

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

FRANCISCO RODRIGUEZ-MARTINEZ,)
)
Appellant,)
)
v.)
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

Case No. 2D13-22

Opinion filed September 18, 2013.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court for
Hardee County; Marcus J. Ezelle, Judge.

MORRIS, Judge.

Francisco Rodriguez-Martinez appeals the dismissal of his motion filed under Florida Rule of Criminal Procedure 3.850. We affirm but without prejudice to permit Mr. Rodriguez-Martinez to file an amended motion.

Mr. Rodriguez-Martinez was initially charged with lewd molestation. On April 25, 2006, he entered a negotiated plea to a lesser-included offense of abuse of a child and was sentenced to five years' probation with adjudication withheld. On August 31, 2011, the victim of the lewd molestation charge signed a sworn affidavit recanting her allegations against Mr. Rodriguez-Martinez.

On October 19, 2012, Mr. Rodriguez-Martinez filed a motion for postconviction relief, raising two grounds for relief. We affirm the denial of the second ground without comment. In his first ground for relief, Mr. Rodriguez-Martinez claimed that the victim's affidavit proves that he was actually innocent of the charges filed against him.

The postconviction court dismissed Mr. Rodriguez-Martinez's motion as untimely under rule 3.850(b) because his judgment and sentence became final more than six years before he filed this motion for postconviction relief. But the victim's recantation could amount to newly discovered evidence under rule 3.850(b)(1). See Davis v. State, 26 So. 3d 519, 526 (Fla. 2009) ("[R]ecanted testimony that is alleged to constitute newly discovered evidence will mandate a new trial only if (1) the court is satisfied that the recantation is true[] and (2) the recanted testimony would probably render a different outcome in the proceeding."). Nevertheless, the court correctly dismissed the motion because Mr. Rodriguez-Martinez failed to allege the victim's recantation could not have been previously ascertained by the exercise of due diligence. See Fla. R. Crim. P. 3.850(b)(1).

We note that the two-year period during which Mr. Rodriguez-Martinez may raise a claim of newly discovered evidence under rule 3.850(b)(1) will have run during the pendency of this appeal. Accordingly, we affirm the postconviction court's order without prejudice to permit Mr. Rodriguez-Martinez to file an amended motion in conformance with rule 3.850(b)(1) within thirty days of the date this opinion becomes final. See Davis, 26 So. 3d at 527 (granting leave to amend facially insufficient claims

of newly discovered evidence). The amended motion shall not be considered untimely or successive.

Affirmed without prejudice.

KELLY and SLEET, JJ., Concur.