IN THE SUPREME COURT OF FLORIDA

ROBERT N. GRESHAM,
Petitioner,

v.

Case No.: 1D14-5913

STATE OF FLORIDA,
Respondant.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

On review from the District Court of Appeal,
First District
State of Florida

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STATEMENT OF CASE AND FACTS

Robert Gresham was charged by information alleging two counts of Capital Sexual Battery and one count of Lewd or Lascivious Molestation.

June 30, 2004, after a jury trial, the Defendant was found guilty of two counts Sexual Battery and one count of Lewd or Lascivious Molestation.

On September 8, 2014, the Defendant filed a post conviction motion for DNA testing pursuant to Fla.R.Crim.P. 3.853 and Section 925.11 Florida Statute.

On November 5, 2014, the Court denied the motion for D.N.A. testing.

On November 18, 2014, Defendant filed a motion for rehearing.

On November 26, 2014, the Court denied the motion for rehearing.

On December 19, 2014, the Defendant filed his Notice of Appeal.

On May 14, 2015, the First District Court issued an Order to the Attorney General to show cause.

On June 3, 2015, the Attorney General filed its response.

On July 21, 2015, the Appellant filed his reply to the State's response.

On December 8, 2015, the First District Court filed its opinion.

On December 21, 2015, the Appellant filed a Rehearing En Banc.

On January 25, 2016, the First District Court summarily denied Appellant's motion for Rehearing En Banc.

Whereupon the Petitioner filed his Notice to Invoke Jurisdictional Discretion to Review the Conflict of the First District Court's ruling in his case.

SUMMARY OF THE ARGUMENT

In the present case, the First district Court of Appeals held that, "In order to allege a facially sufficient claim for DNA testing, a defendant must allege that identification was genuinely disputed issue at trial **and** explain how the DNA testing will exonerate him." Under Fla.R.Crim.P. 3.853 (b) (4), the decision of the Second District Court in Gonzalez v. State, 41 So.3d 1050 (Fla. 2d DCA 2010), which found Rule 3.853 (b) (4) to have alternate parts, identification is genuinely disputed; **or** explaining how DNA evidence would exonerate. Also, the First District's decision is in conflict with this Court's ruling in Amendment to Fla. Rule of Cr. Proc. 3.853, 807 So.2d 633 (Fla. 2001).

In the present case, the First District Court held that, "even if the motion had been facially sufficient triggering the requirement for the trial court to receive a response from the state prior to ruling on it, we would still affirm under the doctrine of harmless error." This decision finds conflict with Harris v. State, 40 Fla. L. Weekly D939 (Fla. 2d DCA 22, 2015) which found that it was reversible error for the lower court to summarily deny a 3.853 motion with out issuing a show cause order to the state first, even where the record conclusively refutes a defendants claim.

In the present case, the First District Court held that, "Appellant did not and cannot allege that identification was genuinely disputed in this case. He was the

boyfriend of the victim's mother and lived in the home with the victim. "This decision is in conflict with the Second District Court's ruling in Knighting v. State, 829 So.2d 249 (Fla. 2d DCA 2002) and the Third District Court's ruling in Jordan v. State, 950 So.2d 442 (Fla. 3rd DCA 2007), both of which the Courts stated that even with the victim's identification of the defendants, identification was still in dispute especially for the purpose of postconviction DNA testing were the DNA could prove that someone other than the defendants could have committed the crimes.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of Law. Art. V, § 3 (b) (3) Fla. Constitution (1980); Fla. R. App. P., 9.030 (a) (2) (A) (iv).

ARGUMENT

ISSUE I

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FLORIDA SUPREME COURT IN *AMENDMENT TO FLA. RULES OF CR. PRO. 3.853*, 807 SO.2D 633 (FLA. 2001) AND OF THE SECOND DISTRICT COURT IN *GONZALEZ V. STATE, 41 SO.3D 1050 (FLA. 2D DCA 2010).*

The First District Court of Appeal interpreted Rule 3.853 (b) (4) Florida Rules of Criminal Procedure, "to allege a facially sufficient claim for DNA testing, a defendant must allege that identification was a genuinely disputed issue at trial **and** explain how the DNA testing will exonerate him." This decision of the First District Court conflicts with the decision of this court in Amendment To Fla. Rules of Cr. Proc. 3.853, 807 So.2d 633, 634 (Fla. 2001),

> (We have modified proposed subdivision (a) of the proposed rule to explain that the new rule simply provides procedures for obtaining D.N.A. testing under section 925.11, Florida Statutes. Subdivision (b) of Rule 3.853 lists the contents of a motion seeking DNA testing. In response to the comments and consistent with subsection (1) (a) of section 925.11, which authorizes DNA testing when the evidence tested may contain DNA that would exonerate the movant or mitigate the sentence received, we have modified subdivision (b) (4) of the new rule to require :
>
> > A statement that identification of the movant is a genuinely disputed issue in the case, and why it is an issue ***or*** *an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received.*) Emphasis added.

Thus, this Court created proposed rule to include a secondary provision in order to fulfill the pleading requirement of subdivision (b) (4).

Also, the First District Court's decision conflicts with a decision of the Second District Court in Gonzalez v. State, 41 So.3d 1050 (Fla. 2d DCA 2010), Finding:

> "The motion was also facially sufficient under Rule 3.853 (b) (4). That rule is written in the alternative: the movant must allege that identification is a genuinely disputed issue **or** he must explain how the DNA evidence would exonerate him."

The final determination of the Gonzalez court states that:

> "Although Gonzalez's motion did not allege that identification was an issue, it did, as previously discussed, explain how DNA testing would exonerate him. Accordingly, the motion was facially sufficient under Rule 3.853 (b) (4)."

This conflict with the First District's ruling creates a question of law that requires this Court to resolve. The question is:

> "Is Rule 3.853 (b) (4) written where the Defendant must prove that identification is genuinely disputed in the case and explanation of how the DNA evidence would prove exoneration; or does Rule 3.853 (b) (4) contain two options, one option being that a defendant proves that identification is genuinely disputed on the case and the second option being that a defendant proves how the DNA evidence would prove exoneration?"

ISSUE II

THE FIRST DISTRICT COURT'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT IN HARRIS V. STATE, 40 FLA. L. WEEKLY D939 (FLA. 2D DCA APR. 22, 2015)

The First District Court quoted Harris v. State, 40 Fla. L. Weekly D939 (Fla. 2d DCA Apr. 22, 2015); stating:

> "The Second District has held that it is reversible error for the trial court to deny a facially sufficient motion without receiving a response from the State, even where the record conclusively demonstrates that the defendant is not entitled to relief."

Then creates conflict with the Second District Court's ruling by saying:

> "Additionally, we note that even if the motion had been facially sufficient triggering the requirement for the trial court to receive a response from the State prior to ruling on it, we would still affirm under the doctrine of harmless error."

This Decision is in express and direct conflict with the Second District Court, and therefore creating the question, "Is it reversible error for the Lower Court to summarily deny a 3.853 motion without issuing a show cause to the State; or is it harmless error?"

ISSUE III

THE DECISION OF THE FIRST DISTRICT COURT IN THIS CASE CREATES DIRECT AND EXPRESS CONFLICT WITH THE SECOND DISTRICT COURT IN KNIGHTEN V. STATE, 829 SO.2D 249 (FLA. 2D DCA 2002) AND WITH THE THIRD DISTRICT COURT IN JORDAN V. STATE, 950 SO.2D 442 (FLA. 3RD DCA 2007)

In the First District Court's ruling it states:

> "Appellant did not and cannot allege that identification was genuinely disputed in this case. He was the boyfriend of the victim's mother and lived in the home with the victim"

This statement is in direct and express conflict with the Second District Court's ruling in Krighten v. State, 829 So.2d 249 (Fla. 2d DCA 2002):

> "...the trial court was incorrect in finding that identification was not at issue simply because both victims identified the movant as their attacker at trial."

The First District Court's decision expressly and directly conflicts with The Third District Court's ruling in Jordan v. State, 950 So.2d 442 (Fla. 3rd DCA 2007):

> "In this case, as in Hampton, if DNA testing could separate out several individual DNA strands on the swabs, none of which match Jordan, that evidence would tend to exonerate Jordan particularly as the victim testified at trial that Jordan was the man she scratched..."

Both decisions of the Second and Third District Court's crates the question, "Is identity a disputed issue for the purpose of post conviction DNA testing even if the victim identifies the Defendant, or is the victim's identification enough to

prove that a defendant cannot raise the claim of disputed identity for the purpose of post conviction D.N.A. testing?"

CONCLUSION

The petitioner respectfully submits that this Court has the discretionary jurisdiction to review the decision of the First District Court of Appeal, and this Court should exercise that jurisdiction to consider review and resolve the conflict by quashing the decision of the First District Court and review the merits of the petitioners' argument.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have placed a true and correct copy of the foregoing *Petitioner's Jurisdictional Brief* in the hands of institutional staff for mailing via first-class U.S. mail, postage pre-paid, to the Office of the Attorney General, PL-01, The Capital, Tallahassee, Florida 32399 on this 26 day of February, 2016.

Robert N. Gresham, Pro Se
D.O.C. # G10973

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing *Petitioner's Jurisdictional Brief* has been computer generated utilizing Microsoft windows and prepared using Times New Roman 14-point-font in compliance with the font requirements of the Florida rules of court/appellate procedure 9.210(a) (2).

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ROBERT N. GRESHAM,

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STATE OF FLORIDA,

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

CASE NO. 1D14-5913

Opinion filed December 8, 2015.

An appeal from an order of the Circuit Court for Levy County.
Mark W. Moseley, Judge.

Robert N. Gresham, pro se, Appellant.

Pamela Jo Bondi, Attorney General, and Kristen Bonjour, Assistant Attorney General, Tallahassee, for Appellee.

ROWE, J.

Appellant, Robert N. Gresham, challenges the denial of his motion for post-conviction DNA testing filed pursuant to Florida Rule of Criminal Procedure 3.853. Because Appellant's motion was facially insufficient, we affirm the trial court's denial of the motion.

In 2004, following a jury trial, Appellant was convicted of two counts of capital sexual battery and sentenced to life imprisonment. After his conviction, he

filed a motion seeking testing of DNA evidence allegedly found on the victim. Without requiring a response from the State, the trial court denied the motion on the merits, finding that the DNA evidence would not have changed the outcome of the trial. Appellant argues that this was error because case law prohibits trial courts from denying facially sufficient rule 3.853 motions until after the State responds to the motion. See Girley v. State, 935 So. 2d 55, 56 (Fla. 1st DCA 2006) ("A court should deny a facially sufficient rule 3.853 motion on the merits only after the state has responded."); Cheshire v. State, 872 So. 2d 427, 428 (Fla. 5th DCA 2004) (holding that it was error to summarily deny a legally sufficient rule 3.853 motion without ordering the State to respond); Manual v. State, 855 So. 2d 97, 98 (Fla. 2d DCA 2002) (same). However, these cases are not applicable to Appellant's motion because it was facially insufficient; therefore, no response was required by the State.

In order to allege a facially sufficient claim for DNA testing, a defendant must allege that identification was a genuinely disputed issue at trial and explain how the DNA testing will exonerate him. See Fla. R. Crim. P. 3.853(b) (explaining requirements for facially sufficient motion); Robinson v. State, 865 So. 2d 1259, 1265 (Fla. 2004) ("It is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's

sentence."). Appellant did not and cannot allege that identity was genuinely disputed in his case. He was the boyfriend of the victim's mother and lived in the home with the victim. Moreover, Appellant confessed to police officers that he sexually abused the victim.* Appellant also failed to explain how DNA testing would exonerate him in light of the fact that the State admitted at trial that there was no DNA evidence linking Appellant to the crime. Thus, DNA testing of the requested items would only confirm a fact of which the jury was already aware, that Appellant's DNA was not found on the victim. Because Appellant failed to sufficiently allege that identity was a disputed issue and explain how DNA testing would exonerate him, his motion was facially insufficient. As such, the trial court did not err in denying the motion without first receiving a response from the State.

Additionally, we note that even if the motion had been facially sufficient, triggering the requirement for the trial court to receive a response from the State prior to ruling on it, we would still affirm under the doctrine of harmless error. The Second District has held that it is reversible error for the trial court to deny a facially sufficient motion without receiving a response from the State, even where the record conclusively demonstrates that the defendant is not entitled to relief. Harris v. State, 40 Fla. L. Weekly D939 (Fla. 2d DCA Apr. 22, 2015). We

* Appellant also implicitly admitted to committing the crime in a prior post-conviction motion when he argued that counsel was ineffective for failing to present evidence that he was a pedophile, which would have led to a defense of insanity or to a mitigation of the charges.

disagree. A harmless error analysis should be applied when a trial court denies a facially sufficient rule 3.853 motion without first receiving a response from the State. We acknowledge that this Court held in Girley that, "[a] court should deny a facially sufficient rule 3.853 motion on the merits only after the state has responded." 935 So. 2d at 56. However, this case is distinguishable from Girley because the portions of the record showing that Appellant's request for DNA testing was meritless are attached to the order on appeal. Because it is apparent from the face of the record that Appellant's claims are meritless, it would be futile to reverse and remand for the trial court to order a response from the State when it is clear that the failure to do so was harmless error.

We, therefore, AFFIRM the trial court's denial of Appellant's rule 3.853 motion.

LEWIS and THOMAS, JJ., CONCUR.