

IN THE SUPREME COURT OF FLORIDA

JAMES KING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC01-1883

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts does not include the mandatory references to the appropriate pages of the record. See Florida Rule of Appellate Procedure 9.210(b)(3). Therefore, the following statement of the case and facts is offered:

Petitioner was charged by a nine-count information with one count of burglary of a structure, six counts of grand theft, one count of possession of a motor vehicle with altered/removed vehicle identification number ("VIN"), one count of attempted first degree murder with a firearm, and one count of solicitation to commit first degree murder. (R3 308-311) In each specific count it was alleged that the crime occurred in Orange County, Florida. The information, however, included the general jurisdictional allegation that each crime "occurred in two or more judicial circuits...as part of a related transaction or said offenses were connected with an organized criminal conspiracy affecting two or more judicial circuits..." (Id.)

Defense counsel did not challenge the jurisdiction of the Office of Statewide Prosecution ("OSP") by either a motion to dismiss or a motion for statement of particulars. During the trial of this cause the trial court inquired of the defense as to whether Petitioner would challenge the jurisdiction of the

statewide prosecutor's office. (T2 188-189) The defense responded affirmatively and the trial court heard testimony outside the presence of the jury. Witness Schaefer testified that he heard Petitioner and others "brag about previous years" when they had stolen motorcycles at Bike Week and Biketoberfest in Daytona Beach. (T2 234-235) The witness also affirmed that crimes occurred in Orange County as well. (T2 237-238) Mr. Schaefer witnessed Petitioner alter the VINs of stolen motorcycles. Petitioner admitted to Mr. Schaefer that he had been "operating" a long time and had not been caught. (T2 239-240) The trial court took the jurisdictional question under advisement but noted that statewide jurisdiction was established. (T2 244)

It was subsequently shown during trial that Petitioner altered the VINs of the stolen motorcycles in order to obtain fraudulent titles containing said altered VIN. (T3 270) In fact, it is likely that Petitioner used another State to "clean up" the title before applying for a new title from Tallahassee, which is located in Leon County, Florida. (T3 273, 311-312; T8 1034)

Witness Wilkerson testified that two of the stolen motorcycles with altered VINs were found in Lake County, Florida and recovered from said county. (T4 408-409) Petitioner also told another witness that Wilkerson had a house in Clermont,

Lake County, Florida. The conversation regarding Clermont occurred in connection with Petitioner's solicitation to murder Wilkerson; the murder was to take place in Clermont or at a junkyard in Orange County. (T4 401, R5 612, 632)

The thefts, attempted murders, and fraud occurred, at a minimum, in Leon, Lake, Orange, and Volusia counties. The trial court heard extensive argument regarding these factors during Petitioner's motion for judgment of acquittal. (T8 1033-1040) The trial court entered a written order finding that statewide jurisdiction was established. (R5 403-405)

On direct appeal Petitioner alleged that the trial court erred in denying his motion for judgment of acquittal based upon the OSP jurisdictional grounds. The Fifth District entered its written decision affirming the jurisdiction of the OSP.

In said written opinion, the Fifth District Court made the finding that Petitioner had for some time operated a motorcycle "chop shop" in Orange County (Ninth Circuit) which depended in part on stolen motorcycles from Volusia County (Seventh Circuit). The court then analyzed the nature of the crime of burglary (it must always be a "local" crime unless the structure or stolen property sits on both sides of a county/circuit line) and the OSP's express statutory power to prosecute burglaries. The court concluded that it is within the OSP's power to prosecute individual burglaries separately

in different counties/circuits for the convenience of witnesses or other such reason. The jurisdiction of the OSP was affirmed.

Petitioner, through new counsel, next filed a motion for rehearing *en banc*¹ alleging grounds not previously raised in the briefs. (5DR 19-29)² The court granted the motion for rehearing for the purpose of certifying the following question to the supreme court, either because it is of exceptional importance or because of its "possible" conflict with Winter v. State, 781 So.2d 1111 (Fla. 1st DCA 2001):

DOES THE OFFICE OF THE STATEWIDE PROSECUTOR HAVE JURISDICTION TO PROSECUTE A BURGLARY IN THE COUNTY IN WHICH IT WAS COMMITTED IF IT IS ALLEGED THAT THE BURGLARY WAS A PART OF A BUSINESS ENTERPRISE ENGAGED IN MULTI-CIRCUIT CRIMES?

This Court has reserved ruling on jurisdiction and ordered briefs on the merits to be filed.

¹ This motion was not filed "in conjunction with" a motion for rehearing pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331(d).

² "5DR" refers to the record in the 5th DCA. All other references are to the trial court record.

SUMMARY OF THE ARGUMENT

There is no conflict and the narrow certified question is not a matter of great public importance. The jurisdiction of the Statewide Prosecutor is not a matter to be decided by the jury. It is instead a legal question which directly relates to the validity of the charging instrument; if the information is signed by an authorized person (i.e., a statewide prosecutor or State's Attorney), the document is not subject to dismissal on said ground.

Moreover, because the statewide prosecutor and the State's Attorney have concurrent jurisdiction to try this case, it matters not which agency actually files the charges against Petitioner. This issue is therefore not one of great public importance.

Here, Petitioner challenged jurisdiction during his motion for judgment of acquittal - which requires all facts to be viewed in a light most favorable to the State. But regardless of the manner in which the challenge was mounted, the appropriate jurisdictional allegation is present in the information and the evidence supports the finding of jurisdiction. The Fifth District's decision should be upheld.

ARGUMENT

ISSUE

THIS COURT IS WITHOUT JURISDICTION BECAUSE THERE IS NO "POSSIBLE CONFLICT" AND NO MATTER OF GREAT PUBLIC IMPORTANCE. THE OFFICE OF STATEWIDE PROSECUTION HAS JURISDICTION TO PROSECUTE A BURGLARY IN THE COUNTY IN WHICH IT WAS COMMITTED IF IT IS ALLEGED THAT THE BURGLARY WAS A PART OF A BUSINESS ENTERPRISE ENGAGED IN MULTI-CIRCUIT CRIMES.

JURISDICTION BASED UPON AN ISSUE OF GREAT PUBLIC IMPORTANCE

Initially, the State points out that the certified question, as phrased, is not a matter of great public importance. Indeed, Petitioner has abandoned this claim because he does not discuss or argue this issue in his initial brief on the merits. Instead, Petitioner "agrees" that the OSP can prosecute a local burglary if it is alleged and proven that OSP has authority to file the charges. (merits brief at 4) And there can be no dispute that the local State's Attorney could prosecute this case instead of the OSP. The penalty would be the same in either case. The power to prosecute is basically a procedural matter. Thus, even though the question may be of academic interest, it is not a matter of great public importance. Moreover, the State need only allege jurisdiction to try a case; the State proves venue during the trial.

If the OSP cannot prosecute a crime committed in Orange County, then a local (Ninth Circuit) prosecutor can file the information and handle the case. Both prosecutors have concurrent jurisdiction to prosecute a crime. See Article IV, Section 4(c), Florida Constitution. Thus, the authority to prosecute a specific burglary offense in the county in which it was committed ("selective filing") does not qualify as a matter of great public importance. Petitioner has appropriately chosen not to expend any effort pursuing said argument.

JURISDICTION BASED UPON CONFLICT

This Court has conflict jurisdiction under Article V, Section (3)(b)(3) of the Florida Constitution only where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). However, in this case the Fifth District merely suggested a "possible conflict" with Winter v. State, 781 So.2d 1111 (Fla. 1st DCA), review denied, SC01-830 (2001). A "possible" conflict falls far short of the express and direct conflict required to invoke this Court's jurisdiction. The "four corners" of the opinion in this case do not include

a citation to Winter, supra. The Fifth District analyzed the Florida Constitution and examined Florida Statutes in regard to the power of the OSP to prosecute a "local" burglary offense. The opinion then emphasized factual findings which supported the holding of the trial court. Only at the behest of Petitioner in his motion for rehearing *en banc* did the Fifth District "certify" a question based upon "possible" conflict. (5DR 87)

Petitioner's reliance on Winter v. State, supra, as a basis for conflict is misplaced. Winter does not involve selective filing or the prosecution of a "local" offense. Although Winter and the case under review both involve the jurisdiction of the OSP, they could not be more dissimilar. Winter was charged with fourteen counts including conspiracy to launder money and to commit theft - but it was stipulated that all of his acts occurred in one county. The target of the conspiracy was a State Employee's self-insurance fund. This bank account or "fund" was ostensibly owned by various state employees residing throughout the state. The *only* basis for OSP jurisdiction was the fact that the targeted bank account was "owned" by persons living in other judicial circuits. The reasoning is that if a person conspires to steal property (cash) belonging to people residing in separate circuits, then that criminal conspiracy affects victims in two or more

judicial circuits.

In the case under review there is no conspiracy charge and there is uncontroverted physical evidence that Petitioner physically committed crimes in two or more circuits. Motorcycles were stolen in Volusia County, VINs were altered by application through Leon County, and some stolen vehicles were eventually recovered in Lake County. This scenario is far removed from the legal ownership of a trust fund that was opened and accessed in only one circuit.

In summary, it cannot be overemphasized that in the Winter case it was "[w]ithout dispute... [that] the crimes charged in the information took place only in the Second Judicial Circuit." See Winter, 781 So.2d at 1115. Here, that issue was disputed and the State presented evidence that physical criminal acts occurred in several circuits.

There is yet another clear distinction between the two cases. The Winter court reasoned that the OSP would have jurisdiction only if the crimes were connected with an organized multi-circuit criminal conspiracy. But in the case under review the Fifth District analyzed only the "related transaction" clause regarding the OSP jurisdiction, not an organized criminal conspiracy. Section 16.56, Florida Statutes (1999) confers the OSP authority to prosecute: (1) where the crime is occurring in two or more circuits as part of a related

transaction or (2) where the crime is connected with an organized criminal conspiracy affecting two or more circuits.

In fact, in Winter the court expressly found the "related transaction" analysis inapplicable. Winter, 781 So. 2d at 1116. ("Here we are concerned with that part of the statute allowing the OSP to prosecute an offense 'connected with an organized criminal conspiracy affecting two or more judicial circuits.'") Thus, not only was it stipulated that all of Winter's criminal acts were committed in one judicial circuit, but the Winter court analyzed a different jurisdictional provision.

There is no conflict between the two cases. Winter held, based upon stipulated facts, that the OSP did not have authority to prosecute. Here, after a ruling upon disputed facts, the court found that the OSP had authority to prosecute "local" crimes in Orange County.

ARGUMENT ON THE MERITS

In this case the general multi-circuit allegation is found in the charging document. Petitioner therefore attempts to modify and expand the certified question beyond that which was framed by the Fifth District opinion. He now claims there are two issues: (1) was jurisdiction sufficiently alleged, and (2) were the jurisdictional facts sufficiently proven.

Petitioner also argues that the jury did not hear the jurisdictional evidence; and that Petitioner was "ambushed" on the jurisdictional question by references to uncharged crimes. (merits brief at 6) Finally, Petitioner also claims that the decision in this case contrasts with the decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). These claims are refuted in the following argument.

The sufficiency of allegations or proof is largely a factual matter beyond the limited conflict or certified question review of this Court. The "certified" question in this case, as framed by the district court, is whether the OSP can prosecute only a few related offenses and conduct the trials locally. For instance, can the OSP charge and prosecute several Orange County burglaries (in Orange County) without charging the other (related) crimes committed in other circuits? Can they also separately prosecute one related burglary in Tampa and one in Daytona? This procedural question must be answered in the affirmative.

Historically, venue and jurisdiction are proper in the county in which the crime was committed. The creation of the OSP provided a means by which a crime could be joined (for prosecution) with a crime committed in another circuit, but this expansion of venue is not exclusive and does not divest

the "host" county or circuit of its jurisdiction. There is no statutory language which alters the long-established rule that venue lies in the county where the criminal act occurred. And of course, in this case the charged offenses all took place in Orange County even though related acts occurred in and affected more than one circuit. Moreover, as noted earlier, Article IV, Section 4(c) of the Florida Constitution (2000) provides that the statewide prosecutor has "concurrent jurisdiction" with State's attorneys to prosecute violations of law.

The fact that the jury did not hear the jurisdictional evidence and argument (other than the proof that the charged crimes occurred in Orange County) is a benefit to Petitioner. The jury remains unbiased because it does not hear evidence of uncharged crimes. In fact, it is almost never appropriate to inform a jury of uncharged crimes. Of course, the easiest way to resolve this issue is to require that *more* charges be filed against Petitioner. It is ironic that Petitioner is actually complaining that the State failed to file *other* charges which were committed in a separate circuit. This failure, it is alleged, results in a lack of jurisdiction. Such a claim is unprecedented and would result in judicial usurpation of executive function. If the OSP has the authority to prosecute a case, then it has the authority to choose which charges will

be filed and which will not.

Nevertheless, the venue of the charged crimes was Orange County, and the jury was presented with evidence supporting said venue. The validity of the charging document, which is never admitted as evidence, is not a question for the jury. Whether or not the proper or authorized person has signed a charging document or whether the allegations are sufficient to prove jurisdiction is a matter for the trial court. A jury cannot "decide" upon documents not entered into evidence. Clearly, the information is subject to a motion to dismiss, a motion for a bill of particulars, or permissible jurisdictional challenges. And Petitioner admits in his brief that he "repeatedly challenged...the OSP's jurisdiction." (merits brief at 8-9) But if Petitioner raised this issue "repeatedly" (i.e., pretrial as well as during trial) he should not have been surprised or "ambushed" regarding the matter.

Petitioner was clearly aware that the OSP filed the charges alleging multi-circuit jurisdiction; and it was obvious that all the charged counts occurred only in Orange County. The proffered jurisdictional evidence was revealed or could have presumably been revealed to Petitioner through depositions and pretrial discovery. Petitioner was aware of the allegations as soon as the information was filed. He was not "surprised"

or "ambushed" as a result of raising the issue at trial.

Lastly, Petitioner raised for the first time in his motion for rehearing *en banc* the relevance of the holding in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). But not only is this issue procedurally barred because it was not timely raised below, Apprendi focused upon findings which increase the penalty for a crime. Here, the fact that the OSP is involved in a case does not increase the punishment for the crime. Nor does the jurisdictional issue increase the range of penalties available. Therefore, Apprendi provides no basis upon which to conclude that a jury must find, beyond a reasonable doubt, that subject-matter jurisdiction lies in the circuit where the case is tried. To rule otherwise would result in an additional essential element to be proven in all criminal cases (i.e., jurisdiction in addition to venue); at the very least a special jury verdict would be required. Such a result was not intended by the caselaw or the legislature.

Petitioner concludes his merits brief by arguing that "the Fifth District's decision in this case **and** the First District's decision in Winter **clearly run afoul of ... due process...**" (merits brief at 11-12) Assuming *arguendo* that both cases are indeed similar in their violation of due process, then there is little likelihood that Winter "directly

and expressly conflicts" with the case under review. Obviously, where both cases violate due process in a similar fashion, there can only be a "partial" conflict.

The certified question raises a very narrow issue involving the authority of the OSP to separately prosecute individual burglaries that are allegedly part of a multi-circuit enterprise. In the first page of his argument Petitioner states that he "agrees with the Fifth District's conclusion" that the OSP can prosecute a local burglary if it is alleged and proven that said burglary is part of a related transaction occurring in another circuit or if it is "connected" with an organized criminal conspiracy affecting two or more circuits. (merits brief at 4) The "related" criminal transactions were alleged in the information and proven in the trial court.

Nevertheless, should this Court determine that conflict exists, it should clarify the inference found in the Winter opinion that the authority of the OSP to prosecute a case is the equivalent of subject matter jurisdiction. "[S]ubject-matter jurisdiction concerns the power of the trial court to deal with a class of cases to which a particular case belongs." Cunningham v. Standard Guaranty Ins. Co., 630 So.2d 179, 181 (Fla. 1994). Subject matter jurisdiction is not a matter for the jury to decide; it is an issue that can be raised even when no jury is empaneled. Accord, Winter 781

So.2d at 1117 (“[t]he question of jurisdiction of the OSP will be determined by the court and will not be submitted to the jury as a question of fact”).

Of course, the State’s concern is that subject matter jurisdiction can be raised at any time. Thus, if the authority of the OSP is the equivalent of subject-matter jurisdiction, any convicted felon could challenge the authority of the OSP twenty years or more after conviction. The State contends that subject-matter jurisdiction is simply the power of a court to hear a case; and after an information or indictment is filed the OSP and the State’s attorneys have “concurrent jurisdiction” pursuant to the Florida Constitution to prosecute the case. Subject-matter jurisdiction will always lie in the county where the crime was committed.

A technical flaw does not strip a circuit court of subject matter jurisdiction over a cause which is expressly conferred by law. Card v. State, 497 So.2d 1169, 1173 (Fla. 1986) cert. denied, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987). Similarly, a defective felony information or indictment will still invoke the subject-matter jurisdiction of the Circuit Courts. Section 26.012(2)(d), Florida Statutes (1981), provides that the circuit court has jurisdiction over all felony trials. Further, article V, section 5(b) of the Florida Constitution provides that “[j]urisdiction of the

circuit court shall be uniform throughout the state." Thus, once venue is properly established, the circuit court has subject matter jurisdiction over the cause.

Where a felony is alleged to have occurred in a particular circuit or county, the appropriate circuit court has subject-matter jurisdiction to handle the case even where the information is unsigned or otherwise defective. And if the defendant alleges that an unauthorized person signed the information, then the trial court has subject-matter jurisdiction to rule on the question. If the information or indictment is dismissed, it is not because the trial court lacked subject-matter jurisdiction; for it could not have ordered a dismissal without subject-matter jurisdiction.

Petitioner's claim that subject-matter jurisdiction is implicated in these circumstances has been rejected by the courts of this State. In Colson v. State, 717 So.2d 554, 555 (Fla. 4th DCA 1998) the defendant argued that the trial court lacked jurisdiction because the information was not signed and was therefore defective. Colson relied upon State v. Anderson, 537 So.2d 1373 (Fla. 1989) to support his argument that the defect should be deemed fundamental error. But in Anderson, this Court stated that "jurisdiction to try an accused does not exist under article I, section 15 of the Florida Constitution unless there is an extant information,

indictment, or presentment filed by the state." Anderson, 537 So.2d at 1374. This Court held that Anderson was distinguishable because the court was describing a situation in which there was no information or indictment. Here, (and in Colson and Winter) there was an information describing a felony which conferred subject matter jurisdiction on the circuit court.

Similarly, this Court should reaffirm that subject-matter jurisdiction exists whenever even an unsigned information is filed in the appropriate court. The fact that an information is procedurally defective renders it subject to a motion to dismiss or to an application for a writ of *quo warranto*, but it does not impact the subject-matter jurisdiction of the court. A defendant may not challenge the validity of an information or the authority of the prosecutor twenty years after conviction. A defendant waives such a defect in the information if he fails to object before pleading to the substantive charges. Colson, supra, 717 So.2d at 555.

A criminal charge can only be dismissed because of a defective charging document if the defendant timely and properly brings the error to the trial court's attention. Courts have long acknowledged the well-established rule of Champlin v. Cochran, 125 So.2d 565 (Fla. 1960) that where a defendant makes no attack on an information before or during trial, the failure

of the prosecuting officer to attach an oath to an information is not fatal to conviction after defendant's pleading and trial on the merits. See Morffey v. State, 534 So.2d 733, 734 (Fla. 3d DCA 1988).

Florida Rule of Criminal Procedure 3.140(g) mandates that no objection to an information that was not properly signed or verified shall be entertained after the defendant pleads to the merits. Moreover, pursuant to subsection (o) of the same rule, no indictment or information shall be dismissed on account of any defect unless the court shall be of the opinion that the information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense. This issue involving the validity of the charging document or the authority of the prosecutor should not be confused with subject-matter jurisdiction. This Court should settle the question and rule that any allegation pertaining to the validity of the indictment or information (including the authority of the signor) is waived unless it is raised prior to entering a plea.

In summary, the specific facts of this case align it with State v. Nuckolls, 677 So.2d 12 (Fla. 5th DCA 1996) where it was held that a general multi-circuit allegation (such as the identical allegation used in the information under review) is sufficient to fulfill the jurisdictional requirements of the

OSP.³ More importantly, in an earlier decision the same court expressly held that motor vehicle title violations and notary public violations fall under the auspices of the OSP. See State v. Nuckolls, 606 So.2d 1205 (Fla. 5th DCA 1992); section 16.56(1)(a)6, Florida Statutes (2000) (crimes involving or resulting in the commission of fraud or deceit upon any person). Of course, the crux of this case involves a vehicle chop shop, "cleaned" titles, removal of VINs. and the recovery of stolen vehicles. Not only do title applications have to be processed and issued in Leon County, it is uncontroverted that motorcycles stolen by Petitioner were recovered in Lake County. Furthermore, the evidence was clear that Petitioner planned to kill a witness in both Lake and Orange counties. There is no express or direct conflict with any Florida cases. This Court should decline jurisdiction herein or, in the alternative, this cause should be affirmed in its entirety.

³ This Court recently declined to accept jurisdiction of Winter based upon conflict with Nuckolls, thereby suggesting there is no conflict between the two cases.

CONCLUSION

Review should be denied and Petitioner's conviction and sentence should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Neal T. McShane, Esq., 836 North Highland Avenue, Orlando, Florida 32803, this 19th day of November, 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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