IN THE SUPREME COURT OF FLORIDA

FILED
FEB 18 1987
CLERK, SUPREME COURT
By ____ Deputy Clerk

RAYMOND HAROLD TINGLEY,

Petitioner,

v.

CASE NO. 69,651

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

Respondent supplements petitioner's Statement of the Case and Facts, as follows:

This court, on January 23, 1987, granted petitioner's motion to reinstate.

## SUMMARY OF ARGUMENT

This court should decline to exercise its discretionary jurisdiction, in that no express or direct conflict of decisions exists. In its decision, Tingley v. State, 495 So.2d 1181 (Fla. 5th DCA 1986), the district court correctly followed the law in Florida, to the effect that an indictment cannot be amended and to the effect that a statement of particulars cannot be considered a part of the accusatory document. While the state sub judice unquestionably alleged one time frame for the offenses at issue in the indictment, and proved another at trial, the state proved the time frame as set out in its statement of particulars, such statement requested by the defense: likewise, both the dates proven and those alleged, were within the statute of limitations and prior to the date upon which the indictment was returned. Cases relied upon by petitioner for conflict, which concern situations in which the date alleged was impossible or after the rendition of the indictment, are inapposite, and the instant petition for writ of certiorari should be denied.

ARGUMENT

THE DECISION OF THE DISTRICT COURT BELOW, TINGLEY V. STATE, 495 So.2d 1181, (Fla. 5th DCA 1986), DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH SUCH PRIOR DECISIONS OF THIS COURT AS DICKSON V. STATE, 20 Fla. 800 (1884), STRAUGHTER V. STATE, 83 Fla. 683, 92 So. 469 (1922) PICKERON V. STATE, 94 Fla. 268, 113 So. 707 (1927) OR STATE V. BLACK, 385 So.2d 1372 (Fla. 1980), SUCH THAT EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION WOULD BE WARRANTED.

In its decision, Tingley v. State, 495 So.2d 1181 (Fla. 5th DCA 1986), the district court below reviewed a claim of error regarding the denial of petitioner's motion to dismiss the indictment; the basis for such motion had been the fact that the state had filed a statement of particulars which set forth a time frame for the offenses different from that alleged in the indictment. The Fifth District rejected petitioner's argument that an impermissible amendment of the indictment had taken place, and, in so doing, noted specifically the law in Florida, as set out in State v. Black, 385 So.2d 1372 (Fla. 1980), to the effect that there is no mechanism for amendment of an indictment. The court concluded that the statement of particulars, which had been requested by the defense, had not constituted an amendment, in that such pleading was not a part of the accusatory or charging document. The court further noted that, in contrast to the situation in Dickson v. State, 20 Fla. 800 (1884), the dates alleged and proven in the case were in all respects "possible" dates and prior in time to the return date of the indictment. The court concluded that although there was a variance between the dates alleged and those proven, such

variance was not fatal, in that the state had proven that the crimes had occurred before the rendition of the indictment and within the statute of limitations.

In his jurisdictional brief, petitioner contends that the Fifth District misapplied Black and Dickson, as well as Pickeron v. State, 94 Fla. 268, 113 So. 707 (1927) and Straughter v. State, 83 Fla. 683, 92 So. 569 (1922), such that this court should exercise its discretionary jurisdiction, pursuant to Article V, Section 3(b)(3), Florida Constitution. Respondent disagrees. It is clear from the citation of decisions within the opinion itself that the district court recognized this court's holdings to the effect that an indictment cannot be amended, and that the district court acted in accordance with such. Likewise it is equally true that the district court stated the law correctly when it observed that a statement of particulars cannot be considered a part of the accusatory or charging document. See, Smith v. State, 93 Fla. 238, 112 So. 70 (1927). Because in this case the state proved at trial that the crimes had been committed at the time set forth in the statement of particulars, affirmance of petitioner's convictions was not error. See, State v. Beamon, 298 So.2d 376 (Fla. 1974).

Petitioner's reliance upon Dickson and Straughter is misplaced. In each case, the state had alleged in the indictment an "impossible" date and, at least in Dickson, had later sought to rectify such error through amendment. In Dickson, the state had alleged that the crime had been committed on December 10, 1884, despite the fact that the indictment was returned in April

of **1884;** in Straughter, the state had alleged that the crime had been committed on September **31, 1916.** This court found in each case that a jurisdictional void had existed, in that the indictment had failed to vest jurisdiction in the trial court. Obviously no such result was necessary sub judice, in that the indictment alleged "possible" dates. As this court noted in Sparks v. State, **273** So.2d **74** (Fla. **1973),** the reason for requiring a definite date in an indictment is to show that the prosecution is not barred by the statute of limitations. There is no statute of limitations for the crimes at issue, capital sexual battery in violation of section **794.011(2),** Florida Statutes **(1981),** and dismissal of the indictment below was not required: Pickeron involved a misallegation in the caption of the indictment, which this court deemed not to be fatal, and, thus, equally provides no basis for invocation of this court's jurisdiction.

In conclusion, respondent would maintain that no basis exists for exercise of this court's discretionary jurisdiction. The decision below does not expressly and directly conflict with the four precedents of this court cited by petitioner. Additionally, respondent would note that this court receded from State v. Black in Tucker v. State, **459** So.2d 306 (Fla. **1984)** and, that Spark, supra, additionally, seemed to overrule, at least in part, the holdings of Dickson, Pickeron, and Straughter. Further, the "gist" of Tingley is in accordance with the state of the law in Florida - that a variance between a date alleged and a date proven is not fatal, where the dates proven are within the

statute of limitations and prior to the return of the indictment, see Horton v. Mayo, 15 So.2d 327 (Fla. 1943), as well as with the law to the effect that the state must prove the dates set forth in any statement of particulars. See, Beamon, supra. As the court below noted in its opinion, petitioner never argued that the statement of particulars was given so close in time to the trial so as to prevent him from being able to effectively present a defense or that such statement of particulars delayed or hampered his defense at trial. Tingley at 1182. It is clear that the offenses of which petitioner was convicted are not ones in which time was a special element, and petitioner has failed to demonstrate any basis for this court's exercise of its discretionary jurisdiction. The instant petition for writ of certiorari should be denied in all respects.[1]

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[1]Respondent additionally respectfully realleges the arguments contained in its response to petitioner's motion to reinstate, filed on or about December 11, 1986, and suggests that such decision to reinstate should be reconsidered in light of Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982), and State v. Meyer, 430 So.2d 440 (Fla. 1983).

## CONCLUSION

WHEREFORE, for the aforementioned reasons, respondent respectfully requests this honorable court to deny the instant petition for writ of certiorari in all respects, and to decline to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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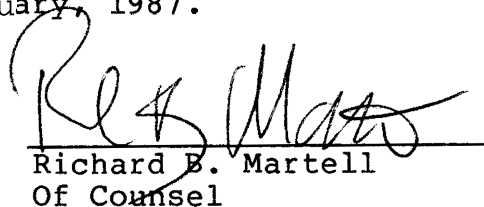
## CERTIFICIATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished, by prepaid first class mail, to Michael S. Becker, Assistant Public Defender for petitioner, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 17 day of February, 1987.



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