IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

DARREL HARVEY,

APPELLANT,
vs

STATE OF FLORIDA,

APPELLEE,

DCA No. 1D2023-0476
L/T No. 2017 CF 526

ON APPEAL FROM THE CIRCUIT
COURT FOR SECOND JUDICIAL DISTRICT
IN AND FOR LEON COUNTY
HONORABLE STEPHEN EVERETT

APPELLANT'S INITIAL BRIEF

DARREL HARVEY
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APPELLANT
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STATEMENT OF THE CASE AND FACTS

DARREL HARVEY appeals from an order of the Circuit Court Second Judicial District in and for Leon County (Stephen Everett, J.), rendered on February 17, 2023, which denied his motion to correct an illegal sentence, R: 69-71, and the denial of his motion for rehearing on February 22, 2023. R: 301, 302.

On February 13, 2018, Defendant was charged by Amended Information with one count of Traveling to Meet a Minor, one count of Soliciting a Child for Unlawful Sexual Conduct Using a Computer Service or Electronic Device, and one count of Tampering with Physical Evidence. R: 4. Defendant pled not guilty and went to trial on May 22, 2018. Defendant was found guilty as charged on May 23, 2018 by the jury. R: 4.

On June 14, 2018, Defendant was adjudicated guilty and sentenced to 36 months in DOC and 5-years probation for Count1, Count was dismissed, and 36 months for Count 3. Counts I and 3 were to run consecutively with each other and with Count 1, for a total of 8-years with I-day of jail credit. R: 4.

Defendant filed a direct appeal, and on October 13, 2020, the First District Court of Appeal affirmed per curiam on authority of *Davis v. State*, 268 So. 3d 958 (Fla. 1st DCA 2019) (en banc), review granted, No. SC19-716, 2019 Fla. LEXIS 1032, 2019 WL 2427789 (Fla. June 11, 2019). *Harvey v. State*, 304 So. 3d 289 (Fla. 1st DCA 2020).

Defendant filed a Motion for Postconviction Relief pursuant to Fla. R. Crim. P. 3.850 on November 16, 2020, October 1, 2021, and again on May 9 and 17, 2022. The first motion was denied as not cognizable, and the last motions were denied as successive.

This Court affirmed the denial on March 12, 2021. See Harvey v. State, 313 So. 3d 590 (Fla. 1st DCA 2021).

In this proceeding, defendant alleged that his sentence was illegal because the information did not charge an offense in count one with sufficient specificity to support the conviction. R: 5. That count of the information reads as follows:

> On February 12, 2017, did unlawfully and knowingly travel any distance within, this State, for the purpose of engaging in an illegal act described in Chapter 794, Chapter 800, or

> Chapter 827, Florida Statues, or to otherwise engage in other unlawful sexual conduct with a child or a person believed to be a child, after using a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to do so, a child or another person believed to be a child, to engage in or to otherwise engage in other unlawful sexual conduct with a child or another person believed to be a child, contrary to Section 847.0135(4)(a), Florida Statutes.

R: 15, 72.

He also requested that, in the event that relief was not available as a post-conviction motion, that the application be considered as a petition for a writ of habeas corpus. That relief may be conferred in the exercise of this court's inherent authority to grant a writ a habeas corpus in accordance with *Figueroa v. State*, 84 So. 3d 1158, 1162 (Fla. 2d DCA 2012); see also *Johnson v. State*, 226 So. 3d 908, 910 (Fla. 4th DCA 2017) ("Relief [by habeas corpus] may be granted even on a successive petition or claim where failing to do so would result in manifest injustice."); See *Hall v. State*, 643 So. 2d 635, 636 (Fla. Ist DCA 1994) ("Courts have the authority to treat prisoner petitions as if the proper remedy were sought if it would be in the interest of

justice to do so.")[1].

The Circuit Court denied relief and issued an order to show cause directing the Appellant to show cause why he should not be barred from future filings. R: 69-73, 74-264. Following receipt of Appellant's objection, R: 282-284, the Court issued such an order barring further pro se filings. R: 293-300.

STANDARD OF REVIEW

This Court reviews a determination on "the ability of a pro se litigant to separately address the court" for abuse of discretion. See *Sheppard v. State*, 17 So.3d 275, 280 (Fla.2009); *Bivins v. State*, 35 So. 3d 67, 69 (Fla. 1st DCA 2010). As the petition for relief presents only legal issues, the standard of review is de novo. See *Wickham v. State*, 124 So. 3d 841, 858 (Fla. 2013).

ARGUMENT

I. The Bar Against Filings Must Be Set Aside

Appellant recognizes that a court may issue an order barring future pro se filings in egregious a circumstances. See *Parker v. State*,

[1]. Appellant requests that this rule be applied on this appeal if it is necessary to do so.

324 So. 3d 553 (Fla. 1st DCA 2021) (14 unsuccessful postconviction motions collaterally attacking judgment and sentence). This is not such a case. See *Bivins v. State*, 35 So.3d 67, 69 (Fla. 1st DCA 2010) (reversing a prohibition on further pro se filing where the defendant filed a single pro se motion raising a variation of an issue that the trial court already denied and ordered that it would not reconsider).

As the Fourth District put it in reversing such an order, "we find that the trial court abused its discretion in barring Defendant from further pro se filings after his third postconviction motion. Florida courts have long recognized the need for judicial economy and the importance of curtailing the egregious abuse of judicial processes. See, e.g., *Bivins v. State*, 35 So.3d 67 (Fla. 1st DCA 2010). Nevertheless, barring a criminal pro se litigant from filing future petitions has been described as an 'extreme remedy' which should be reserved for those who have repeatedly filed successive, frivolous, and meritless claims which were not advanced in good faith." *Gaston v. State*, 141 So. 3d 627, 628 (Fla. 4th DCA 2014).

Gaston was recently discussed by the Second District, which

similarly reversed an order precluding future pro se filings. See *Ward v. State*, 323 So. 3d 811 (Fla. 2d DCA 2021). As that Court noted, defendants are permitted to file successive motions to correct illegal sentences. *Id.* at 814[2]. Although the "prior motions 'did not succeed, the issues raised were not successive or repetitive and they appeared to have been advanced in good faith.'" *Id.* (quoting *Gaston*, 141 So. 3d at 628). See also *Thomas v. State*, 353 So. 3d 1219, 1224 (Fla. 2d DCA 2022) ("we reverse the portion of the postconviction court's order finding that Mr. Thomas's fourth rule 3.800(a) motion was frivolous and an abuse of process and referring him to the DOC for discipline.")

More important, recent precedent, unavailable at the time of the earlier filings, casts doubt upon the construction of the statute. See *United States v. Walker*, 2023 U.S. Dist. LEXIS 31559, *5, 2023 WL 2250297 (N.D. Fla. February 27, 2023) ("Fla. Stat. § 847.0135(4)(b) criminalizes all of the illegal acts described in chapter 827, including the nonsexual ones, which means the statute is not categorically an

[2]. In order "to prevent a manifest injustice and a denial of due process, relief may be afforded even to a litigant raising a successive claim." *Stephens v. State*, 974 So. 2d 455, 457 (Fla. 2d DCA 2008); see also *State v. McBride*, 848 So. 2d 287, 291-92 (Fla. 2003)

offense relating to the sexual abuse of a minor.")

That is precisely the circumstance here. All the Circuit Court did is recite the prior motions. The Court did not find that the issues raised on this application had previously been brought. They had not and as reflected in the recent *Walker* decision and as shown below, they are substantial. Appellant's good faith has not, and could not, be questioned. Thus, there is no basis for the prohibition on pro se filings.

II. The Information Did Not Charge an Offense in Count One with Sufficient Specificity to Support the Conviction

Appellant's argument revolves around the allegation in the information that he used an electronic device "to engage in or to otherwise engage in other unlawful sexual conduct with a child or another person believed to be a child. . . ." R:282. Specifically, he contends the information fails to allege what illegal sexual activity he engaged in that is proscribed by law. R: 8.[3]

"Due process of law requires the State to allege every essential

[3]. Each count or charge in an information or indictment is considered as if it were a separate information or indictment. *Sullivan v. State*, 562 So. 2d 813, 814 (Fla. 1st DCA 1990). Thus, a court is not permitted to rely upon the contents of the other counts in the information

element when charging a violation of law to provide the accused with sufficient notice of the allegations against him. Art. I, § 9, Fla. Const.; *M.F. v. State*, 583 So. 2d 1383, 1386-87 (Fla. 1991)." *Weatherspoon v. State*, 214 So. 3d 578, 583 (Fla. 2017). "In order to sufficiently inform an accused of the allegations against him, due process requires the State to allege every essential element when charging a violation of law." *Lawshea v. State*, 99 So. 3d 603, 606 (Fla. 2d DCA 2012) Thus, Fla. R. Crim. P. 3.140(d)(1) requires that an information allege all essential facts of each crime charged as well as the statutory citation for each crime.

In *Figueroa v. State*, 84 So. 3d 1158 (Fla. 2d DCA 2012), the Second District court considered whether the information sufficiently charged the firearm element of the offense of robbery with a firearm. The information titled the count as robbery with a firearm, but in the body, it did not allege the use of a firearm and it cited only section 812.13 generally, the robbery statute. *Id.* at 1159-60. The Second District held that the information was fundamentally defective because it "totally omit[ted] an essential element of the crime" and it

"did not charge violation of a *specific subsection*." *Id.* at 1161 (emphasis supplied).

Similarly, in *Lawshea v. State*, 99 So. 3d 603, 605-606 (Fla. 2d DCA 2012), the Second District held that an information was defective because it generally alleged that the defendant panhandled but it "did not allege that [he] panhandled in a prohibited place or time," as prohibited by section 23-7 of the city ordinance, or that "he did so in a prohibited manner," as prohibited by section 23-8 of the city ordinance. The information cited a provision of the city ordinance, section 23-6, but that provision only defined panhandling and did not prohibit it. The court held that because "the information failed to allege the nature of [the defendant's] violation" and "failed to cite the specific section of the ordinance that included the missing element," the information was defective and the error was fundamental. *Id.* at 606.

These cases were discussed and followed in *Richards v. State*, 237 So. 3d 426 (Fla. 2d DCA 2018), which involve parallel facts and calls for reversal here. In that case, the Second District reversed and

ordered the defendant's discharge because the information did not allege the essential elements of the charged offense, failure to register as a sexual predator within 48 hours of a location change under § 775.21(6)(g), Fla. Stat., and it *did not cite the specific subsection of the statute* that included the missing elements or otherwise placed defendant on notice of the nature of his alleged criminal conduct.

Citation to a statute thus does not help the State here. In *United States v. Walker*, 2023 U.S. Dist. LEXIS 31559, *5, 2023 WL 2250297 (N.D. Fla. February 27, 2023), the Court held "Fla. Stat. § 847.0135(4)(b) criminalizes all of the illegal acts described in chapter 827, including the nonsexual ones, which means the statute is not categorically an offense relating to the sexual abuse of a minor." Accordingly, the mere citation of a statute would not put a defendant on notice of the facts underlying the charge.

To be sure, Florida Courts have held generally when information cites a statute, defendant is on notice that he is charged with each element of the offense in the statute. *Duboise v. State*, 520 So. 2d 260, 265 (Fla. 1988); *Calloway v. State*, 37 So. 3d 891, 894 (Fla. 1st DCA

2010) (same). However, that rule is subject to an exception, applicable here.

As the Supreme Court has instructed,

> When an indictment or information charges a crime substantially as defined in the statute denouncing it, it is generally sufficient, where the statutory language and the descriptive details state the nature and the cause of the accusation without misleading the accused in concerting his defense. *Finch v. State*, 116 Fla. 437, 156 So. 489 (1934). As a necessary corollary to this rule, this Court has held that when the charging document substantially follows the statute, if the information as a whole is still vague, indefinite, inconsistent, or calculated to mislead the defendant in the preparation of his defense, or expose him to the danger of a second prosecution, it is not sufficient. *State v. Russee*, 68 So.2d 897 (Fla. 1953). To remedy such insufficiency, the information must be supplemented by other factual allegations which set out the acts alleged to constitute the offense with precision and particularity. *State ex rel. Swanboro v. Mayo*, 155 Fla. 330, 19 So.2d 883 (1944). This may be necessary when the statute defines the offense in general terms and the accusation using the statutory language does not clearly and specifically apprise the accused of what he must defend against. See, e.g., *Rosin v. Anderson*, 155 Fla. 673, 21 So.2d 143 (1945); *Mills v. State*, 58 Fla. 74, 51 So. 278 (1910); *State v. Barnett*, 344 So.2d 863 (Fla. 2d DCA 1977).

State v. Covington, 392 So. 2d 1321, 1324 (Fla. 1981).

In the *Covington* case, the following allegations were ruled to be

fatally deficient: "That the appellees, during the period from September, 1972 to January, 1979, 'did directly or indirectly engage in transactions, practice or course of business with regard to the sale of the bonds of Lake Padgett Estates East Road and Bridge District, Extension No. 3, Pasco County, Florida, which operated as a fraud or deceit upon the said bondholders in connection with their purchase of the said bonds… contrary to Chapter 517.301(1)(c) . . . .'"

The Supreme Court said "the information merely tracked the statute. The offense is there defined in broad, general terms. There was no supplemental description of the alleged misconduct. Without more particular factual allegations, the information failed to convey notice of the accusations with sufficient precision and clarity." 392 So. 2d at 1324. See *State v. Petagine*, 290 So. 3d 1106, 1116 (Fla. 1st DCA 2020) (recognizing *Covington* exception)

As in *Covington*, "in this case there are no elements expressed, thus the information is so vague and indefinite that it violates Article I, Section 16 of the Constitution of the State of Florida and Article VI of the Articles in Amendment of the Constitution of the United States

of America. This information is, on its face, as constitutionally deficient as would be one which merely charged that one 'did in violation of Florida Statute 784.04 commit the crime of murder' or that one 'did in violation of Chapter 810 engage in burglary' or that one 'engaged in theft in violation of Florida Statute 812.014.'" *Leonetti v. State*, 418 So. 2d 1192, 1194 (Fla. 5th DCA 1982).

The information misled defendant and embarrassed him in the preparation of his defense, as indicated by the confusion regarding the charged conduct and what the State needed to prove at trial.

The Circuit Court also relied upon *Hartley v. State*, 129 So. 3d 486 (Fla. 4th DCA 2014) to conclude that the information was sufficient. But, the sufficiency of the information was not at issue in *Hartley.* The analysis of the elements of the statute was discussed in the context of double jeopardy.[4] In this instance, citation of *Hartley* by the Circuit Court is the very essence of impermissible reliance upon obiter dictum. See *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA

[4]. Parenthetically, this Court rejected the Fourth District's analysis in *State v. Murphy*, 124 So. 3d 323 (Fla. 1st DCA 2013), and the Supreme Court overruled *Murphy* in *State v. Shelley*, 176 So. 3d 914, 916 (Fla. 2015).

1975) ("[A] purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple."). Such dictum does not function as precedent. See *Continental Assur. Co. v. Carroll*, 485 So. 2d 406, 408 (Fla. 1986).

In short, in this case Appellant was impermissibly faced with the burden of defending against a generic statute.

It is not necessary that a defendant make a showing of prejudice in cases such as this because the error is structural in nature. “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. Since a conviction cannot rest upon such an indictment or information, 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.” *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983).

In any event, in this case Appellant can show prejudice in that

he was sentenced to an 8-year split sentence in Count 1 (the insufficiently charged count) and only sentenced to three years each in Count 3 which does not constitute a crime if the predicate crime does not exist.

In addition, the Defendant's constitutional right to be informed of the nature of the allegation against him demands that every significant fact and important ingredient of the offense be charged with precision and certainty; an essential element may not be left up to interpretation. Art. I, § 16, Fla. Const.; see *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (per curiam) (holding that due process forbids a state to convict a person of a crime without proving all elements beyond a reasonable doubt).

In short, if an essential element is missing from the information and is not provided in a statute listed in the subject information, a defendant cannot be convicted and sentenced for that offense. See *Dominauez v. State*, 876 So. 2d 675, 678 (Fla. 3d DCA 2004).

Conclusion

Decisional law establishes that the information in this case was

jurisdictionally defective, warranting the grant of his motion to set aside an illegal sentence. There is no basis to preclude him from any pro se filings, especially given that this application is meritorious.

Accordingly, the order should be reversed, the motion to vacate granted, the conviction under counts one and three[5] of the information vacated, the injunction against pro se filings vacated, and the matter remanded to the Circuit Court for further proceedings.

Dated: March 22, 2023 /s/ DARREL HARVEY

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

The undersigned hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Bookman Old Style 14 Point.

/s/ DARREL HARVEY

[5]. Count three must fall if count one falls as there is no predicate crime.

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on March 23, 2023 to:

ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050

/s/ DARREL HARVEY