IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO: 72,065
	)	
LEON CECIL WILKINS,	)	
	)	
Respondent.	)	
	)	

PETITIONERS BRIEF ON THE MERITS

Respectfully submitted,

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the appellant in the District Court of Appeal of the State of Florida, and the prosecuting authority at trial, and Respondent, Leon Cecil Wilkins, was the appellee in the District Court and the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, the Honorable Richard B. Burk, presiding. The parties herein are referred to as they appeared at trial and as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE AND FACTS

This is an appeal by the State from an order of the trial court granting the defendant's motion to dismiss the amended information. (R 30). The stated basis of the order was the trial court's finding:

> That the State presented no justifiable grounds for enhancing the charges in the Amended Information.

(R 30).

The record reveals that a mistrial was granted on or about August 5, 1985, in a trial upon the original information which charged attempted robbery and battery. (R 8, 13, 24). The defense Motion to Dismiss represents the reason for the mistrial was that the jury was deadlocked. (R 24). The information was amended on August 11, 1986, by the addition of the words "and in the commission of said Robbery did use a deadly weapon, to-wit: a rock." (R 19). This changed the statute from §812.13(2)(c) to §812.13(2)(a). (R 13, 19).

By an unsworn motion, dated August 12, 1986, the defendant moved to dismiss the amended information. (R 23-24). An unsworn memorandum of law and fact accompanied the Motion to Dismiss. (R 25-29). No testimony or other evidence was presented by the defendant in support of his motion.

The trial court granted the motion, the State filed a notice of appeal (R 31), and the trial court granted a

continuance until 90 days after the district court of appeal enters its mandate. (R 36). The issuance of the mandate has been stayed pending review by this Court.

SUMMARY OF THE ARGUMENT

There is no double jeopardy issue present. There was no impermissible motive found on the part of the State Attorney in filing the amended information. Also, the defendant's motion was not verified. The trial judge's order was based upon a finding that the State did not present justifiable grounds to "enchance" the charges in the amended information. The trial judge's order infringes upon the State Attorney's exclusive discretion to bring charges against criminal defendants and violates the separation of judicial and executive powers.

The dicta in this Court's opinion in Weed v. State, 411 So.2d 863, 865 (Fla. 1982), seems to indicate there is a presumption of prosecutorial vindictiveness which arises whenever the state amends an information by enhancing charges after a mistrial, even if the mistrial does not result from the assertion by the accused of any right, but rather from a deadlocked jury. The bases of this dicta, which was approved by this Court as stated in the opinion of the First District Court of Appeals in State v. Weed, 373 So.2d 42, at 44 (Fla. 1st DCA 1979) are 1969 and 1974 United States Supreme Court opinions and a 1974 District of Columbia Circuit of Appeals decision. In recent decisions of the Eleventh Circuit Court of Appeals the presumption has been abolished. The United

States Supreme Court has denied certiorari, leaving the Eleventh Circuit decisions as current Federal precedent, and which would require reversal of the trial court.

ARGUMENT

POINT ON APPEAL

WHETHER A PRESUMPTION OF PROSECUTORIAL VINDICTIVENESS ARISES WHEN THE STATE AMENDS AN INFORMATION BY ENHANCING CHARGES AFTER A MISTRIAL RESULTING FROM A DEADLOCKED JURY OR OTHER CIRCUMSTANCE NOT INVOLVING THE ASSERTION BY THE ACCUSED OF A PROTECTED RIGHT.

A mistrial following a hung jury is not an event which terminates original jeopardy, and therefore, there is no double circumstances involving the mistrial upon the original information. United States Constitution, Amendment 5; Berry v. State, 458 So.2d 1155 (Fla. 1st DCA 1984); United States v. Corona, 804 F.2d 1568, rehearing denied, 812 F.2d 1415 (11th Cir. 1987), certiorari denied, 481 U.S. ____, 107 S.Ct. 1896, 95 L.Ed.2d 503 (1987).

Having a clean state before him after the mistrial, the State Attorney was authorized to amend the information by filing a signed and sworn to "Amended Information". (R 19-20). There was no jury sworn subsequent to the mistrial. The speedy trial rule was not involved in the trial court's decision. Because the "amended" information was signed and sworn to, leave of the trial court was not necessary. State v. Stell, 407 So.2d 642 (Fla. 4th DCA 1981).

The filing of a signed and sworn to amended information has the legal effect on the original information of a nolle prosequi. Stell; State v. Belton, 468 So.2d 495 (Fla. 5th DCA 1985). The decision to nolle prossequi an information is vested solely in teh discretion of the State. State v. Burnett, 468 So.2d 1119 (Fla. 4th DCA 1985).

None of the grounds enumerated in Florida Rule of Criminal Procedure 3.190(c) are present sub judice. The defendant claimed a violation of double jeopardy rules, prosecutorial vindictiveness, and racial motivation, but cited only cases involving de novo trials after appeal. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 59 (1969); Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); and a case where the defendant had moved for a mistrial at the initial trial because of a due process violation, to wit: Murphy v. State, 453 N.E.2d 219 (Ind. 1983).

Notwithstanding the foregoing, the trial judge's stated reason for granting the motion was not based upon any impermissible motive on the part of the State Attorney, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights. Rather, the trial judge assumed a presumption of prosecutorial vindictiveness had arisen merely because the jury had become deadlocked and the State had amended the charges.

That the State presented no justifiable

> grounds for enhancing the charges in the Amended Information.

(R 30).

The District Court below affirmed solely upon the basis of this Court's dicta in Weed v. State, 411 So.2d 863, 865 (Fla. 1982), which approves the First District's opinion in State v. Weed, 373 So.2d 42, at 44 (Fla. 1st DCA 1979) which cites to the above United States Supreme Court cases and to United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974). In Jamison, the defense obtained a mistrial based upon ineffective assistance of counsel in a second-degree murder trial and the government subsequently re-indicted the defendants for first-degree murder. The court in Jamison was rightly concerned that permitting an increase in charges, without justification, after the defendant asserted his right to effective assistance of counsel and obtained a mistrial, would have a chilling affect upon defendants' due process rights. However, the instant case does not involve such an assertion by Wilkins. The mistrial was not obtained by either party, but was the result of a deadlocked jury.

Also, the deadlocked jury meant that the initial trial was not completed. Therefore United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), where prosecutors increased the charges after the defendant asserted his right to trial by a jury, does not support Wilkins. Below,

Respondent cited Goodwin as support for his argument that "application of a presumption of vindictiveness [is] therefore more justifiable, in a charging decision made after trial, rather than before trial." The United States Supreme Court really wrote: "Thus a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." 457 U.S. at 381, 73 L.Ed.2d at 85. The presumption of prosecutorial vindictiveness described in Goodwin does not arise where the trial is not completed because of a jury deadlock over which neither had control.

> A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.

457 U.S. at 382, 73 L.Ed.2d at 86.

The United States Supreme Court then noted that prosecutors are not infallible, and that plea negotiations often give rise to the use of "additional charges," or else the process could not survive. Id. U.S. 378 n.10, 382 n.14, L.Ed.2d 84 n.10, 86 n.14.

Recent cases from the United States Court of Appeals for the Eleventh Circuit specifically hold there is no presumption of prosecutorial vindictiveness from the adding of

charges to an indictment following a mistrial caused by a jury deadlock. United States v. Corona, 804 F.2d 1568, rehearing denied, 812 F.2d 1415 (11th Cir. 1987), certiorari denied, 481 U.S. 107 S.Ct. 1896, 95 L.Ed.2d 502 (1987); United States v. Mays, 738 F.2d 1188 (11th Cir. 1984). As the District Court stated below, Mays represents the modern, enlightened view on the issue of prosecutorial vindictiveness under circumstances such as are present in the instant case. State v. Wilkins, ___ So.2d ___, 13 F.L.W. ___, (Fla. 4th DCA March 2, 1988).

Clearly, there is no presumption of prosecutorial vindictiveness. The defendant's unsworn motion and memorandum presented no evidence to the trial court support a finding of prosecutorial vindictiveness, had one ever been made. Therefore the trial court erred by granting the motion to dismiss on the basis that the State had presented no grounds for enhancing the charges where the defendant had made no threshold showing of facts to support his Fla. R. Crim. P. 3.190(c) motion.

Also, the defendant and his counsel failed to swear to the motion to dismiss and to the memorandum of law, both of which contained numerous allegations of fact. Therefore, the motion was not properly considered by the trial court. Fla. R.Crim. P., Rule 3.191(c)(4); State v. Lewis, 463 So.2d 561 (Fla. 2nd DCA 1985).

The State must be afforded the opportunity to present its case in a trial. It is not the function of a trial judge to determine what charges should or should not be brought against a criminal defendant. That is within the sole executive discretion of the State Attorney's office. State v. Bloom, 497 So.2d 2 (Fla. 1986).

If, after the State has presented its case, and a proper motion is made, then the trial court may determine if a prima facie case exists, State v. Bailey, 12 F.L.W. 1339 (Fla. 4th DCA, May 27, 1987), not before. In this case the trial judge exceeded his authority and stepped over the line separating judicial and executive powers. His order must be reversed.

CONCLUSION

This Court should adopt the modern, enlightened view on the issue of prosecutorial vindictiveness as represented in United States v. Mays and United States v. Corona, supra.

The District Court's decision affirming the trial court's order granting the motion to dismiss the amended information should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been sent by courier to Anthony Calvello, Assistant Public Defender, 9th Floor, Governmental Center, 301 N. Olive Avenue, West Palm Beach, Florida 33401, this 4th day of April, 1988.

Of Counsel