

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STEVEN R. POWELL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D15-1221

[August 19, 2015]

Appeal of order denying rule 3.850 motion from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David Crow, Judge; L.T. Case No. 502012CF005639AXXX.

Steven R. Powell, Okeechobee, pro se.

No appearance required for appellee.

PER CURIAM.

Steven Richard Powell appeals the summary denial of his rule 3.850 motion which the trial court found to be untimely. Following an order to show cause, the state concedes error. We remand for the court to consider the merits of his claims.

While on probation, Powell committed new, substantive offenses. He was charged with attempted burglary of a dwelling (count 1) and criminal mischief (\$1,000 or more) (count 2). From the sparse record on appeal, it appears that the codefendant, Larry Dean Hafner, also was charged with possession of cocaine (count 3) and possession of marijuana less than 20 grams (count 4). According to Powell's motion, he entered a guilty plea and was convicted on all four counts, even though he was not charged with counts 3 and 4. It is unclear from the record whether Powell was convicted of both counts 3 and 4 or only count 3.

A conviction for an uncharged crime can be raised at any time as it is a denial of due process. *See, e.g., Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010) ("It is a fundamental principle of due process that a defendant may not be convicted of a crime that has not been charged by the state."). The

fact that a plea was negotiated would not cure the error. *Moore v. State*, 924 So. 2d 840, 841 (Fla. 4th DCA 2006). The trial court could have considered the untimely 3.850 motion as a petition for writ of habeas corpus.

We reverse and remand for the trial court to consider the merits of Powell's motion and determine whether he was convicted of uncharged crimes in counts 3 and 4.

Reversed and remanded with instructions.

STEVENSON, LEVINE and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.