

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

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CLERK, SUPREME COURT

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ROBERT GLEN FIKE,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 66,024

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LUCINDA H. YOUNG
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STATEMENT OF THE CASE AND FACTS

The State filed an information in the Circuit Court for Marion County on November 24, 1982, alleging that Petitioner, ROBERT GLEN FIKE, "did unlawfully and feloniously sell or deliver to another person, cannabis, a controlled substance commonly known as Marijuana, in violation of Florida Statute 893.13(1)(a) (2); a third degree felony" (R240).

Fike was tried by a jury in the Circuit Court and found guilty, as charged (R206,257). On April 4, 1983, he was adjudicated guilty of sale of marijuana and placed on probation for five years, with the condition that he serve 360 days in the county jail (R265-267).

On appeal to the Fifth District Court of Appeal, Fike argued that the information was insufficient to invoke the jurisdiction of the circuit court because it alleged, in the alternative, a felony or a misdemeanor. On September 13, 1984, the Fifth District Court of Appeal, in an en banc decision, affirmed by a four-to-two vote, receding from its decisions in Nelson v. State, 398 So.2d 920 (Fla. 5th DCA 1981)(A-2) and Young v. State, 439 So.2d 306 (Fla. 5th DCA 1983)(A-3). Fike v. State, 455 So.2d 628 (Fla. 5th DCA 1983)(A-1). The majority's rationale was that the portion of the information alleging a misdemeanor was "mere surplusage". Fike, supra. The dissenting judges thought the information was duplicitous and would have reversed the conviction for lack of jurisdiction. Fike, supra.

Notice to Invoke Discretionary Jurisdiction was timely

filed on October 12, 1984. This Court accepted jurisdiction on
January 25, 1985.

SUMMARY OF ARGUMENT

The information in the instant case alleged sale or delivery of cannabis, without specifying the amount of cannabis delivered or that the delivery was for consideration. Section 893.13(1)(f), Florida Statutes, makes delivery without consideration of not more than twenty grams of marijuana a misdemeanor. Thus, the information charged Fike with committing either a felony or a misdemeanor. Petitioner submits that an information which alleges, in the alternative, a felony or a misdemeanor is insufficient to invoke the jurisdiction of the circuit court.

ARGUMENT

AN INFORMATION WHICH ALLEGES, IN THE ALTERNATIVE, A FELONY OR A MISDEMEANOR, IS INSUFFICIENT TO INVOKE THE JURISDICTION OF THE CIRCUIT COURT.

The information in the instant case alleged that Fike did "unlawfully and feloniously sell or deliver to another person, Cannabis".

Section 893.13(1)(a)(2), Florida Statutes, makes it a third degree felony for "any person to sell ... or deliver" cannabis. Section 893.13(1)(f), however, provides that the "delivery without consideration of not more than twenty grams of cannabis" is a first degree misdemeanor.

An information which charges delivery of marijuana without specifying the quantity of marijuana involved or that the delivery was for consideration charges only a misdemeanor. DiCaprio v. State, 352 So.2d 79 (Fla. 4th DCA 1977), cert. denied, 353 So.2d 679 (Fla. 1977); Boley v. State, 273 So.2d 109 (Fla. 4th DCA 1973), cert. discharged, 287 So.2d 668 (Fla. 1973); Pope v. State, 268 So.2d 173 (Fla. 2d DCA 1972), cert. discharged, 283 So.2d 99 (Fla. 1973). Thus, the information in the instant case alleged, in the disjunctive, a felony (sale) or a misdemeanor (delivery).

Pursuant to Article V, Sections 5 and 6 of the Florida Constitution, the Legislature has given the circuit court jurisdiction over all felonies and all misdemeanors arising out of the same circumstances as a felony which is also charged.

Section 26.01(d), Florida Statutes (1981). County courts have jurisdiction over all misdemeanors not cognizable in the circuit court. Section 34.01, Florida Statutes (1981). The circuit court has no subject matter jurisdiction over an information which charges only a misdemeanor. Brehm v. State, 427 So.2d 825 (Fla. 3d DCA 1983); Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981); Page v. State, 376 So.2d 901 (Fla. 2d DCA 1979); Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); Radford v. State, 360 So.2d 1303 (Fla. 2d DCA 1978); Boley, supra.

The courts of Florida in a long line of decisions have found informations which were ambiguous with respect to whether a felony or a misdemeanor was charged were insufficient to vest jurisdiction in the circuit court. See Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981); DiCaprio, supra; Rogers v. State, 336 So.2d 1233 (Fla. 4th DCA 1976), cert. dismissed, 348 So.2d 952 (Fla. 1977); Pope v. State, 268 So.2d 123 (Fla. 2d DCA 1972).

In Young v. State, 439 So.2d 306 (Fla. 5th DCA 1983) (A-3), the Fifth District Court of Appeal held that an information identical to that in the present case was insufficient to invoke the jurisdiction of the circuit court^{1/}. Similarly, in

^{1/} The opinion in Young, supra, relied heavily on State v. Black, 385 So.2d 1372 (Fla. 1980), which held that an indictment which failed to allege venue was fundamentally defective and void. Black was receded from in Tucker v. State, 459 So. 2d 306 (Fla. 1984), but the court emphasized that venue must be distinguished from allegations which are jurisdictional requisites. Tucker, supra at 308.

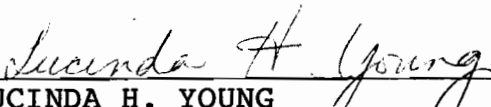
Nelson v. State, 398 So.2d 920 (Fla. 5th DCA 1981), the court found an information which charged, in the alternative, a felony or a misdemeanor did not confer jurisdiction on the circuit court. Petitioner submits that Young, supra, Nelson, supra, and the dissenting opinion in the instant case express the better view and should be adopted by this Court. "The State should be required to directly, specifically, and concisely charge a person with a crime and not be duplicitous about it". Fike, supra at 629 (Dauksch, J., dissenting).

CONCLUSION

BASED UPON the foregoing arguments and authorities, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal of the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Robert Glen Fike, Post Office Box 283, Candler, Florida 32624, on this 14th day of February, 1985.



LUCINDA H. YOUNG
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