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 THE MERITS

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INTRODUCTION

Petitioner, Melvee Tucker, was the appellant in the district court of appeal, and the defendant in the trial court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the trial court. In this brief, the parties will be referred to as petitioner and the State. The symbol "R" will be used to refer to the record on appeal in the district court. The symbol "TR" will be used to refer to the transcript of testimony in the district court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On December 15, 1977, an indictment was filed charging the defendant with first degree murder (R. 1-1A). The body of that indictment reads as follows:

> The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 11th day of June, 1974, MELVEE TUCKER did, unlawfully and feloniously, from a premeditated design to effect the death of a human being, or while engaged in the perpetration of, or in the attempt to perpetrate a robbery, kill HAROLD ROSENBAUM, a human being, by shooting him with a firearm, in violation of Florida Statute 782.02, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

(R. 1).

A jury trial on the above charge commenced on September 26, 1978 (TR. 311). At the conclusion of the State's case, the defendant moved to dismiss the indictment based on its failure to allege venue (TR. 639). The motion was denied (TR. 641). The jury subsequently found the defendant guilty as charged (R. 229). The defendant was adjudicated guilty and sentenced to life imprisonment with the requirement that he serve twenty-five (25) calendar years before becoming eligible for parole (R. 230).

The conviction and sentence were appealed to the District Court of Appeal, Third District (R. 233). The defendant raised six points as error, including the trial court's failure to dismiss the indictment because it contained no allegation of venue. As to this point, the District Court of Appeal, with Judge James R. Jorgenson dissenting, held that the defendant was precluded from challenging his conviction and sentence on the grounds that the

indictment failed to allege venue because he had failed to raise the issue by pre-trial motion. Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982). The defendant's judgment of conviction and sentence were affirmed, with the District Court certifying to this Court the following question 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?

417 So.2d at 1013, 1020. Motions for rehearing of the decision of the District Court of Appeal were filed July 2, 1982 and July 6, 1982. The motions were denied August 25, 1982.

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed September 24, 1982. Review was sought based on the question certified to be of great public interest, and also based on the grounds that the decision expressly and directly conflicted with a decision of this Court on the same question of law. [1]

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[1] This conflict was created by that portion of the decision of the District Court of Appeal upholding the trial court's refusal to instruct the jury on the lesser included offenses of first degree murder because the statute of limitations had run as to those lesser included offenses. Petitioner's brief on jurisdiction relating to this issue was filed October 6, 1982.

ARGUMENT

THE FAILURE OF AN INDICTMENT TO SPECIFY THE PLACE WHERE THE CRIME ALLEGEDLY OCCURRED IS FUNDAMENTAL ERROR WHICH MAY BE RAISED FOR THE FIRST TIME ON APPEAL, EVEN WHERE THE DEFENDANT IS NOT HINDERED IN THE PREPARATION OR PRESENTATION OF HIS DEFENSE AND THE SITUS OF THE CRIME IS PROVED AT TRIAL.

In its decision reported in Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982), the Third District Court of Appeal certified the following question 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?

417 So.2d at 1013, 1020. Petitioner submits that this question has already been answered in the affirmative by this Court in State v. Black, 385 So.2d 1372 (Fla. 1980). Accordingly, the decision of the Third District Court of Appeal affirming petitioner's conviction and sentence notwithstanding the failure of the indictment to allege venue, must be quashed.

In State v. Black, supra, this Court addressed the very issue presented to the Third District Court of Appeal in the case at bar. The indictment in Black contained no statement as to the place of the alleged crime, and the indictment in the instant case is deficient in the same respect. As a result of the failure to allege venue, this Court in Black approved the District Court of Appeal decision reversing the defendant's conviction and sentence.

The decision of the Third District Court of Appeal in the case at bar acknowledges the decision of this Court in State v. Black, supra,

but attempts to distinguish that decision based on the fact that the defective indictment in Black was attacked by pre-trial motion. An examination of this Court's opinion in Black conclusively establishes that the failure to attack by pre-trial motion an indictment which fails to allege venue does not preclude appellate review of the sufficiency of the indictment.

In Black, the following question had been certified to this Court by the Second District Court of Appeal:

> Is a grand jury indictment insufficient to sustain a conviction when it fails to specify the place where the crime allegedly occurred, even though this allegation is subsequently supplied by a bill of particulars, the defendant is not hindered in the preparation or presentation of his defense, and the situs of the crime is proved at trial?

385 So.2d at 1374. This question was answered in the affirmative by this Court in its unanimous [2] opinion.

Thus, although a pre-trial motion to dismiss the indictment had been filed in Black, the question before this Court was not whether the failure of the indictment to allege venue rendered that indictment subject to dismissal upon the filing of a pre-trial motion to dismiss. The question before this Court was whether the failure of a grand jury indictment to allege venue rendered that indictment insufficient to sustain a conviction. By answering this question in the affirmative, this Court squarely held that a conviction could not stand where an

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[2] Justice England wrote a specially concurring opinion with which Justice Overton concurred. This specially concurring opinion indicated that the decision of the Court was correctly decided under existing law, but suggested a re-evaluation of Florida's rules governing the sufficiency of indictments.

indictment failed to allege venue.

This Court's opinion in Black contains a number of other statements which indicate that the failure of an indictment to allege venue is fundamental error which can be raised for the first time on appeal. This Court's opinion repeatedly refers to the fundamental nature of such a defect, and repeatedly speaks of allegations as to venue in jurisdictional terms:

> ". . .it is equally certain that a statement of particulars cannot cure fundamental defects in an indictment."
>
> . . . . .
>
> "Allegations as to the place of the alleged offense also fix the jurisdiction of the grand jury and court. . .Proper jurisdictional allegations are as essential in an accusatory writ as are those relating to the material elements of the crime."
>
> . . . . .
>
> "In view of the secrecy which surrounds grand jury proceedings, indictments, especially, should facially indicate jurisdiction."

385 So.2d at 1375 (citations omitted). Finally, at the conclusion of the opinion, this Court describes the seriousness of the defect in the following clear and unambiguous terms:

> The indictment completely failed to allege venue; in this it was fundamentally defective and void.

Id. In light of the foregoing excerpts from this Court's opinion in Black, there can be no doubt that the failure of an indictment to allege venue is fundamental error which can be raised for the first time on appeal. See generally, Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981); Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); DiCaprio v. State, 352 So.2d 78 (Fla. 4th DCA 1977), cert.

denied 353 So.2d 679 (Fla. 1977); Pope v. State, 268 So.2d 173 (Fla. 2d DCA 1972), cert. dismissed, 283 So.2d 99 (Fla. 1973).

This Court's holding in Black is in accord with decisions from other states on the issue of whether the failure to allege venue constitutes fundamental error. See e.g. People v. Steiner, 640 P.2d 250, 252 (Colo.App.1981)("We agree with the defendant that failure to allege that the offenses were committed within the jurisdiction of the court rendered counts 6 through 10 defective, and, as a result, the court was without jurisdiction as to these counts."); State v. Mowrey, 91 Idaho 693, 429 P.2d 425 (1967)(information dismissed by appellate court for lack of jurisdiction based on failure to allege venue); People v. Hill, 68 Ill. App.2d 369, 216NE2d 212, 215 (1966)(failure to allege venue "is a substantive deficiency which makes the judgment of conviction void."); Application of Alexander, 80 Nev.354, 293 P.2d 615, 617 (1964) ("We are compelled to hold that the failure of the indictment to allege that the crime was committed in the State of Nevada was fatal and that the district court never acquired jurisdiction to try the case, and that its judgment was void."); People v. Webber, 133 Cal. 623, 66 P.38 (1901) (contention of prosecution that failure to file demurrer precluded subsequent attack on information failing to allege venue, held "untenable.").

As noted by the Second District Court of Appeal's opinion in Black v. State, 360 So.2d 142, 144, n.3 (Fla. 2d DCA 1978), although a number of states have enacted statutes eliminating the requirement of an express allegation of venue in the charging instrument, Florida has not seen fit to do so. Justice England's special concurring opinion in State v. Black, supra, at 1375-1376, suggested that the common law

rule requiring that venue be alleged in an indictment be modified or abrogated by way of either a rule change by this Court, or statutory enactment. No such modification or abrogation has occurred in this state, and therefore this Court's opinion in Black controls the disposition of the instant case. As that opinion clearly establishes that the failure of an indictment to allege venue is fundamental error, even where the defendant is not hindered in the preparation or presentation of his defense and the situs of the crime is proved at trial, the question certified by the Third District Court of Appeal must be answered in the affirmative.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to answer the certified question in the affirmative, quash the decision of the Third District Court of Appeal, and direct that Court to reverse the petitioner's judgment of conviction and sentence.

Respectfully submitted,

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By: _____
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Assistant Public Defender

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 19th day of October, 1982.

By: _____
HOWARD K. BLUMBERG
Assistant Public Defender