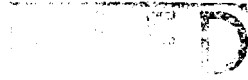


IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 JACKIE ANDERSON,)
)
 Respondent.)
 _____)

CASE NO. 72,051



APR 25 1988

CLERK OF THE COURT
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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellant in the court below and the defendant in the trial court. Petitioner was the Appellee in the court below and the prosecution in the trial court. All emphasis in this brief is supplied by Respondent unless otherwise indicated. A copy of the district court's opinion is attached to the brief as the appendix.

The following symbols will be used:

"R"	Record on appeal
"SR"	Supplemental Record on Appeal
"A"	Appendix

STATEMENT OF THE CASE AND FACTS

Respondent would accept Petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

Because a defendant may not waive, or consent to, a trial court's jurisdiction, the concept of invited error cannot be used to overcome the trial court's lack of jurisdiction.

Only the state had the authority to bring the original charge against Respondent. This could only be done by refileing the charge. The trial court had no authority to revive the original charge.

ARGUMENT

THE TRIAL COURT LACKED JURISDICTION TO TRY
RESPONDENT FOR THE OFFENSE OF BURGLARY.

In this case the Fourth District Court of Appeal has 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.

(A8).

Thus, the district court has presented two questions to this Court. One involves the concept of invited error. The other involves the concept of revival of an extinguished information. Both questions will be discussed below.

A. Invited error

Petitioner argues that there was error -- trying the charges without jurisdiction -- but that the error was invited or waived.¹ It is well-settled that jurisdiction is the very power of the court to hear a cause and cannot be waived, or conferred upon the court by agreement. Lane v. State, 388 So.2d 1022 (Fla. 1980); Rodriguez v. State, 441 So.2d 1129 (Fla. 3d DCA 1983); Dicaprio v. State, 352 So.2d 78 (Fla. 4th DCA 1977);

¹ Jurisdiction is determined solely from the face of the information. Allen v. State, 463 So.2d 351, 360 (Fla. 1st DCA 1985); Sullivan v. State ex rel. McCrory, 49 So.2d 794, 797 (Fla. 1951). Once an amended information had been filed, the original information had been vitiated. Wilcox v. State, 248 So.2d 692, 694 (Fla. 4th DCA 1971); 42 C.J.S. Indictments and Informations § 78. Once the amended information was dismissed, there was no jurisdiction to try the burglary charge on the original information. Wilcox, supra.

Cancela v. State, 2 So.2d 859, 147 Fla. 500 (Fla. 1941); Florida Nat. Bank of Jacksonville v. Kassewitz, 25 So.2d 271, 156 Fla. 761 (Fla. 1946); Brautigam v. MacVicar, 73 So.2d 863 (Fla. 1954); Wilson v. State, 487 So.2d 1130 (Fla. 1st DCA 1986) (the appellant was not estopped from arguing lack of jurisdiction even where he consented to the error). Thus, the concept of invited error does not apply to the situation where there is a lack of jurisdiction.

B. Revival of the extinguished information

Petitioner does not address this question. However, because this question has somewhat more merit than the concept of "invited error". Respondent will address it.

After the state had decided to withdraw the amended information, Respondent decided to proceed to trial on the original information after the trial court informed him that the state was going to proceed on the original information and that he had the right to require the state to refile the original information (SR3). Respondent indicated that he understood his rights. The trial court then indicated that the case would proceed on the original information.²

² This issue is somewhat different than the issue involving invited error. In arguing invited error it was urged that the trial court can act without jurisdiction if done with the Respondent's consent. Whereas the present issue deals strictly with whether the original information was revived thus giving the trial court jurisdiction, and not whether a trial court can act without jurisdiction.

An analogous situation to the present case is presented in Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68 (Fla. 1978). In Randle this Court held that a voluntary dismissal of a complaint by the plaintiff divested the trial court of any jurisdiction to relieve the plaintiff of the dismissal. In essence, this Court held that once the plaintiff had dismissed his complaint, the trial court had no authority to try to revive the dismissed proceeding. This Court noted that while a plaintiff has the privilege of dismissing a complaint, the dismissal privilege also carries with it a risk that the "action taken may prove prejudicial to the ultimate success of the litigation." 360 So.2d at 69.

Like the court in Randle, when the state chose to dismiss the information against Respondent, the trial court was divested of jurisdiction to reinstate the original complaint. Like the plaintiff in Randle, in this case the state had the responsibility of ensuring that a valid complaint was filed before the trial commenced. Once the amended information was dismissed, the state was required to file a new information.

There is no constitutional or statutory authorization for the trial court to revive an information as an alternative to the requirement that the state file a new information. Nor is it the defendant's responsibility to do the state's job and ensure that he is properly charged with a crime. Cf. Stuart v. State, 360 So.2d 406, 413 (Fla. 1978) (it is not defendant's duty to do state's job in ensuring that the case is not discharged due to a speedy trial violation). Contrary to Petitioner's assertions,

the state was not forced by Respondent, or the trial court, to proceed to trial on a lower degree felony. At the time of trial, the state still could have proceeded under the amended information, or could have filed a new information charging the first degree felony. However, the state specifically chose to try Respondent on the second degree felony, thus abandoning any idea of prosecution of the first degree felony. The charge Respondent was to be tried for was solely up to the discretion of the state. The original charge could not be revived by the trial court. The failure of the state to file a new information deprived the trial court of jurisdiction.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities cited herein, Respondent respectfully requests this Honorable Court to affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 21 day of April, 1988.



Of Counsel