

IN THE SUPREME COURT OF FLORIDA

JAN 21 1987

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RAYMOND TINGLEY,)
)
 Petitioner,)
)
 VS.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 69,651

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

RAYMOND TINGLEY,)
)
 Petitioner,)
vs .) CASE NO. 69,651
STATE OF FLORIDA,)
)
 Respondent.)
_____)

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted after jury trial of four counts of capital sexual battery. The indictment alleged that Petitioner had committed these offenses on or between April 1, 1982 and September 30, 1982. (R1082) By a statement of particulars, the state announced its intention to prove that the offenses occurred between September 1, 1981 and March 1, 1982.

(R4) Petitioner filed a motion to dismiss on the ground, inter alia, that in effect this constituted an impermissible amendment of the indictment since the statement of particulars covered some six months outside the time set forth in the indictment.

(R1107-1109) At trial, the victims testified that these offenses occurred in October, November and December, 1981.

(R314-316,228,321,222) On appeal to the Fifth District Court of Appeal, Petitioner argued the denial of the motion to dismiss. The Fifth District Court of Appeal affirmed Petitioner's judgments and sentences specifically rejecting the argument

regarding the propriety of the state proving a crime outside the parameters of the offense as charged in the indictment. In doing so, the court acknowledged that no clear precedent existed in Florida for its affirmance. Tingley v. State, 11 FLW 1877 (Fla. 5th DCA, August 28, 1986). Petitioner filed a timely motion for rehearing which was denied on October 14, 1986. Petitioner filed a notice to invoke discretionary review on November 14, 1986, which was dismissed as untimely. On December 4, 1986, Petitioner filed a motion to reinstate the petition for discretionary review.

SUMMARY OF ARGUMENT

A state attorney has no authority to alter or amend a grand jury indictment. A statement of particulars is a document whereby the state sets forth with precision the particular times that the alleged crimes occurred. When such document is filed, it restricts the state to proof thereof. While a statement of particulars is not part of the accusatory document, the state cannot use this document as a vehicle to change the times alleged in the indictment. The allegation of the time or date of an alleged offense in an indictment is one of substance and not merely of form. Consequently, amendment of such date by the state is unlawful and renders this indictment a nullity.

ARGUMENT

THE DECISION OF THE DISTRICT COURT
BELOW, TINGLEY V. STATE, 11 FLW 1877
(Fla. 5th DCA, August 28, 1986)
EXPRESSLY AND DIRECTLY CONFLICTS WITH
THIS COURT'S PRIOR DECISIONS IN PICKERON
V. STATE, 94 Fla. 268, 113 So.707
(1927), DICKSON V. STATE, 20 Fla. 800
(1884), AND STATE V. BLACK, 385 So.2d
1372 (Fla. 1980).

In the case sub judice, Petitioner was indicted by a grand jury on four counts of capital sexual battery. Each count alleged that the offense was committed between April 1, 1982 and September 30, 1982. The state, in response to Petitioner's demand, filed four separate bills of particulars the last of which provided that the state intended to prove the offenses occurred between September 1, 1981 and March 1, 1982. These time periods were totally outside the parameters of the offenses as charged in the indictment. The proof at trial coincided with the information supplied in the bill of particulars but did not coincide with the allegations in the indictment. Petitioner moved to dismiss the indictment pre-trial alleging, inter alia, that by supplying a bill of particulars outside the parameters of the offense as alleged in the indictment, the state was in effect amending the indictment. On appeal, the Fifth District affirmed Petitioner's convictions finding no error in allowing the state to have supplied the bill of particular. The court ruled that the time element is not a substantive, essential element of the indictment. Petitioner asserts that the instant case cannot be reconciled with prior decisions of this Court and thus conflict

exists.

In Pickeron v. State, 94 Fla. 268, 113 S. 707 (1927) and Dickson v. State, 20 Fla. 800 (1884) this Court held that the allegation of the time or date of the commission of an offense is one of substance and not of form. Without question, in Florida, amendments of an indictment as to matters of substance may only be accomplished by returning the matter to the original grand jury. Pickeron, supra; State v. Black, 385 So.2d 1372 (Fla. 1980).

In Straughter v. State, 83 Fla. 683, 92 So. 569 (1922), an indictment charged the defendant with committing an offense on September 31, 1916. The Supreme Court found that since the indictment alleged a non-existent date, a judgment thereon could not stand. In so ruling, the majority rejected the suggestion by the dissenters that the error was technical and thus harmless especially since the proof at trial supported the conviction and the defendant was not embarrassed in his defense. Petitioner asserts that the error in Straughter, supra, is far less egregious than in the instant case since Petitioner stands convicted of offenses not charged and apparently from the indictment were not even considered by the grand jury. The bill of particulars cannot be used as a vehicle to amend an indictment but rather it traditionally is used solely as a limiting device for a defendant whereby the state narrows the time set forth in the charging document and is restricted to proof of the offenses within the particular times alleged.

Petitioner asserts that the decision of the District Court sub judice is in direct conflict with the prior decisions of th s Court in Pickeron v. State, 94 Fla. 268, 113 So. 707 (1927); Dickson v. State, 20 Fla. 800 1884); Straughter v. State, 83 Fla. 683, 92 So. 569 (1922); and State v. Black, 385 So.2d 1372 (Fla. 1980). Pursuant to Article V, Section 3(b)(3), Florida Constitution, this Court has jurisdiction to accept the case sub judice for review.

CONCLUSION

Based on the reasons and authorities presented herein, Petitioner respectfully requests this Honorable Court exercise its discretionary jurisdiction and accept the instant case for review to resolve the conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Ave., 4th Floor, Daytona Beach, FL 32014, in his basket at the Fifth District Court of Appeal and mailed to Raymond Tingley, #097331, Cross City Correctional Institution, P.O. Box 1500, Cross City, FL 32628, on this 20th day of January, 1987.

Michael S. Becker
MICHAEL S. BECKER
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