IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JACKIE ANDERSON,

Respondent.

CASE NO. 72,051

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellee in the court below and the prosecution in the trial court. Respondent was the appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court of Appeal. All emphasis in this brief is supplied by Petitioner unless otherwise indicated. A copy of the district court opinion is attached to this brief and designated (Appendix I).

The following symbols will be used:

"R"	Record on Appeal
"SR"	Supplemental Record on Appeal

STATEMENT OF THE CASE AND FACTS

On May 14, 1986, Respondent, Jackie Anderson, was charged by information with one count of burglary "contrary to Florida Statute 810.02(1)(3)" (R 253-254). The day before trial was to commence, October 14, 1986, the state filed an amended information charging Respondent with one count of burglary "contrary to Florida Statute 810.02(1)(2)(a) (R 264-265)." On the day of trial, October 15, 1986, Respondent personally expressed his desire to proceed to trial on the original information, without further delay, by waiving the need to refile the original information (SR 2-4). The trial court dismissed the amended information (R 264), and reinstated the original information (R 253-254). Immediately thereafter a jury trial commenced. On October 16, 1986, the jury found Respondent guilty of burglary (R 266). Respondent was adjudicated and sentenced to four and one-half (4½) years in prison. Respondent then appealed to the Fourth District Court of Appeal (R 271).

By opinion filed February 3, 1988, the district court reversed the conviction finding that the trial court lacked jurisdiction to try Respondent on the original information after an amended information had been filed, and subsequently withdrawn. The Fourth District however, also certified the following question as one of great public importance:

> Whether invited error can overcome the fact that technically the information

> has been extinguished by the filing of an amended information, or whether an information so extinguished can be revived by mutual agreement of the state, the defendant and the court.

The State filed its Notice to Invoke Discretionary Jurisdiction of this Court February 29, 1988. This brief is filed in compliance with this Court's Order of March 9, 1988.

SUMMARY OF THE ARGUMENT

The filing of a signed and sworn amended information has the legal effect of a nolle prosequi on the original information. The record supports the view that the trial court was cognizant of this rule and was prepared to continue the case in order to allow the state to file a new information and protect Respondent against surprise due to the late filing of the amended information. Because it was to his advantage to proceed to trial on the original information which charged him with burglary as a second-degree felon under §810.02(1)(3), as opposed to the amended information charging burglary as a first-degree felony under §810.02(1)(2)(a), Respondent prompted and agreed to proceed to trial on the original information without giving the state any further chance to perfect the information to charge burglary as a first-degree felony. Respondent should not be allowed to now complain of an error which he promoted, and specifically waived at the trial level. Under the facts of this case, Respondent is barred from advancing the claim of an invalid information on appeal.

ARGUMENT

A SUBSEQUENTLY AMENDED INFORMATION CAN BE REVIVED BY MUTUAL AGREEMENT OF THE STATE, THE DEFENDANT AND THE COURT.

The original information filed May 14, 1986, charged Respondent with burglary of a dwelling contrary to §810.02(1)(3) as a felony of the second-degree (R 253-254). The amended information, filed the day before trial, charged Respondent with the same burglary but as a felony of the first-degree or contrary to §810.02(1)(2)(a) (R 264-265). Before beginning trial on the amended information, pursuant to defense counsel and Respondent's request, the trial court swore in Respondent and the following proceedings took place:

P R O C E E D I N G S

THE COURT: Have your client step up to the microphone.

MS. ALLEN [Defense Counsel]: I believe Mr. Johnson and I have resolved the matter and the State will be proceeding on the second-degree burglary. That is my understanding.

MR. JOHNSON [Prosecutor]: That's correct, Your Honor.

THE COURT: Raise your right hand, please sir.

WHEREUPON:

JACKIE ANDERSON

having been called as a witness on his own behalf, and after being first duly sworn by the Court, was examined and testified under the oath as follows:

THE COURT: Lower your hand.

State your name.

THE DEFENDANT: Jackie Lee Anderson.

THE COURT: Lower your hand.

Mr. Anderson.

Because the State filed at the last minute an Amended Information, you are legally entitled to a continuance, a delay in this matter.

Has your lawyer explained that to you and do you understand the choice is yours?

You have to answer me.

THE DEFENDANT: Yes, sir.

THE COURT: Is it your choice and your desire to proceed to trial, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Now, they filed an Amended Information which changes the original Information for the State to proceed on and you to proceed to defend on the original Information, which required a waiver of an important legal right on your part.

You have the right to require the State to refile the original charge and to proceed on that. In other words, to in effect non-pros the amended charge and refile the original charge.

You could raise that as a defense or attack it on appeal if you were to be convicted on the original charge, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: It is your choice, your desire to waive or give up that legal right, and it is sort of a technicality but it is an important legal right too, if you are convicted on the original Information, it will be the same as if it were the pending Information in all respects and you can be sentenced and you cannot complain that they filed an Amended Information, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Mr. Hesse, vacate and set aside the Amended Information.

The Court with the consent of the State and the defense proceeds on the original Information and in all respects it is a viable charging document on which Mr. Anderson will be found guilty or not guilty depending on the decision of the jury.

Okay. Have a seat, Mr. Anderson.

We will get underway.

(Whereupon, a recess was taken at 10:10 a.m.)

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(SR 2-4)

The only point urged on appeal for reversal of the judgment of the conviction sub judice was the alleged absence of a valid information at time of trial to provide the required jurisdiction to try Respondent for burglary. The record on appeal clearly shows, however, that if any error occurred, Respondent participated in the error and induced the trial judge into proceeding with the trial without requiring the state attorney to file a new information. Thus, under the doctrine of invited error Respondent is barred from raising this issue on appeal when he himself induced it at trial. See, Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984); Sullivan v. State, 303 So.2d 632 (Fla. 1974); Castle v. State, 305 So.2d 794, 797 (Fla. 4th DCA 1974); Stanley v. State, 357 So.2d 1031, 1034 (Fla. 3d DCA 1978).

The doctrine of invited error, under which a party cannot complain on appeal of error for which he is responsible, is well-established in the Florida courts. See, 3 Fla.Jur.2d, Appellate Review §294. The doctrine most clearly applies when the defendant affirmatively requests the error, acquiesces therein, or fails to object thereto. Francois v. Wainwright, 741 F.2d 1275, 1282 (11th Cir. 1984).

The record is absolutely clear the trial court was well-aware that the filing of the amended information vitiated

the original information. The trial court was ready to grant a continuance due to the lateness of the filing. However, Respondent made a strategic decision to force the State to proceed on the second-degree felony as charged under the original information immediately, before the State had the opportunity to reword the information and perfect the charge against Respondent as a first-degree felony burglary. Thus, under the circumstances herein it is clear that all parties were traveling under the assumption that the original information was reinstated, and technically "refiled." The Respondent was obviously not prejudiced thereby, but rather benefited by going to trial on the original information.

The Fourth District relied on its opinion in Wilcox v. State, 248 So.2d 692 (Fla. 4th DCA 1971) for reversal of the conviction herein. The Wilcox case is, however, readily distinguishable from this case. In Wilcox the defendant was charged with having received or aided in the concealment of certain stolen property. Thereafter the State, with the consent of the court, amended the information to correct the description of the stolen property. Subsequently, the court entered an order granting the State's motion to withdraw the amended information. When the case was called for trial, the defendant, Wilcox, objected to being tried on the original information. The objection was overruled and Wilcox was tried and found guilty of the charge contained in the original information. This Court held:

> A comparison of the amended information with the original indicates that the

> amended information charges a totally different crime than that charged in the original information.
>
> * * *
>
> We cannot sanction the procedure that was here followed as harmless error. . . . [T]he procedure here employed contains a serious potential for the imposition of surprise and the consequent denial fo a fair trial.

Id. at 593, 694. At bar, it is clear the two informations charged the exact same crime. More importantly, Respondent sub judice did not object, nor claimed surprise, but rather prompted the trial court to proceed immediately on the original information as if the amended information had never been filed. Respondent therefore is not entitled to a new trial because a party may not invite error and then be heard to complain of that error on appeal. Pope v. State, supra; Rauso v. State, 425 So. 2d 618 (Fla. 4th DCA 1983); McKee v. State, 450 So.2d 563 (Fla. 3d DCA 1984); McIntyre v. State, 380 So.2d 1064 (Fla. 2d DCA 1980); Smith v. State, 344 So.2d 905 (Fla. 3d DCA 1977); Field v. State, 338 So.2d 249 (Fla. 3d DCA 1976)

The agreement between the parties sub judice for all intended purposes reinstated the original information. Judge Walden's dissenting opinion which presents the better reasoning to this issue is adopted by Petitioner herein, and reproduced in its entirety for the benefit of the Court as follows:

"The case presents a situation where a defendant

convinced the court to allow him to proceed to trial on an original information, rather than trying him on the more serious offense contained in the amended information. The record below reveals that the state filed a valid amended information shortly before trial, thus entitling appellant to a continuance. Instead of electing to delay the matter, appellant chose to proceed to trial on the original information and waive his legal right to require the state to refile the original charge. Appellant indicated he understood that if he were convicted on the original information it would be the same as if it were the pending information in all respects and that he could not later complain that the state had filed an amended information. Based on this understanding, the trial court vacated and set aside the original information. With the consent of the state and defense, the court proceeded on the original information, noting that in all respects the original information was a viable charging document on which appellant would be tried.

As the majority opinion recognizes, "appellant at least acquiesced in what may be styled as reinstatements of the original information, if he did not, indeed, sponsor it." Since appellant convinced the court to dismiss the perfectly valid amended information, upon appellant's waiver and understanding that he could not collaterally attack his conviction on these grounds, it would be unfair to now allow appellant to have his conviction invalidated for a technicality on the same grounds, to wit: that the trial court lost jurisdiction by dismissing the amended information.

Appellant's decision to rely on the original information would more fairly be viewed as the equivalent of implicitly amending the existing information. Florida courts have held that an implicit or tacit amendment does not divest the trial court jurisdiction. See Chanklin v. State, 369 So.2d 620 (Fla. 2d DCA 1979) (Appellant's plea of guilty to the crime of battery of a law enforcement officer after the state had properly laid a factual basis, even though the information failed to allege that he "knowingly" struck a law enforcement officer, constituted a tacit amendment of the information to properly charge that offense. Once the information was deemed to have been amended, jurisdiction was no longer a problem, and the judgment could not be collaterally attacked). See also Acton v. State, 457 So.2d 540, 541 (Fla. 2d DCA 1984) (Although an information erroneously charged appellant under section 893.13 rather than section 893.135, appellant's plea bargain was clearly premised upon the sentencing requirements of section 893.135 and the prosecutor laid a factual basis under that statute. If there was any doubt that the information failed to sufficiently charge the crime, the colloquies at the entry of the plea were sufficient to constitute an amendment to the information).

Moreover, any alleged error in the state's failure to refile an amended information was waived by appellant's failure to object timely. Suarez v. State, 95 Fla. 42, 115 So. 519, 521 (1928). Even if the trial court's acceptance of appellant's plea was technically error, it was error which was induced by appellant. Andrews v. State, 343 So.2d 844 (Fla. 1st DCA 1976) (Appellant

pled guilty to aggravated assault, but the information did not allege use of a deadly weapon. On appeal, appellant complained he was convicted of a crime for which he was not charged. The First District reasoned that appellant's argument was purely a technical one, since appellant's attorney had asked that appellant be allowed to plead guilty to the "lesser included offense of aggravated assault." The First DCA stated that if the trial court's acceptance of appellant's plea was error, it was error which was induced by appellant. The court noted that it would have been very easy at the time for the state to have filed an amended information charging aggravated assault. The court concluded that under the circumstances, the error was harmless rather than fundamental, and appellant could not take advantage of an error which he himself induced).

Under the reasoning expressed in the above cases, there does not appear to be an abuse of discretion by the trial court. I would affirm." See Appendix, pages 8-11.

Under the particular circumstances of this case, the judgment below must be affirmed under the doctrine of invited error.

CONCLUSION

WHEREFORE based on the foregoing analysis and authorities cited, Petitioner respectfully requests this Court answer the certified questions in the AFFIRMATIVE, QUASH the District Court's opinion of February 3, 1988 and AFFIRM the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner on the Merits has been furnished, by courier, to JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401 this 4th day of April, 1988.

Of Counsel