IN THE FLORIDA SUPREME COURT

HERBERT N. PRICE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC06-2045

ON APPEAL FROM THE

DISTRICT COURT OF APPEAL OF FLORIDA,

FIFTH DISTRICT

Mary E. Adkins
Florida Bar No. 0935417
Post Office Box 511
303 State Road 26
Melrose, Florida 32666
(352) 273-0880 (telephone)
adkinsm@law.ufl.edu (e-mail)
Attorney for the Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT iv

OPINION BELOW iv

STATEMENT OF JURISDICTION iv

STATEMENT OF CASE AND FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE INFORMATION IS FUNDAMENTALLY DEFECTIVE, WHICH ISSUE MAY BE RAISED FOR THE FIRST TIME IN A PROCEEDING FOR POST-CONVICTION RELIEF. 5

II. MR. PRICE'S APPEAL WAS ERRONEOUSLY DISMISSED; THEREFORE, MR. PRICE WAS UNABLE TO ADDRESS THE SUFFICIENCY OF THE INFORMATION ON DIRECT APPEAL. 10

CONCLUSION 12

CERTIFICATE OF STYLE AND FONT 12

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967) 11

Brown v. State, 124 So. 2d 481 (Fla. 1960) 9

De Jonge v. Oregon, 299 U.S. 353 (1937) 7

Gill v. State, 586 So. 2d 471 (Fla. 4th DCA 1991) 6

Graves v. State, 704 So. 2d 147 (Fla. 1st DCA 1997) 6, 8

Jones v. United States, 526 U.S. 227 (1999) 7

Price v. State, 937 So. 2d 702 (Fla. 5th DCA 2006) ..... iv, 2, 11

Price v. State, 950 So. 2d 414 (Fla. 2007) iv

Rallo v. State, 726 So. 2d 839 (Fla. 2d DCA 1999) 6, 8

Smallwood v. State, 809 So. 2d 56 (Fla. 5th DCA 2002) 10

State v. Gray, 435 So. 2d 816 (Fla. 1983) ..... passim

State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) 7

Statutes

Florida Statutes, Section 79.05 (2006) 10

Florida Statutes, Section 794.011 (4)(f) (2000) 8

Florida Statutes, Section 794.011(1)(h) (2000) 6

Rules

Florida Rule of Criminal Procedure 3.140(b) 5

Florida Rule of Criminal Procedure 3.850(d) 10

Constitutional Provisions

Florida Constitution, Article V, section 3 (b)(3) iv

PRELIMINARY STATEMENT

The Petitioner, Herbert N. Price, will be referred to as "Mr. Price." References to specific pages in the Record will be made in the format of the following example: (R.2.) References to specific pages in the Appendix will be made in the format of the following example: (A.2.)

OPINION BELOW

The opinion below is reported at *Price v. State*, 937 So. 2d 702 (Fla. 5th DCA 2006). This Court granted review on February 28, 2007; that grant of review is reported at *Price v. State*, 950 So. 2d 414 (Fla. 2007).

STATEMENT OF JURISDICTION

This Court has jurisdiction of this matter under the authority of article V, section 3 (b)(3) of the Florida Constitution.

STATEMENT OF CASE AND FACTS

On July 16, 2002, the State charged Herbert N. Price ("Mr. Price") with one count as follows:

> IN THAT HERBERT PRICE on or about May 7, 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 incapacitated, contrary to Florida Statute 794.011(4)(f). (1 DEG FEL) (R.9.)

On February 26, 2003, Mr. Price was found guilty by a jury trial of sexual battery upon an incapacitated person contrary to section 794.011(4)(f).

On April 16, 2003 Mr. Price filed a direct appeal of his judgment and sentence through his privately retained attorney. Following sanctions by the Fifth District Court of Appeals against Mr. Price's privately retained attorney for repeatedly failing to prosecute the appeal, the Fifth District granted Mr. Price's motion to discharge the privately retained attorney. (A.1.) Mr. Price was appointed an assistant public defender to prosecute the appeal. The public defender filed an *Anders* brief raising the single issue of whether it was error to deny Mr. Price's motion for judgment of acquittal. (A.2-26.) Mr. Price then filed a *pro se* document voluntarily dismissing his direct appeal. (A.27-28.) The Fifth District never entered an order relieving the public defender from legal

representation of Mr. Price, but the Fifth District granted Mr. Price's *pro se* motion and dismissed the appeal. (A.30.)

On March 7, 2005 Mr. Price filed a Florida Rule of Criminal Procedure 3.850 motion alleging seven errors. The trial court held an evidentiary hearing on some of the grounds, and on November 2, 2005 the trial court denied relief on all of the grounds. Mr. Price filed a direct appeal of the November 2, 2005 order, which is presently pending decision by the Fifth District Court of Appeal.

On March 2, 2006 Mr. Price filed a petition for writ of habeas corpus with the trial court. (R.1-15.) Mr. Price alleged that the information charging him with a crime was fundamentally defective and because of that the trial court lacked jurisdiction over his criminal prosecution. (R.4-7.) On March 20, 2006 the trial court denied Mr. Price's petition. (R.16-17.) Mr. Price appealed the denial of his petition on April 5, 2006 (R.18.) and on August 11, 2006 the Fifth District Court of Appeal of Florida affirmed the denial on the ground that the legal sufficiency of the information could have and should have been raised on direct appeal. *Price v. State*, 937 So. 2d 702, 702-03 (Fla. 5th DCA 2006); *rev. granted*, 950 So. 2d 414 (Fla. 2007). Price timely petitioned the Florida Supreme Court for review; review was granted on February 28, 2007.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeals affirmed the trial court's summary denial of Mr. Price's petition for writ of habeas corpus by holding that Mr. Price procedurally waived whether the information charging him with sexual battery was defective when Mr. Price did not raise that issue on direct appeal. This holding is erroneous for two reasons: First, because the complete insufficiency of the charging information to charge a crime is an issue which can be raised at any time; and, second, because Mr. Price did not have the benefit of a plenary appeal, as his appeal was erroneously dismissed.

The Fifth District's holding is erroneous because it conflicts with this Court's ruling in *State v. Gray* that "the complete failure of the 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." *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983).

The longstanding test whether relief should be granted based on a defect in the charging document is actual prejudice to the fairness of the trial. *Id.* Mr. Price was summarily denied a post-conviction hearing to prove that prejudice. Constitutional due process and the Rules of Criminal Procedure require that either

Mr. Price receive a "live" evidentiary hearing on his petition or that trial record material refuting his allegation be attached to the order summarily denying the petition. In this case, neither occurred.

Mr. Price acknowledges that a distinction has developed in court decisions: while certain less serious defects in an information or indictment must be raised at trial or waived, more serious errors in the drafting of an information are treated as fundamental error, rising to due process violations, that may be raised at any point in the criminal process.

The error in Mr. Price's information is that the information is unclear on its face on whom, or by whom or what, the penetration was to have occurred. Florida district courts have held failure to state this clarifying allegation renders an information fundamentally defective.

Second, Mr. Price was denied a plenary appeal. His privately retained counsel's misconduct was egregious enough to warrant an appellate opinion describing and condemning it. His public defender filed an *Anders* brief and motion to withdraw. When the appellate court accepted Mr. Price's *pro se* voluntary dismissal while he was still represented, rather than conducting the required *Anders* review, it improperly deprived Mr. Price of the right to have his issues examined by the court.

Therefore, this Court should reverse the Fifth District Court of Appeal and grant Mr. Price's petition for writ of habeas corpus.

ARGUMENT

I. THE INFORMATION IS FUNDAMENTALLY DEFECTIVE, WHICH ISSUE MAY BE RAISED FOR THE FIRST TIME IN A PROCEEDING FOR POST-CONVICTION RELIEF.

This Court should reverse the Fifth District Court of Appeal and grant Mr. Price's petition for writ of habeas corpus because the charging information wholly failed to allege an essential element of the crime of sexual battery of a physically incapacitated person. Because the failure of an indictment or information to allege an essential element of the charged crime is a fundamental defect, it may be raised for the first time in a proceeding for post-conviction relief. Therefore, Mr. Price properly raised the issue in his petition for writ of habeas corpus and is entitled to relief.

This Court has plainly held: "Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983) (emphasis added). *See also* Fla. R. Crim. P. 3.140(b) ("The indictment or information on which the defendant is to be tried shall be a plain, concise, and

definite written statement of the essential facts constituting the offense charged.") Here the indictment wholly fails to allege whether the sexual battery occurred through penetration by an instrument or contact with a sexual organ from Price's body. Indeed, the indictment could be read as charging that the penetration was by the victim's own body.

Sexual battery is defined by statute as: "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; however, sexual battery does not include an act done for a bona fide medical purpose." § 794.011(1)(h), Fla. Stat. (2000). As expressly provided in the statute, sexual battery may occur through an object that is not a sexual organ, but penetration must occur. § 794.011(1)(h), Fla. Stat; *Graves v. State*, 704 So. 2d 147, 149 (Fla. 1st DCA 1997). By contrast, sexual battery may occur by mere contact between sexual organs without penetration. § 794.011(1)(h), Fla. Stat.*; Gill v. State*, 586 So. 2d 471 (Fla. 4th DCA 1991). Moreover, where the evidence does not tend to prove a sexual battery which substantially comports with the charging information, the defendant could be subject to double jeopardy. *See Rallo v. State*, 726 So. 2d 839, 840 (Fla. 2d DCA 1999) (" 'The proof at trial must substantially conform to the allegations of the indictment or information in order that the defendant not be prejudiced in the preparation of a defense or subject him to reprosecution for the same offense.'"

(citations omitted)). It is therefore significant what type of sexual battery is being alleged.

The United States Supreme Court and this Court have held that failure of a charging instrument violates a number of federal and state constitutional protections. Recently the United States Supreme Court has again held that under the Sixth and Fourteenth Amendments guaranteeing notice and due process, respectively, it is necessary that the "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). *See also, De Jonge v. Oregon*, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be sheer denial of due process."). This Court has likewise held conviction on a charge not made is a denial of federal constitutional due process. *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983). In addition, this Court has held that conviction on a charge not made violates both article I, section 9 of the Florida Constitution, which guarantees due process of law and forbids double jeopardy; and article I, section 16 of the Florida Constitution, which guarantees that the accused be informed, on demand, of the nature of the charges and be accorded a fair trial. *State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991) (citing Art. I, §§ 9,16, Fla. Const.).

Mr. Price's charging information read:

> …HERBERT PRICE … did unlawfully commit sexual battery by oral and/or vaginal petration [sic] by, or union with the sexual organ of

> [blank] a person 12 years of age or older, without [blank] consent and while [blank] was physically incapacitated, contrary to Florida Statute 794.011(4)(f). (1 DEG FEL) (R.9.)

The record reveals that the evidence tended to prove that Mr. Price penetrated the victim with his penis. (R.6.) However, Mr. Price remains at risk of double jeopardy because the nature of the sexual battery was not specified in the charging information. (R.9.) Anal or digital penetration, penetration by a tongue, or penetration by an object can constitute additional counts of sexual battery. § 794.011 (4)(f), Fla. Stat. (2000); *see, e.g., Graves,* 704 So. 2d 147, 149 (digital versus sexual organ); *Rallo v. State*, 726 So. 2d 839, 840 (hands and sexual organ).

Additionally, the charging information for Mr. Price could, as worded, lead to a conclusion that the penetration occurred "by" the sexual organ of the victim. (R.9.) Although the charging information appears to track parts of the statutory language, it is crafted into a sentence in such a way that the meaning is ambiguous. Without any manipulation other than choosing one option where a disjunctive ("or") is provided, the information reads: "HERBERT PRICE [date and location omitted] did unlawfully commit sexual battery by …vaginal petration [sic] by … the sexual organ of [blank] a person 12 years of age or older, without [blank] consent ...." (R.9.)

Assuming that "[blank]" means the victim, the charging information says that the vaginal penetration was done by the sexual organ of the victim!

Mr. Price admits that the State probably did not intend to make such a charge. Nevertheless, that is how the information reads, and it was on that information – confusing at best, absurd at worst – that Mr. Price was convicted. Under this reading also, then, the charging information failed to allege an essential element of the crime – the element that would have specified how Mr. Price accomplished the deed.

Because the information failed to allege an essential element of the crime of sexual battery, it wholly failed to allege a crime. *Gray*, 435 So. 2d 816, 818. Therefore, Mr. Price's petition for habeas corpus should be granted and Mr. Price released.

The longstanding test whether relief should be granted based on a defect in the charging document is actual prejudice to the fairness of the trial. *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983). This is consistent with this Court's test of whether fundamental error occurred, that is, whether the trial was made unfair. *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960).

However, Mr. Price was summarily denied a post-conviction hearing to prove whether actual prejudice to the fairness of the trial did occur. Constitutional due process, the Florida Statutes, and the Florida Rules of Criminal Procedure

require that Mr. Price either receive a "live" evidentiary hearing on his petition or that trial record material showing that he is entitled to no relief is attached to the order summarily denying the petition. § 79.05, Fla. Stat. (2006); Fla. R. Crim. P. 3.850(d); *Smallwood v. State*, 809 So. 2d 56 (Fla. 5th DCA 2002). This would be true whether the motion were styled a Rule 3.850 motion, a petition for habeas corpus, or alleging ineffective assistant of trial or appellate counsel. In this case, neither occurred. Therefore, Mr. Price was unable to demonstrate that the failure of the charging information caused actual prejudice to the fairness of his trial. *See Gray,* 435 So. 2d 816, 818.

II. MR. PRICE'S APPEAL WAS ERRONEOUSLY DISMISSED; THEREFORE, MR. PRICE WAS UNABLE TO ADDRESS THE SUFFICIENCY OF THE INFORMATION ON DIRECT APPEAL.

Before Mr. Price filed the motion for habeas corpus which is under this Court's review, he filed a direct appeal. The unfortunate handling of that direct appeal is chronicled in *Price v. State*, 873 So. 2d 1246 (Fla. 5th DCA 2004), and resulted in Mr. Price moving to dismiss his privately retained counsel after her handling of the appeal nearly cost him the appeal. (A.1.) The court then appointed an assistant public defender, who filed an *Anders* brief and moved to withdraw as counsel. (A.2-26.) In its *Anders* Order, the court did not grant or deny the public defender's motion to withdraw. (A.27.) Mr. Price then, pro se, filed a Voluntary

Dismissal of the appeal. (A.28-29.) The Fifth District Court of Appeal granted the dismissal, even though Mr. Price was still represented by counsel. (A.30.)

The Fifth District Court of Appeal granted the dismissal erroneously. Because the *Anders* Order did not grant the public defender's motion to withdraw, and because the Order invited Mr. Price to file an additional brief (A.27.), the Fifth District should have treated Mr. Price's voluntary dismissal as a waiver of his right to file a brief. The court should then have fully examined all the proceedings and decided whether the case was wholly frivolous, as *Anders v. California,* 386 U.S. 738, 744 (1967), required. Only then could the court have granted the public defender's motion to withdraw and decided whether to dismiss the appeal or reach a decision on the merits. *Id*. Instead, the Fifth District approved the voluntary dismissal of Mr. Price (A.30.), who was then represented by counsel, depriving Mr. Price of his opportunity under *Anders*, 386 U.S. 738, 744, to have his issues on appeal examined by the court. Because of the procedural irregularity of the dismissal of the appeal, Mr. Price should be accorded the opportunity to address in this habeas petition the issues he attempted to raise on direct appeal.

CONCLUSION

This Court should reverse the Fifth District Court of Appeal and grant Mr. Price's petition for habeas corpus. Mr. Price's charging information was fundamentally defective because it completely failed to allege an essential element of the offense for which he was convicted, and he was denied an evidentiary hearing to demonstrate prejudice to his trial. Even if Mr. Price were to have been required to raise the charging information claim on direct appeal, he was denied a meaningful direct appeal. For the foregoing reasons, this Court should grant Mr. Price's petition for habeas corpus.

CERTIFICATE OF STYLE AND FONT

I CERTIFY that this Brief was prepared using Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing was sent to Kellie Nielan, Esq., Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118-3951, by United States Mail this 4th day of May, 2007.

Respectfully submitted,

Mary E. Adkins, Esq.
Florida Bar No. 0935417
Post Office Box 511
303 State Road 26
Melrose, Florida 32666
(352) 372-0880
Attorney for the Petitioner