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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF FACTS

The State submits the following additions/corrections to the Petitioner's Statement of Facts:

On July 16, 2002, an information was filed against the Defendant specifically charging him with violating section 794.011(4)(f) of the Florida Statutes, which prohibits sexual battery on a physically incapacitated person. (R. 9). The information included in the record (attached to the Defendant's petition as Exhibit A) redacted the victim's name, stating as follows:

> IN THAT HERBERT PRICE on or about May 07, 2001, in the County of VOLUSIA and State of Florida, did unlawfully commit sexual battery by oral and/or vaginal penetration by, or union with the sexual organ of [the victim] a person 12 years of age or older, without [the victim's] consent and while [the victim] was physically incapacitated, contrary to Florida Statute 794.011(4)(f).(1 DEG FEL)

(R. 9).

At trial, the Defendant did not claim the charging information was defective, nor did he ever file a motion to dismiss under Florida Rule of Criminal Procedure 3.190(c). (Docket Entry Text).

The victim testified at trial that the Defendant penetrated her vagina with his penis, without her consent. (R. 10-11). On

February 26, 2003, after a jury trial, the Defendant was found guilty as charged. (Docket Entry Text). The jury had been instructed in relevant part as follows:

> The allegation is that on or about May 7, 2001, in Volusia County, Florida, that he did unlawfully commit a sexual battery by oral and/or vaginal penetration by or union with the sexual organ of Amber Wardell [the victim], a person 12 years of age or older, without Amber Wardell's consent and while Amber Wardell was physically incapacitated.

(R. 13-14). The court then went through the various elements of sexual battery. (R. 14).

The Defendant appealed from his conviction and sentence, and as documented in the Petitioner's Appendix ended up dismissing his private counsel. His public defender filed an Anders[1] brief and moved to withdraw, after which *the Defendant himself* voluntarily dismissed his appeal.

One year after filing a 3.850 motion and while the appeal of the denial of that motion was pending,[2] the Defendant filed the habeas petition at issue in the instant case. (R. 1-15). In this petition, the Defendant raised a single claim – that the information was fatally defective and did not support a judgment

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[1] Anders v. California, 386 U.S. 738 (1967)

of conviction because it failed to allege an essential element of the crime.

The trial court denied the Defendant's petition, reasoning as follows:

> Habeas corpus is not to be used for obtaining additional appeals of issues which were raised or should have been raised on direct appeal, which were waived at trial, or which could have, should have, or have been raised in prior postconviction filings. ... Defendant's claim of defective information should have been raised on direct appeal.

(R. 16) (citations omitted).

On appeal, the district court agreed with the trial court, finding that the court "correctly held that a habeas corpus petition cannot be used to litigate matters that could have and should have been raised on direct appeal." (R. 21); Price v. State, 937 So. 2d 702, 702-03 (Fla. 5th DCA 2007).

The Defendant now asks this Court to reverse the decision of the district court.

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[2]The district court has now affirmed the denial of the Defendant's 3.850 motion. Price v. State, ___ So. 2d ___ (Fla. 5th DCA May 8, 2007) (case no. 5D06-890).

SUMMARY OF ARGUMENT

The district court properly denied the Defendant's petition for habeas corpus relief where the Defendant could have raised his claim on direct appeal or in a 3.850 motion. This Court has held on numerous occasions that habeas corpus is not to be used as a substitute for such proceedings. The Defendant's challenge to the information in the instant case does not warrant the application of an exception to this well-established rule.

ARGUMENT

(PETITIONER'S ISSUES I & II)

HABEAS RELIEF IS PROPERLY DENIED WHERE A CLAIM COULD HAVE BEEN RAISED ON DIRECT APPEAL.

The Defendant contends that the district court erred in affirming the trial court's finding that his claim of a defective information was procedurally barred, as it should have been raised on direct appeal. According to the Defendant, the court's holding is contrary to this Court's opinion in State v. Gray, 435 So. 2d 816 (Fla. 1983). This position should be rejected by this Court.

In Gray, the defendant challenged the sufficiency of the information in a motion for an order in arrest of judgment in the trial court, then raised this challenge again on direct appeal. Id. at 817-18. The district court determined that the statute under which the defendant was charged needed an intent element to be constitutional, then concluded that the information was fatally deficient for failing to include this element. Id. at 818.

In reviewing this decision, this Court rejected the State's argument that any claim of error was waived by the defendant's failure to bring a pretrial motion to dismiss. Id. This Court

noted that such a waiver was not applicable under the limited circumstances at issue there – where the information was so defective that it "completely fails to charge a crime." Id. In such a case, this Court noted, "the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time – before trial, after trial, on appeal, or by habeas corpus." Id.

The language in this Court's opinion in Gray has not been, and should not be, construed to allow a defendant to challenge the sufficiency of an information in every case at any time, no matter how technical the challenge. Indeed, numerous post-Gray cases continue to apply the well-established rule that the failure to challenge an information *at trial* (when a defect can be easily remedied) waives such a challenge. See, e.g., Sanders v. Moore, 821 So. 2d 301 (Fla. 2002); McMillan v. State, 832 So. 2d 946 (Fla. 5th DCA 2002); Hernandez v. State, 749 So. 2d 1284 (Fla. 3d DCA 2000).

Surely the failure to raise such a claim *either* at trial *or* on direct appeal should be deemed no less a waiver. See, e.g., Rowe v. McDonough, 950 So. 2d 414 (Fla. 2007) (habeas corpus is not a second appeal and cannot be used as a substitute for claims that were or could have been raised on direct appeal or

in prior postconviction proceedings); Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992) (same).

Indeed, since Gray was decided this Court has explicitly recognized that the writ of habeas corpus has been largely supplanted by Rule 3.850 as the mechanism to file postconviction challenges to a conviction or sentence, and the writ should be used only for those claims not cognizable under the Rule. Baker v. State, 878 So. 2d 1236, 1238-45 (Fla. 2004). See also Richardson v. State, 546 So. 2d 1037, 1039 (Fla. 1989) (noting that Rule 3.850 has "absorbed many of the claims traditionally brought under habeas corpus").

In light of this more recent case law and the continuing development of reasonable limits on the never-ending cycle of postconviction relief, this Court may find that it is time to reconsider the above-quoted statement in Gray and definitively hold that a challenge to a charging document may *never* be brought in a habeas proceeding and instead must at the very least be brought on direct appeal or in a 3.850 motion, rather than by habeas corpus.

At any rate, even the Gray case itself expressly limits its application to challenges to the "complete failure of an accusatory instrument to charge a crime," a fundamental defect

clearly not present in the instant case. While the Defendant alleges that the information fails to specify *how* the victim's vagina was penetrated (with the Defendant's penis or with an instrument), this alleged failure does not render the information fatally defective.

Indeed, the information specifically referenced the statute the Defendant was being charged with violating. (R. 9). Under this statute, sexual battery specifically includes "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." § 794.011(1)(h), Fla. Stat. (2001).

At worst, then, the information in this case was imprecise, and the reference to the statute clearly remedied any possible prejudice from such imprecision. See Jones v. State, 415 So.2d 852, 853 (Fla. 5th DCA 1982), rev. denied, 424 So.2d 761 (Fla. 1982). See also Hope v. State, 588 So. 2d 255, 257 (Fla. 5th DCA 1991) (distinguishing Gray; noting that relief is not warranted based on allegedly defective information where defendant was not embarrassed in preparing defense and where there was no real threat of prosecution for same offense), rev. denied, 599 So. 2d 656 (Fla. 1992).

The Defendant's claim that he fears a second prosecution for raping this victim on May 7, 2001, is disingenuous. Clearly the information was sufficient to charge a crime, and in the absence of such a fundamental defect the trial court and district court properly concluded that the Defendant's claim should have been raised earlier and was accordingly procedurally barred.

The Defendant alternatively contends that even if he was required to raise this issue on direct appeal, his right to such an appeal was denied. First, the State notes that this issue was never presented as a ground for relief below and accordingly was not properly preserved for review and should not be considered by this Court. See, e.g., Westerheide v. State, 831 So. 2d 93, 98 n.4 (Fla. 2002).

Additionally, the Defendant's claim has no merit. While the Defendant's initial private attorney was far less than stellar, there is no reason to believe that his appointed public defender, who replaced private counsel, provided anything less than effective representation. Moreover, because the public defender filed an Anders brief, the Defendant himself was given the opportunity to file his own brief bringing to the court's

attention any issues he deemed worthy. Rather than file such a brief, the Defendant instead voluntarily dismissed his appeal.

Contrary to the Defendant's contention in this Court, he was never denied an appeal, but voluntarily chose to dismiss it. He should not be heard to complain about *his own* decision on this matter.

In conclusion, then, because the district court's holding in this case is fully consistent with this Court's decision in Gray, as well as numerous cases applying a procedural bar in this situation, this Court should find that jurisdiction was improvidently granted and dismiss this appeal. Alternatively, this Court should approve the district court's decision, which properly applied a procedural bar.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court find that jurisdiction was improvidently granted or, alternatively, approve the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief on the Merits has been furnished by U.S. mail to Mary E. Adkins, counsel for Petitioner, P.O. Box 511, 303 State Road 26, Melrose, Florida 32666, this _____ day of May, 2007.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

_____
Kristen L. Davenport
Assistant Attorney General