

**SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

Case No. 6D2023-1929
Lower Tribunal No. 2000-CF-001452-AXXX-XX

DWAYNE JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal pursuant to Fla. App. P. 9.141(b)(2) from the Circuit Court for Collier County.
Elizabeth V. Krier, Judge.

November 27, 2024

PER CURIAM.

Dwayne Johnson appeals an order denying his motion for continuance, accepting the notice of voluntary withdrawal of his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, and dismissing his motion for postconviction relief with prejudice. We have jurisdiction. *See* Fla. R. App. P. 9.030(b)(1)(A), 9.140(b)(1)(D).

Under *Clark v. State*, 491 So. 2d 545, 546 (Fla. 1986), Johnson was entitled to withdraw his rule 3.850 motion while it was pending when there would be no prejudice to the State. *See Simon v. State*, 768 So. 2d 1089, 1090 (Fla. 3d DCA

1995). The sole issue before us is whether the postconviction court properly dismissed Johnson’s rule 3.850 petition with prejudice. “A typical postconviction motion should not be dismissed with prejudice when the defendant volunteers to dismiss it unless there is prejudice to the State or some justification for resolving the motion on the merits.” *McCray v. State*, 104 So. 3d 1201, 1201 (Fla. 2d DCA 2012); *see also Hutchinson v. State*, 921 So. 2d 780, 781 (Fla. 1st DCA 2006).

The State concedes that it will not suffer prejudice if the petition is dismissed without prejudice and, therefore, concedes error. The motion for postconviction relief should have been dismissed without prejudice, and we remand for entry of such an order.

REVERSED and REMANDED with instructions.

STARGEL, NARDELLA and BROWNLEE, JJ., concur.

Michelle R. Walsh, of Law Offices of Michelle R. Walsh, P.A., Coral Gables, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Taylor A. Schell and Ceresse Crawford Taylor, Assistants Attorney General, Tampa, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING
AND DISPOSITION THEREOF IF FILED