

IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,683

FILED

NOV 22 1982

SID J. WHITE
CLERK SUPREME COURT
M
Chief Deputy Clerk

MELVEE TUCKER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

* * * * *

BRIEF OF RESPONDENT ON MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

STEVEN JACOB
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

*Michael Nekman is the
new assistant taking Mr. Jacob's
case load. SJ*

ok/jw

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INTRODUCTION

The petitioner, Melvee Tucker, was the appellant in the district court of appeal, and the defendant in the trial court. The respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the trial court. In the brief the parties will be referred to as they stood at trial. The symbol "R" will be used to refer to the record on appeal. The symbol "T" will be used to refer to the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's Statements of the Case and Facts as being a substantially true and correct account of the proceedings below. The State respectfully reserves the right to argue additional facts in the argument portion of this brief.

POINT ON APPEAL

WHETHER THE TRIAL COURT WAS CORRECT
IN DENYING THE DEFENDANT'S MOTION TO
DISMISS THE INDICTMENT BASED ON THE
FAILURE TO ALLEGE VENUE WHERE THE
DEFENDANT WAIVED HIS OBJECTION BY
FAILING TO RAISE IT TIMELY?

ARGUMENT

THE TRIAL COURT WAS CORRECT IN DENYING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT BASED ON THE FAILURE TO ALLEGE VENUE WHERE THE DEFENDANT WAIVED HIS OBJECTION BY FAILING TO RAISE IT TIMELY.

At the conclusion of the State's case, the defendant moved to dismiss the indictment based on its failure to allege venue. (T. 639). The district court of appeal held that the defendant waived the objection by failing to raise it before trial.

A venue objection is waived if not timely asserted. Inverness Coca Cola Bottling Co. v. McDaniel, 78 So.2d 100 (Fla. 1955); Lane v. State, 388 So.2d 1022, 1026 (Fla. 1980). In this case this objection to venue was not timely asserted, therefore the objection was waived.

The real issue in this case is that by failing to allege the place of the offense in the indictment, the indictment failed to allege territorial jurisdiction (as opposed to subject matter jurisdiction or personal jurisdiction).

We agree with the distinction drawn between venue and jurisdiction that was outlined by the Supreme Court of Maine in State v. Baldwin, 305 A.2d 555, 558 (Me. 1973):

We see a vast difference in the policy considerations governing the adoption of a rule as to venue and the adoption of a rule as to territorial jurisdiction.

* * * * *

The sovereign power of the State exists whether the venue is properly laid in one county or another so long as the appropriate venue is within the territorial jurisdiction of the State.

See also, Annot., 67 A.L.R.3d 988 (1975).

Lane v. State, supra at 1026, 1027.

See also, Section 910.005, Florida Statutes (1981).

The defendant cannot waive the territorial jurisdiction of the court. If the defendant chooses to challenge the territorial jurisdiction of the trial court, this Court should conclude that there was, in fact, territorial jurisdiction. The proof at trial established that the trial court did, in fact, have territorial jurisdiction. The only defect which the defendant could allege is that the indictment failed to allege territorial jurisdiction.

Although the filing of the indictment (or information) is the procedure used to invoke the jurisdiction of the trial

court, the procedural steps by which jurisdiction is invoked are not themselves jurisdictional, and ordinarily may be waived. Criminal Law, Section 161, 22 C.J.S. 416, 418. In the instant case the trial court did, in fact, have jurisdiction. While the procedural step for invoking jurisdiction may have been defective, the defendant waived that defect by not timely objecting to the indictment.

In State v. Black, 385 So.2d 1372 (Fla. 1980), the defendant timely challenged the indictment before trial. Therefore, he did not waive the procedural defect.

The failure to allege venue in the instant case was a defect waived by the defendant by not making a timely objection. The question of whether the trial court had territorial jurisdiction could be raised at any time. The court did, in fact, have territorial jurisdiction. Although the indictment failed to allege territorial jurisdiction,¹ the procedural step by which jurisdiction is invoked is not jurisdictional and was never raised by the defendant.

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The indictment in this case was sufficient to allege venue and territorial jurisdiction if, for example, it would be sufficient to merely place the name of the county and the court in the caption or margin of the indictment. See, State v. Black, supra at 1376 (England, Justice, specially concurring).

CONCLUSION

Based on the foregoing arguments and citations of authority the State respectfully requests this Court to affirm the opinion of the district court of appeal.

Respectfully submitted,

JIM SMITH
Attorney General



STEVEN JACOB
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Merits was furnished by mail to Howard K. Blumberg, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33128, on this 18th day of November, 1982.



STEVEN JACOB
Assistant Attorney General

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