

Third District Court of Appeal

State of Florida, January Term, A.D. 2009

Opinion filed April 15, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-14
Lower Tribunal No. 07-40854

Walter E. Curry,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, John Schlesinger, Judge.

Walter E. Curry, in proper person.

Bill McCollum, Attorney General, for appellee.

Before WELLS, SHEPHERD, and SUAREZ, JJ.

SUAREZ, J.

Walter E. Curry appeals from the trial court's order denying his petition for writ of habeas corpus. We affirm.

Curry was convicted and sentenced in August 2008. He filed a timely appeal from his judgment and sentence. In December 2008, while his direct appeal was still pending, Curry filed a petition in the trial court for writ of habeas corpus, in which he made arguments going to the merits of the underlying conviction. The trial court correctly noted that Curry's motion was premature and that the trial court was without jurisdiction to rule on the issues while the appeal was pending. The trial court nevertheless denied the motion without making clear that the denial was without prejudice, and notified the defendant of his right to appeal the order. Curry appealed.

While it is clear that the trial court had no jurisdiction to render a ruling on the post-conviction petition while the judgment and sentence were pending on appeal in this Court, it is also clear that the trial court intended that the ruling be without prejudice to Curry to timely pursue his post-conviction remedies at the conclusion of his direct appeal. See Marshall v. State, 481 So. 2d 973 (Fla. 2d DCA 1986). We therefore affirm the order denying relief, as modified.

Affirmed.