

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

JANUARY TERM 2012

JAMES BRUCE PETERSON,

Appellant,

v.

Case No. 5D12-1483

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed May 25, 2012.

3.850 Appeal from the Circuit Court
for Marion County,
Edward L. Scott, Judge.

James Bruce Peterson, Milton, pro se.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Wesley Heidt,
Assistant Attorney General,
for Appellee.

PER CURIAM.

James Peterson appeals the lower court's order dismissing his rule 3.850 motion as untimely. We reverse because Peterson's motion was directed to his resentencing and was filed within two years of his sentence becoming final.¹ Thus, it was timely.

¹ After Peterson violated his probation on several occasions, he was resentenced to five years in the Department of Corrections on January 12, 2010. He filed the instant rule 3.850 motion on November 30, 2011.

See Fla. R. Crim. P. 3.850(b). On remand, the lower court is instructed to consider Peterson's motion on the merits.

REVERSED and REMANDED.

GRIFFIN and JACOBUS, JJ., concur.
COHEN, J., concurs specially, with opinion.

COHEN, J., concurs, and concurs specially.

The trial court's initial denial of Peterson's motion for postconviction relief is understandable. The motion appears to challenge the 2004 judgment and sentence and thus would have been time-barred under Florida Rule of Criminal Procedure 3.850.

Following the initial denial, however, Peterson filed a motion for rehearing, explaining his motion was not time-barred because he was actually challenging the 2010 sentence following his admission to a violation of probation.

Many litigants seem to view motions for rehearing as obligatory. However, Peterson's case demonstrates why it is important not to simply be dismissive of such motions. His motion for rehearing should have alerted the trial judge to the fact that the motion was not time-barred. What we refer to as resentencing in the majority opinion is simply the sentencing on a violation of probation. The trial judge could have either gone forward with considering the merits of the claim or allowed Peterson to amend under Spera.² While I would have found no error in the denial of the original motion, once clarified by the motion for rehearing, dismissal as time-barred constituted error.

² Spera v. State, 971 So. 2d 754 (Fla. 2007).