

IN THE SUPREME COURT OF FLORIDA

HERBERT N. PRICE,

Petitioner,

v.

CASE NO. SC06-2045

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The following facts are set forth in the opinion below:

Herbert N. Price appeals the trial court's denial of his petition for writ of habeas corpus. Price was convicted of sexual battery on a physically incapacitated person and sentenced to prison in March 2003. He voluntarily dismissed his appeal. In March 2005, Price filed a motion for postconviction relief pursuant to Florida Rule of Appellate Procedure 3.850, claiming ineffective assistance of trial counsel. The trial court held an evidentiary hearing on six of Price's claims, summarily denying only one. Following the evidentiary hearing, the trial court denied relief. Price's appeal of that order is pending in this Court. See *Price v. State*, No. 5D-890 (Fla. 5th DCA filed Mar. 16, 2006).

Price then filed a petition for writ of habeas corpus with the trial court, alleging that the information charging him with the crime was fatally defective as it failed to allege an essential element of the offense. The trial court correctly held that a habeas petition cannot be used to litigate matters that could have and should have been raised on direct appeal. This includes the legal sufficiency of the information. See *Moore v. State*, 817 So. 2d 1072 (Fla. 5th DCA 2002).

Price v. State, 31 Fla. L. Weekly D2127 (Fla. 5th DCA August 11, 2006).

SUMMARY OF ARGUMENT

This court does not have jurisdiction to review this case. The decision of the Fifth District Court of Appeal in this case does not expressly and directly conflict with a decision of this Court.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR ANY OTHER COURT.

Price asserts that the decision of the Fifth District Court of Appeal expressly conflicts with this Court's decision in *State v. Gray*, 435 So. 2d 816 (Fla. 1983). This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). In *Jenkins v. State*, 385 So.2d 1356, 1357 (Fla. 1980) this Court quoted from its earlier decision in *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958):

We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed...**It was never intended that the district courts of appeal should be intermediate courts...**To fail to recognize that these are courts primarily of **final appellate jurisdiction** and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of

justice than that which the system
was designed to remedy.

(emphasis supplied).

The district court in the instant case held that a habeas corpus petition cannot be used to litigate matters that could have and should have been raised on direct appeal. *Price, supra*. This holding is totally consistent with prior holdings of this Court. In fact, this Court recently reaffirmed its long time holding that the remedy of habeas corpus is not available in Florida to obtain the kind of collateral post conviction relief available by motion in the sentencing court pursuant to Florida Rule of Criminal Procedure 3.850. *Baker v. State*, 878 So. 2d 1236 (Fla. 2004).

Given the fact that the Fifth District Court is a court of final appellate jurisdiction and given the very limited and restricted bases for this Court's exercise of its discretionary jurisdiction based upon conflict, it cannot be said that Petitioner has established any good cause for the exercise of that jurisdiction. There is no express or direct conflict, and in fact, the decision of the Fifth District in this case is consistent with the decisions of this Court.

CONCLUSION

Based on the arguments and authorities presented herein, the State asserts that this court does not have jurisdiction to review the decision in this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by U.S. Mail to Petitioner Herbert N. Price, DC#V17064, Dorm D12012, Hardee Correctional Institution, 6901 State Road 62, Bowling Green, FL 33834-8976, this _____ day of November, 2006.

CERTIFICATE OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced, in compliance with Fla. R. App. P. 9.210(a)(2).

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