

IN THE SUPREME COURT OF FLORIDA

ROBERT N. GRESHAM,
Petitioner,

v.

CASE NO. SC16-359

STATE OF FLORIDA,
Respondent.

On Discretionary Review from the First District
Court of Appeal: NON-Certified Conflict

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Case--This case arose from denial of Gresham'S motion for DNA testing under rule 3.853. The trial court denied the motion without State response. The First DCA upheld that ruling, on the ground Gresham's motion was facially insufficient; so the trial court did not err. It alternatively held that, assuming the motion was facially sufficient; Gresham's claims were meritless, so any error was harmless.

The decision below was issued December 8, 2015. Gresham v. State, 181 So.3d 1207 (Fla.1st DCA 2015) [App.,p. __]. Rehearing was denied January 25, 2016. Gresham filed notice to invoke this court's discretionary jurisdiction February 23.

Facts--The State accepts the factual aspects of Gresham's statement, with these additions:

In 2004, Gresham was convicted for two counts of capital [person less than 12] sexual battery, and one count of lewd and lascivious molestation of a person under 12. He was sentenced to life in prison. (App.,p.1-2). After conviction, he filed a motion for DNA testing under rule 3.853. The trial court denied it on the merits without State response. (Id.,p.2).

Identity was not genuinely disputed at trial, because Gresham was the boyfriend of the victim's mother; and lived in the same home as the victim. He confessed to the police, and implicitly admitted to committing the crime in an earlier

postconviction motion. (App.,p.3 & fn.).

Gresham failed to explain how DNA testing would exonerate him, given the State admitted there was no DNA evidence linking him to the crimes. Instead, such testing would have confirmed something already known to the jury, that his DNA was not found on the victim. (App.,p.3).

The decision below observed:

[T]he portions of the record showing that Appellant's request for DNA testing was meritless are attached to the order on appeal.

(App.,p.4). For purposes of this jurisdictional brief, the State asserts, as fact, that Gresham's request had no merit.

SUMMARY OF ARGUMENT

The decision below correctly found Gresham's Fla.R.Crim.P. 3.853 motion for DNA testing to be facially insufficient. All decisions advanced by Gresham involve a facially sufficient motion. There is no conflict. This court lacks jurisdiction.

To find Gresham's motion was facially insufficient, the decision below combined language from §925.11(2)(a)3 & 4, Fla. Stat.; while not referencing the inapplicable alternative ("or will mitigate the sentence") in §925.11(2)(a)3. It cited rule 3.853(b) and Robinson v. State, 865 So.2d 1259 (Fla.), cert.den., 124 S.Ct. 1196 (2004). Both recognize the conjunctive nature of (a)1-6. Again, there is no conflict to establish jurisdiction.

The decision below declared that Gresham's rule 3.853 motion was meritless in light of attachments to the order of denial. For jurisdictional purposes, this court must assume the motion was meritless. Any trial court error in not requiring a State response before ruling was harmless. If conflict jurisdiction exists, this court should decline to exercise it.

ARGUMENT

ISSUE

THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER DECISION; AND, ASSUMING CONFLICT, THIS COURT SHOULD NOT EXERCISE JURISDICTION WHEN ANY PROCEDURAL ERROR WAS HARMLESS. (Restated).

A. Standard of Review

The presence of conflict jurisdiction is a legal question answered de novo. See State v. Glatzmayer, 789 So.2d 297, 302 n.7 (Fla. 2001) (purely legal questions reviewed de novo).

B. Merits

1. This Court Lacks Conflict Jurisdiction

The decision below correctly explained why Gresham's rule 3.853 motion was facially insufficient.¹ Therefore, no response

¹The court reasoned:

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. [cites omitted]. Appellant did not and cannot allege that identity was genuinely disputed in his case. He was the boyfriend of the

was required from the State before summary denial. See rule 3.853 (c)(2) ("The court shall review the motion and deny it if it is facially insufficient." [e.s.]). All cases advanced by Gresham presume a facially sufficient motion. There is no conflict between the decision below and a decision by this court or another district court. This court lacks jurisdiction.

The decision below combined language from §925.11(2)(a)3-4, Fla.Stat. Because Gresham received two mandatory life sentences for sexual battery of a child under 12, mitigation of sentence was not possible--short of outright exoneration. There was no need for the decision below to mention the inapplicable alternative ("or will mitigate the sentence") in §925.11(2)(a)3.²

victim's mother and lived in the home with the victim. Moreover, Appellant confessed to police officers that he sexually abused the victim. [fn. omitted]. 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. ... 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.
(App., p.2-3) [e.s].

²In pertinent part, §925.11(2)(a) provides:

(2) Method for seeking postsentencing DNA testing.--
(a) The petition for postsentencing DNA testing must be made under oath by the sentenced defendant and must include the following:

* * *

3. A statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will exonerate the defendant of the crime for which the defendant was sentenced or will mitigate the sentence

It cited rule 3.853(b)³ and followed Robinson, which recognize the overall conjunctive nature of the requisites for DNA testing. See rule 3.853 (fn.3 herein); Robinson, 865 So.2d 1259, 1265 ("Because Robinson failed to meet his burden under rule 3.853 to allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence, we affirm the trial court's denial of relief in this claim."). There is no conflict with a decision of this court or a district court.

Gresham contends the decision below expressly and directly conflicts with five decisions: In Issue I, with Amendment ***

-
- received by the defendant for that crime;
 - 4. A statement that identification of the defendant is a genuinely disputed issue in the case, and why it is an issue;
 - 5. Any other facts relevant to the petition; and
 - 6. A certificate that a copy of the petition has been served on the prosecuting authority. [e.s.].

³The corresponding part of rule 3.853(b) provides:

- (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
- (4) 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;
- (5) a statement of any other facts relevant to the motion; and
- (6) a certificate that a copy of the motion has been served on the prosecuting authority. [e.s.].

Creating Rule 3.853, 807 So.2d 633 (Fla. 2001); and Gonzalez v. State, 41 So.3d 1050 (Fla.2d DCA 2010). In Issue II, with Harris v. State, 2015 WL 1810370 (Fla.2d DCA Ap.22,2015). In Issue III, with Knighten v. State, 829 So.2d 249 (Fla.2d DCA 2002); and Jordan v. State, 950 So.2d 442 (Fla.3d DCA 2007). He is wrong, because conflict between decisions "must be express and direct." Art.V, §3(b)(3), Fla.Const.

In Amendment *** Creating Rule 3.853 (not cited below) this court's adopted rule 3.853. The rule establishes a uniform procedure for requesting DNA testing. It is not premised on any particular set of facts, but does contemplate trial-court denial of insufficient motions. See *id.*, 807 So.2d at 639 ("The court shall review the motion and deny it if it is insufficient."). As a matter of law, it cannot establish conflict jurisdiction.

Gresham's reliance on Amendment *** Creating Rule 3.853 implies he is contending the decision below conflicts with rule 3.853 itself. Under Art.V,§3(b)(3) this court's jurisdiction must rest on express and direct conflict with a "decision of another district court of appeal or of the supreme court on the same question of law." [e.s.]. Conflict with a bare procedural rule does not posit jurisdiction for discretionary review.

Gonzalez held the rule 3.853 motion at issue was facially sufficient. See *id.*, 41 So.3d at 1051 ("The motion was also facially sufficient under rule 3.853(b)(4)."). Because Gresham's

motion was correctly found insufficient, Gonzalez does not establish conflict. Similarly, the holding in Harris was premised on a facially sufficient motion. See *id.* at *1 ("[I]f a postconviction court finds that a rule 3.853 motion is facially sufficient [fn.1 omitted], it must order a response from the State."). Harris cannot establish conflict.

The 3.853 motion in Knighen also was facially sufficient. See *id.*, 829 So.2d at 250 (disagreeing with the trial court's denial of Knighen's motion as facially insufficient). Knighen also cannot establish conflict.

In Jordan, the trial court summarily denied a 3.853 motion which appears to have been a facially sufficient. The court said:

A trial court's summary denial of a Rule 3.853 motion for DNA testing must be reversed, however, unless the post-conviction record conclusively demonstrates that the defendant is not entitled to relief.

Jordan, 950 So.2d at 444. Not only was Jordan's motion facially sufficient, but the necessity for a State response was not at issue. Jordan does not establish conflict jurisdiction.

All decisions advanced by Gresham involve a facially sufficient motion. There is no conflict. This court lacks jurisdiction.

2. Assuming Conflict, this Court Should Not Exercise Jurisdiction

The decision below asserts that Gresham's motion for DNA testing was meritless, in light of attachments to the trial

court's order of denial. For the purpose of determining conflict jurisdiction, this court must assume the motion was meritless. Any trial court error in not requiring a State response before ruling was harmless, even when Gresham's 3.853 motion is treated as facially sufficient.

If this court found error in the First DCA's application of rule 3.853 and reversed, the outcome would not change--Gresham's motion would be denied after State response. Courts are not required to engage in futile or superfluous acts. *Cf. Hendley v. State*, 58 So.3d 296, 299 (Fla.2d DCA), *rev.den.*, 65 So.3d 515 (Fla.2011) (declining Hendley's invitation to remand for an evidentiary hearing on standing, when "remand for that purpose would be a futile exercise in this case"); *Hutchinson v. State*, 979 So. 2d 377, 378 (Fla.4th DCA 2008) "I am not sure why it is necessary to go through this essentially meaningless exercise of correcting an illegal sentence imposed so long ago, which will have absolutely no effect on the defendant's liberty." (Warner,J., concurring). If conflict jurisdiction exists, this court should decline to exercise it.

CONCLUSION

This court lacks conflict jurisdiction. If bare jurisdiction exists, it should not be exercised. Under either alternative, Gresham's petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULES 9.120/9.210

I certify a copy of this JURISDICTIONAL BRIEF has been sent by email to ROBERT N. GRESHAM, pro se, DOC# G10973, Liberty Correctional Institution, 11064 NW Dempsey Barron Road, Bristol, Florida 32321-9711; on March 10, 2016. I also certify this brief complies with Fla.R.App.P. 9.120 & 9.210.

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IN THE SUPREME COURT OF FLORIDA

ROBERT N. GRESHAM,
Petitioner,

v.

CASE NO. SC16-359

STATE OF FLORIDA,
Respondent.

_____ /

APPENDIX

(DECISION UNDER REVIEW)

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

ROBERT N. GRESHAM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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.