

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DANIEL JAKEWAY,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

CASE NO. 2D04-1490

Opinion filed August 13, 2004.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court
for Pinellas County;
Richard A. Luce, Judge.

FULMER, Judge.

Daniel Jakeway appeals the summary denial of his motion for postconviction DNA testing filed pursuant to Florida Rule of Criminal Procedure 3.853. In his motion, Jakeway sought DNA testing of several items of evidence collected during the investigation of the burglary and kidnapping for which he was convicted. The trial court denied the motion based on an affidavit from the St. Petersburg Police Department Supervisor of Evidentiary Services stating that the evidence was no longer

in the custody of the Department because it had either been destroyed in 1996 or given to the case detective.

The trial court erred in denying the motion on this ground because the affidavit from the St. Petersburg Police Department creates a factual issue as to whether the evidence exists, and an evidentiary hearing is required to resolve the issue. See Zollman v. State, 854 So. 2d 775 (Fla. 2d DCA 2003); Borland v. State, 848 So. 2d 1288 (Fla. 2d DCA 2003). Therefore, we reverse and remand for the trial court to provide Jakeway an opportunity at an evidentiary hearing to address the issue of whether testable evidence still exists. See Borland, 848 So. 2d at 1290.

Reversed and remanded.

STRINGER and SILBERMAN, JJ., Concur.