IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,683

MELVEE TUCKER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

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 stood in the trial court. All references are to the defendant's appendix, paginated separately and identified as "A", followed by the page numbers.

STATEMENT OF THE CASE AND FACTS

The defendant, Melvee Tucker, was indicted on December 14, 1977, for the first-degree murder of an individual killed more than three years earlier on June 11, 1974 (A. 4). At trial, the judge refused the defendant's request for a jury instruction on the lesser-included offenses of first-degree murder because the statute of limitations had run as to those lesser-included offenses (A. 5). The defendant was subsequently found guilty of first-degree murder and sentenced to life imprisonment (A. 4).

On appeal to the District Court of Appeal, Third District, the trial court's refusal of the request for a jury instruction on lesser-included offenses was upheld, and the defendant's judgment of conviction was affirmed by a majority of the Court [1] (A. 1-15). The District Court cited its prior decision in Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978), cert.denied, 379 So.2d 953 (Fla. 1980); cert.denied, 449 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d 137 (1980), which held it was not error to refuse to instruct on lesser degrees of homicide when such offenses were barred by the statute of limitations. The District Court found that the decision of the United States Supreme Court in Beck v. Alabama, 447 U.S. 625, 100 S.Ct.2382, 65 L.Ed.2d (1980)

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[1] Judge Jorgenson dissented based on the fact that the indictment failed to allege venue (A. 15). The Court certified the following question to this Court as being of great public interest:

> Is the error in the failure of an indictment to specify the place where the crime allegedly occurred so fundamental that it may be urged on appeal though not properly presented at the trial court, where the defendant is not hindered in the preparation or presentation of his defense and the situs of the crime is proved at trial?

(A. 8,15,16). Review of the District Court's decision is sought based on both this certification and the express and direct conflict created by the District Court's upholding of the denial of a jury instruction on lesser-included offenses.

did not necessitate a re-examination of the holding in Holloway v. State, supra, and also found that the decision in Holloway foreclosed any claim of a denial of equal protection in failing to give instructions on lesser-included offenses barred by the statute of limitations (A. 5-6).

The District Court did find, however, that its prior opinion in Holloway had not resolved the issue of whether by requesting an instruction on the lesser-included offenses, a defendant could waive the statute of limitations thereby causing the lesser-included offense to become a viable charge permitting conviction and sentencing and entitling the defendant to an instruction on that offense (A. 6). In the decision sought to be reviewed, the District Court did directly address this waiver issue.

The District Court held that a defendant can waive the protections of the statute of limitations, but that "there should be a waiver in writing made part of the record or at least an express oral waiver of the statute preventing prosecution and conviction made in open court on the record by the defendant personally or by his counsel in his presence." (A. 8). The Court went on to hold that "a mere request for an instruction on the lesser-included offense is not an express waiver of the right not to be prosecuted and convicted for an offense for which the statute of limitations has run." (A. 8). Finding no effective waiver in the instant case, the District Court found no error in refusing to instruct on the lesser-included offenses, [2] and affirmed the defendant's conviction (A. 8). Motions for rehearing

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[2] Judge Jorgenson stated total agreement with the views expressed by the majority on this issue (A. 15).

were filed July 2, 1982, and July 6, 1982 (A. 17-22). The motions were denied August 25, 1982 (A. 23).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed September 24, 1982.

ARGUMENT

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

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court of Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). [3] In the instant case, the District Court of Appeal announced a rule of law chich directly conflicts with the rule of law announced by this Court in Ray v. State, 403 So.2d 406 (Fla. 1981). Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

In the instant case, the District Court of Appeal upheld the trial court's refusal of the defendant's request for a jury instruction on lesser-included offenses of first-degree murder because the statute of limitations had run as to those lesser-included offenses. The District Court stated that a defendant could waive the protections of the statute of limitations, but held that the defendant's request for an instruction

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[3] The two basic types of direct conflict jurisdiction articulated in Nielsen, supra, would seem to be continued after the April 1, 1980 Constitutional Amendment, as the principles of Nielsen are not antithetical to the jurisdictional changes made by the amendment. See England, Hunter and Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U.Fla.L.Rev. 147 (1980).

on the lesser-included offenses did not constitute such a waiver.[4]

This holding is in direct conflict with the rule of law announced by this Court in Ray v. State, supra. In Ray, this Court addressed the issue of whether a defendant convicted of a crime for which he was not charged, but which was submitted to the jury as a lesser included offense when in fact it was not, may challenge that conviction when he failed to object to the submission of that crime to the jury. This Court began its resolution of that issue by recognizing the fundamental nature of the error in convicting a defendant of a crime for which he was not charged:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.
>
> . . . . . .
>
> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

403 So.2d at 959, quoting Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948).

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[4] The majority opinion cites no authority to support its holding that the defendant's affirmative action of requesting jury instructions on limitations-barred offenses does not constitute a waiver of the statute. Judge Pearson's specially concurring opinion does cite Perry v. State, 103 Fla. 580, 137 So.798 (1931); Blackmon v. State, 88 Fla. 188, 101 So.319 (1924); Keenan v. State; 379 So.2d 147 (Fla. 4th DCA 1980); and Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978), cert.denied 379 So.2d 953 (Fla. 1980), cert.denied 449 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d. 137 (1980) as standing for such a principle. However, an examination of each of those cases reveals that none of them addresses in any way the issue of waiver. The cases merely hold that a defendant is not entitled to instructions on limitations-barred offenses. Indeed, the majority opinion in the instant case expressly recognizes the fact that the waiver issued was not considered in Holloway v. State, supra, (A. 6).

Based on the importance of the principles of due process involved, this Court in Ray held that the defendant's mere failure to object to an instruction on a crime not charged did not constitute a waiver of the error of convicting him of such a crime. However, notwithstanding the magnitude of the constitutional error involved, this Court went on to hold that the error could be waived by defense counsel's affirmative actions of requesting the improper instruction, and under such circumstances the defendant could indeed be convicted of a crime not charged.

In direct conflict with this holding is the holding of the District Court in the decision sought to be reviewed that the defendant's request for an instruction on lesser-included offenses barred by the statute of limitations does not constitute a waiver of the protections of the statute so as to allow a conviction of such lesser-included offenses. Surely the error in convicting a defendant of a crime barred by a statutory limitation does not approach the level of seriousness of the constitutional error in convicting a defendant of a crime with which he has never been charged. Accordingly, the District Court's holding in the instant case that the error of convicting a defendant of a crime barred by the statute of limitations is not waived by the defendant's request for a jury instruction on such a crime cannot be reconciled with this Court's holding in Ray that the more serious error of convicting a defendant of a crime not charged is waived by the defendant's request for an instruction on that crime. This Court's exercise of its discretionary jurisdiction is necessary to remedy this direct conflict between the decision of this Court in Ray, and the decision of the Third District Court of Appeal in the instant case.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal upholding the trial court's refusal to instruct the jury on the lesser included offenses of first degree murder.

Respectfully submitted,

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By: _____
HOWARD K. BLUMBERG
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 4th day of October, 1982.

By: _____
HOWARD K. BLUMBERG
Assistant ~~Public~~ Defender