

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

MAY 3 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

DORIS MOBLEY,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 66,301

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LUCINDA H. YOUNG
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	
JURISDICTION OF THE CIRCUIT COURT IS NOT PROPERLY INVOKED BY AN INFORMATION DIS- JUNCTIVELY ALLEGING IN A SINGLE COUNT THE COMMISSION OF A FELONY OR A MISDEMEANOR.	4
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<u>Boley v. State</u> 273 So.2d 109 (Fla. 4th DCA 1973), <u>cert. discharged</u> 287 So.2d 668 (Fla. 1973)	4
<u>Brehm v. State</u> 427 So.2d 825 (Fla. 3d DCA 1983)	5
<u>Christopher v. State</u> 397 So.2d 406 (Fla. 5th DCA 1981)	4,5
<u>DiCaprio v. State</u> 352 So.2d 78 (Fla. 4th DCA 1977), <u>cert. den.</u> 353 So.2d 679 (Fla. 1977)	4,5
<u>Chatman v. State</u> Sup.Ct. Case No. 66,211	2
<u>Fike v. State</u> 455 So.2d 628 (Fla. 5th DCA 1983)	2,5,6
<u>Mobley v. State</u> 460 So.2d 383 (Fla. 5th DCA 1984)	2
<u>Nelson v. State</u> 398 So.2d 920 (Fla. 5th DCA 1981)	6
<u>Page v. State</u> 376 So.2d 901 (Fla. 2d DCA 1979)	5
<u>Pope v. State</u> 268 So.2d 173 (Fla. 2d DCA 1972), <u>cert. discharged</u> 283 So.2d 99 (Fla. 1973)	4,5
<u>Radford v. State</u> 360 So.2d 1303 (Fla. 2d DCA 1978)	5

TABLE OF CITATIONS

<u>CASES CITED:</u> (Continued)	<u>PAGE NO.</u>
<u>Ramsey v. State</u> Sup.Ct. Case No. 66,167	2
<u>Rogers v. State</u> 336 So.2d 1233 (Fla. 4th DCA 1976), <u>cert. dismissed</u> 348 So.2d 952 (Fla. 1977)	5
<u>State v. Black</u> 385 So.2d 1372 (Fla. 1980)	6
<u>Tucker v. State</u> 459 So.2d 306 (Fla. 1984)	6
<u>Waters v. State</u> 354 So.2d 1277 (Fla. 2d DCA 1978)	5
<u>Young v. State</u> 439 So.2d 306 (Fla. 5th DCA 1983)	5,6
<u>OTHER AUTHORITIES:</u>	
Section 26.012, Florida Statutes (1983)	4
Section 39.01(1)(a), Florida Statutes (1983)	5
Section 893.13(1)(a)(2), Florida Statutes	2,4
Section 893.13(1)(f), Florida Statutes	4
Article V, Sections 5 and 6, Florida Constitution	4

IN THE SUPREME COURT OF FLORIDA

DORIS MOBLEY,)	
)	
Petitioner,)	
)	
vs)	CASE NO. 66,301
)	
STATE OF FLORIDA,)	
)	
Respondent.)	
_____)	

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The Petitioner, DORIS MOBLEY, was the Defendant in the trial court and the Appellant in the Fifth District Court of Appeal.

The Respondent, STATE OF FLORIDA, was the Appellee in the Fifth District Court of Appeal.

In this brief the parties will be referred to as the State, and Mobley or Petitioner.

The following symbol will be used:

"R" - Record on Appeal

STATEMENT OF THE CASE AND FACTS

The State filed an information in the Circuit Court for Hernando County alleging that the Petitioner, DORIS MOBLEY, "did unlawfully sell or deliver to another person, Cannabis, a controlled substance commonly known as marijuana, in violation of Florida Statute 893.13(1)(a)(2); a third degree felony" (R48). Mobley pled no contest and was placed on probation for three years (R49). Following revocation of her probation and imposition of a thirty-month prison sentence (R58-60), Mobley appealed to the Fifth District Court of Appeal. On appeal, the Petitioner argued that the information was insufficient to invoke the jurisdiction of the Circuit Court because it alleged, in the alternative, the commission of a felony or a misdemeanor.

On November 1, 1984, the Fifth District Court of Appeal, in a two-to-one decision, affirmed her conviction based on its decision in Fike v. State, 455 So.2d 628 (Fla. 5th DCA 1983)^{1/}. Mobley v. State, 460 So.2d 383 (Fla. 5th DCA 1984) (See Appendix).

A Notice to Invoke Discretionary Review, based upon express and direct conflict, was filed on December 13, 1984. This Court accepted jurisdiction on April 12, 1985.

^{1/} Fike, supra, was pending jurisdiction in this Court at the time of the District Court's opinion and has now been accepted by this Court (Sup.Ct. Case No. 66,024). The issue raised in the instant case and in Fike, supra, is also pending before this Court in Chatman v. State (Sup.Ct. Case No. 66,211) and Ramsey v. State (Sup.Ct. Case No. 66,167).

SUMMARY OF THE 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 DIS-
JUNCTIVELY ALLEGING IN A SINGLE COUNT THE
COMMISSION OF A FELONY OR A MISDEMEANOR.

The information in the instant case alleged that Mobley did "unlawfully and feloniously sell or deliver to another person, Cannabis" (R48).

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).

Pursuant to Article V, Sections 5 and 6 of the Florida Constitution, the Legislature has given the circuit court jurisdiction over all felonies and all misdemeanors arising out of the same circumstances as a felony which is also charged. Section 26.012(d), Florida Statutes (1983). If only a misdemeanor is

alleged, the circuit court is without jurisdiction and the proper forum is the county court. Section 39.01(1)(a), Florida Statutes (1983); Brehm v. State, 427 So.2d 825 (Fla. 3d DCA 1983); Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981); Page v. State, 376 So.2d 901 (Fla. 2d DCA 1979); Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); Radford v. State, 360 So.2d 1303 (Fla. 2d DCA 1978).

The burden of properly invoking a court's jurisdiction is on the State. Christopher v. State, supra. The allegations of the charging document determine whether the circuit court has subject-matter jurisdiction over the cause. Rogers v. State, 336 So.2d 1233 (Fla. 4th DCA 1976), cert. dismissed, 348 So.2d 952 (Fla. 1977). The Petitioner submits that in the instant case the State failed to meet its burden of unequivocally invoking the jurisdiction of the circuit court.

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, supra; DiCaprio, supra; Rogers, supra; Pope, supra.

In Young v. State, 439 So.2d 306 (Fla. 5th DCA 1983) (receded from in Fike, 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 Fike, supra, express the better view and should be adopted by this 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).

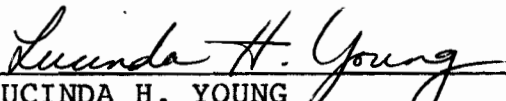
^{2/} The opinion in Young, supra, relied heavily on State v. Black, 385 So.2d 1372 (Fla. 1980), which held that an indictment which failed to allege venue was fundamentally defective and void. Black was receded from in Tucker v. State, 459 So.2d 306 (Fla. 1984), but the court emphasized that venue must be distinguished from allegations which are jurisdictional requisites. Tucker, supra at 308.

CONCLUSION

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

Respectfully submitted,

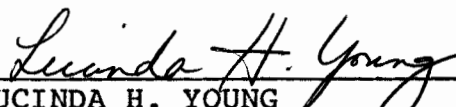
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT


LUCINDA H. YOUNG
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Doris Mobley, Inmate No. 803684, Florida Correctional Institute, Post Office Box 147, Lowell, Florida 32663, on this 2nd day of May, 1985.


LUCINDA H. YOUNG
ASSISTANT PUBLIC DEFENDER