fact, the allegations in his motion and memorandum concerning these claims are facially insufficient. See Honors v. State, 752 So. 2d 1234 (Fla. 2d DCA 2000) (reviewing a claim of failure to call an exculpatory witness); Bieser v. State, 677 So. 2d 59 (Fla. 1st DCA 1996) (reviewing a claim of failure to act upon being informed that one of the jurors was sleeping through critical defense testimony). It is only the allegations contained in his motion and memorandum that the trial court reviewed before denying the claims. Therefore, we cannot consider the factual allegations contained in Garnto's sworn initial brief.

Accordingly, we affirm without prejudice to any right Garnto might have to timely file a facially sufficient rule 3.850 motion raising these two claims. See Beck v. State, 801 So. 2d 964 (Fla. 2d DCA 2001) (holding that, since the trial court properly did not review the additional allegations contained in the memoranda accompanying a rule 3.850 motion, the trial court would be affirmed without prejudice to the timely refile of the motion and memoranda).

Affirmed.

FULMER and DAVIS, JJ., Concur.