

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2004

JOSE A. GONZALEZ,

Appellant,

v.

CASE NO. 5D04-782
CORRECTED

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed April 16, 2004

3.850 Appeal from the Circuit Court
for Volusia County,
S. James Foxman, Judge.

Jose A. Gonzalez, Wewahithcka, *pro se*.

No Appearance for Appellee.

SHARP, W., J.

We affirm the trial court's dismissal of Gonzalez' motion for post-conviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.850. The dismissal is without prejudice to Gonzalez to refile a motion containing sworn, factual allegations. *See Van Aernam v. State*, 715 So. 2d 1143 (Fla. 5th DCA 1998).

Gonzalez signed his motion below the following statement:

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts as stated in it are true.

This affirmation would have been sufficient had the motion contained factual allegations upon which Gonzalez relied to obtain collateral relief.

However, he did not state in the motion the facts upon which he rests his case for collateral relief. The facts are stated in an attachment to the motion which is labeled a memorandum of law. Thus, technically, the motion is insufficient because it is based on facts contained in an unsworn memorandum of law. *See Miller v. State*, 848 So. 2d 401 (Fla. 2d DCA 2003); *Lambert v. State*, 631 So. 2d 361 (Fla. 1st DCA 1994); *Oramas v. State*, 615 So. 2d 853 (Fla. 2d DCA 1993).

Because we affirm based on a technical, not a substantive ground, our affirmance is without prejudice to file a properly sworn motion containing factual allegations.

AFFIRMED.

PETERSON and TORPY, JJ., concur.