w/o o/a

IN THE SUPREME COURT OF FLORIDA

WENDALL J. CHATMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,211

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Wendall J. Chatman was charged by information with a violation of Section 893.13(1)(a)(2), Florida Statutes, by the unlawful sale or delivery of cannabis. (R47) The information did not allege an amount for the marijuana, nor did it allege that the delivery was for consideration. (R47) Following a no contest plea, the defendant was placed on one year's probation. (R48)

Following revocation of his probation and the imposition of a five-year prison sentence, the defendant appealed his case to the Fifth District Court of Appeal. On Appeal, the defendant challenged the Circuit Court's jurisdiction based upon an information which alternatively alleged the commission of a misdemeanor or felony.

On November 1, 1984, the District Court of Appeal, Fifth District, (Judge Cowart dissenting with opinion), held as follows:

PER CURIAM:

AFFIRMED: See Fike v. State, No. 83-568 (Fla. 5th DCA Sept. 13, 1984) [9 FLW 1932].[1/]

A Notice to Invoke Discretionary Jurisdiction, based upon express and direct conflict was filed November 27, 1984. On April 2, 1985, this Court accepted jurisdiction. This brief follows.

1/ Fike v. State, 455 So.2d 628 (Fla. 5th DCA 1984), was pending jurisdiction in this Court at the time of the District Court's opinion and has now been accepted for review. Supreme Court Case No. 66,024.

SUMMARY OF ARGUMENT

The conviction and sentence of the petitioner are a nullity because the state failed to unequivocally invoke the subject matter jurisdiction of the circuit court. An information that disjunctively alleges in a single-count the commission of a felony or a misdemeanor does not establish jurisdiction in the circuit court.

ARGUMENT

JURISDICTION OF THE CIRCUIT COURT IS NOT PROPERLY INVOKED BY AN INFORMATION DISJUNCTIVELY ALLEGING IN A SINGLE COUNT THE COMMISSION OF A FELONY OR A MISDEMEANOR.

In pertinent part, the information in the instant case alleged that Chatman did "unlawfully and feloniously sell or deliver to another, 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 78 (Fla. 4th DCA 1977), cert. den., 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).

A circuit court has exclusive, original jurisdiction in all actions of law not cognizable by the county courts. Section 26.012(2)(a), Fla.Stat. (1983). If only a misdemeanor offense is alleged, the circuit court is without jurisdiction and the proper forum is the county court. Cf. Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978).

The burden of properly invoking a court's jurisdiction is on the state . . . the moving party. Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981). Whether a court has subject matter jurisdiction involves a claim of fundamental error that can be raised anytime, even on appeal. Dicaprio v. State, supra.

"[T]he allegations of the charging document determine whether the court in which the State files the document has jurisdiction over the cause." Rogers v. State, 336 So.2d 1233, 1235 (Fla. 4th DCA 1976)(footnote omitted). In the instant case, the charging document alleges that a felony or a misdemeanor occurred. This is analogous to a civil complaint alleging that an amount in controversy exceeds $2,500, or is less than $2,500. Such an averment is a non sequitur and accomplishes nothing.

As noted early on in the case of Strohbar v. State, 55 Fla. 167, 47 So. 4 (1908):

> If, as is common in legislation, a statute makes it punishable to do a particular thing specified, 'or' another thing, 'or' another, one commits the offense who does any one of the things, or any two, or more, or all of them. And the indictment may charge him with any one, or with any larger number, at the election of the pleader; employing, if the allegation is of more than one, the conjunction 'and' where 'or' occurs in the statute. (citations omitted).

Id. at 7. In Strohbar, supra, this Court concluded that an indictment was not duplicitous because the indictment, in a

single count, conjunctively alleged alternative portions of a statute carrying the same penalties and thus constituting the same offense. Id. at 7.

Precisely the opposite has occurred in the case sub judice. The State, in a single count, alleged diverse offenses carrying different penalties . . . one a misdemeanor and one a felony. The uncertainty and confusion created by a disjunctive allegation is patent . . . so much so that it must be considered fatal.

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, supra; DiCaprio, supra; Rogers v. State, supra; Pope v. State, supra.

In Young v. State, 439 So.2d 306 (Fla. 5th DCA 1983), (receded from in Fike v. State, supra), 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[2/]. Similarly, in 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

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2/ 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.

Fike v. State, supra, express the better view and should be adopted by the 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).

The State can find no solace in Section 26.012(2)(a) Fla.Stat. (1983), which confers jurisdiction to the circuit courts over all felonies "and all misdemeanors arising out of the same circumstances as a felony which is also charged." That provision is clearly intended to provide jurisdiction for the circuit court to contemporaneously hear misdemeanor causes of action in addition to and connected with a felony over which it has exclusive jurisdiction.

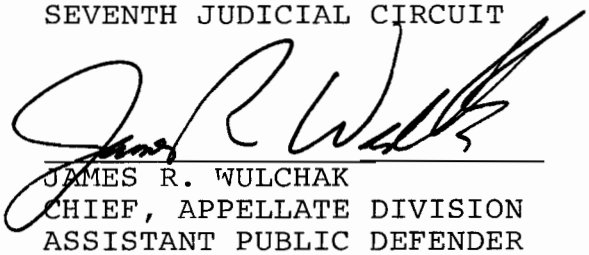
It is respectfully submitted that the circuit court never acquired jurisdiction in the instant cause because the averment in the information that the petitioner committed a felony or a misdemeanor was but a nullity. The State simply failed to meet its burden of unequivocally invoking the jurisdiction of the circuit court. Accordingly, the petitioner's conviction must be vacated.

CONCLUSION

BASED UPON the cases, authorities, and policies presented herein, the petitioner respectfully requires that this Honorable Court reverse the decision of the District Court of Appeal, Fifth District and remand with directions to vacate the petitioner's judgment and sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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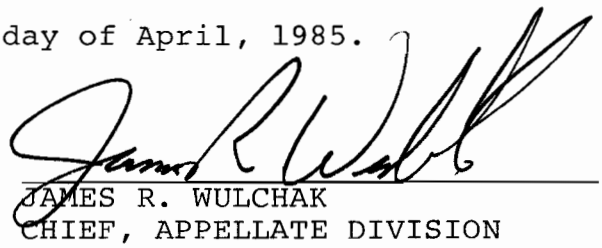
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, FL 32014 and Mr. Wendall J. Chatman, Inmate No. 712009, P. O. Box 699, Sneads, FL 32460 on this 22nd day of April, 1985.



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