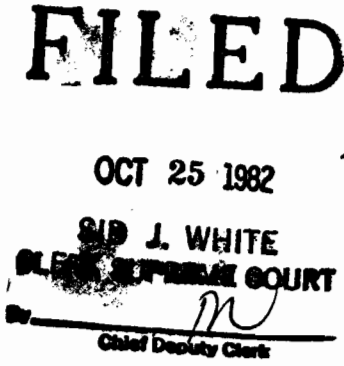
IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,683



MELVEE TUCKER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The petitioner, Melvee Tucker, was the defendant in the trial court and the appellant in the District Court of Appeal. The respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the parties will be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

The State accepts the petitioner's statement of the case and facts as being a substantially true and correct account of the proceedings below.

POINT ON APPEAL

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE CONFLICTS WITH RAY v. STATE, 403 So.2d 956 (Fla. 1981)?

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE DOES NOT CONFLICT WITH RAY v. STATE, 403 So.2d 956 (FLA. 1981).

In the instant case, the Third District held that a request for instructions on lesser included offenses barred by the statute of limitations does not waive the defense of the statute of limitations. The petitioner argues that the holding of the court in Tucker, conflicts with this court's decision in Ray v. State, 403 So.2d 956 (Fla. 1981).

In Ray, the trial court instructed the jury on a offense which was not charged and which was not a permissible lesser included offense of the crime for which Ray was charged. Because the record did not show that Ray's counsel had requested the improper instruction, there was no indication that the defendant waived any error.

This court went on to hold that it is not fundamental error to convict the defendant under an erroneous lesser included charge when he requested the improper charge. That statement was obiter dicta because it was not necessary to the decision. When the court concluded that the record did not establish a request for the erroneous instruction, no other question remained for decision.

In Ciongoli v. State, 337 So.2d 780 (Fla. 1976), this court held that conflicting language which is mere obiter dicta cannot provide the basis for conflict jurisdiction. The only issue in Ciongoli was the threshold question of whether out-of-court identification procedures were legal. When the court below concluded that the out-of-court identification was proper, no other question remained for decision. The District Court opined that there is no evidentiary rule of exclusion applicable to pre-trial identification procedures, and noted that its conclusion is in conflict with another case. However, this court concluded that the questionable statement of law was not necessary for the decision, therefore, it would not support conflict certiorari jurisdiction. It is conflict of "decisions", not conflict of "opinions" or "reasons" that supplies jurisdiction for review by certiorari. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), quoting Justice Adkins in Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970).

In the instant case the petitioner argues conflict with language which is obiter dicta. On that basis the respondent submits that there is no direct conflict and this court should decline to accept jurisdiction.

There is no conflict even when considering the obiter dicta in Ray. In Tucker, the defendant claimed on appeal that he waived the statute of limitations by requesting an instruction

on lesser included offenses. The court concluded that because the statute of limitations is a substantive right, the waiver must be made with unmistakeable clarity.

In Ray, the defendant was found guilty of an offense he was never charged with because it was not a lesser included offense. The error related to a lack of notice. However, in that type of situation the very act of requesting an instruction on a particular offense defeats any argument that the defendant was not on notice. Because the nature of the error in Ray and the alleged error in Tucker are different, the waiver requirements are different, and the cases are distinguishable.

Finally, the distinction between Ray and Tucker is most easily understood by not confusing the concept of "waiver" with the concept of "estoppel". As stated by the court in Tucker;

> .....the issue of whether a defendant may waive the statute of limitations for purposes of conviction appears never to have been directly addressed in Florida,[4]

4. See, e.g., Oliver v. State, 379 So.2d 143 (Fla. 3d DCA 1980) where a defendant charged with first-degree murder was convicted of second-degree murder based on a plea of nolo contendere even though the statute

> of limitations had run as to that offense. On Appeal, this court applied theories of estoppel and initiated error in holding that Oliver could not, for the first time on appeal, raise the statute of limitations as a bar to conviction. The issue of waiver was not addressed.
>
> Tucker v. State, supra at 1011.

See also, 28 Am.Jur.2d 633, Estoppel and Waiver, §30.

In Ray the terms waiver and estoppel are used interchangeably. However, the State respectfully submits that the obiter dicta in Ray is based on principles of estoppel and invited error, not waiver. The decision in Tucker is based on the concept of waiver. Therefore, if the trial court in Tucker had decided to grant the defendant's request and instruct on lesser included offenses which were barred by the statute of limitations, and the defendant was found guilty of a lesser included offense, the court would have found that the defendant did not waive the defense but was estopped from raising the issue. Therefore the decision in the instant case does not conflict with Ray.

CONCLUSION

Based on the foregoing citations of authority and arguments the State respectfully requests this court to decline to accept jurisdiction over this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to HOWARD K. BLUMBERG, Esquire, 1351 N.W. 12th Street, Miami, Florida 33125, this 21 day of October, 1982.

Steven R. Jacob

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