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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The symbol "R" will denote Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following additions and clarifications:

Respondent was originally charged with attempted robbery and simple battery. A jury trial was commenced on these charges. On August 5, 1986 a mistrial was declared in this cause when the jury became deadlocked.

On August 11, 1986, the original information filed against Respondent was amended by substantially increasing the offenses charged against Respondent. Count I was increased to a first degree felony of attempted armed robbery through the additional allegation "of a deadly weapon". Count II of the information was increased from simple battery to a second degree felony, aggravated battery.

On August 12, 1986 Respondent filed a Motion to Dismiss the amended information (R 23) and a memorandum of law in support of said motion. R 25-29. A hearing was held on Respondent's motion to dismiss the information. R 30. The trial judge expressly ruled that "the State presented no justifiable grounds for enhancing the charges in the amended information." R 30.

SUMMARY OF THE ARGUMENT

After a mistrial was declared, the prosecutor significantly enhanced the charges filed against Respondent through the amended information. Respondent's Motion to Dismiss the Amended Information was granted by the trial judge. The trial court expressly ruled that "the State presented no justifiable grounds for enhancing the charges in the Amended Information." R 30. The due process protection afforded by the United States Supreme Court in a line of cases was logically extended to deter prosecutorial vindictiveness following the declaration of the mistrial. The trial judge's decision is supported by this Court's decision in Weed v. State, 411 So.2d 863, 865 (Fla. 1982).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS THE ENHANCED AMENDED INFORMATION

The trial court granted Respondent's Motion to Dismiss the Information. Respondent contends that the trial judge did not err in granting his Motion to Dismiss the enhanced Amended Information. As detailed in Respondent's Motion to Dismiss (R 23-29), Respondent presented no justifiable basis for enhancing the charges in the amended information subsequent to the granting of the motion for mistrial. The trial court granted Respondent's Motion to Dismiss the Information. This ruling of the trial court comes to this Honorable Court clothed in the presumption of correctness. DeConingh v. State, 433 So.2d 501 (Fla. 1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 995 (1984). It was incumbent upon Petitioner to demonstrate error. This Petitioner has failed to do.

The Court in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969), held that an increased sentence imposed by a judge on retrial following appeal gives rise to a presumption of vindictiveness, which may unconstitutionally deter a defendant's due process right to appeal. To free the defendant of any apprehension that such a retaliatory motivation exists, the presumption can only be rebutted by requiring the judge to affirmatively state in the record reasons for his increased sentence based on information concerning objective, identifiable conduct occurring after the original sentence.

A prosecutor's decision to reindict a defendant is limited by the due process clause. Blackledge v. Perry, 417 U.S. 21, 25, 94 S.Ct. 2098, 2101 (1974). In United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485 (1982), the Supreme Court said that prosecutorial vindictiveness was more likely, and application of a presumption of vindictiveness therefore more justifiable, in a charging decision made after trial, rather than before trial. This is because a prosecutor's assessment of the proper extent of the prosecution should crystallize by the time the initial trial begins, and the institutional biases inherent in the judicial system disfavor the retrial of issues already decided.

The due process protection afforded by Blackledge was logically extended to deter prosecutorial vindictiveness following the declaration of a mistrial in United States v. Jamison, et. al., 505 F.2d 407, 416 (D.C. Cir. 1974). In that case, the defendants had been successful in obtaining the declaration of a mistrial order during their trial on a charge of second degree murder, and the prosecutor then had them indicted for first degree upon the same evidence. The Court stated:

"Although free to re prosecute appellants after their first trial was aborted, the government was not necessarily free to reindict them for a more serious crime than had been originally charged. On the contrary, we have concluded that, under the line of Supreme Court cases which began in 1969 with North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 [23 L.Ed.2d 656] (1969), the reindictment of defendants for first degree murder, absent any showing of justification for the increase in the degree of the crime initially charged, denied them due process of law."

Id. at 413 (Emphasis supplied).

* * *

"For a time it was uncertain whether due process required that criminal defendants be shielded as well from the danger of prosecutorial vindictiveness, and specifically from increases in the offense charged. We think the Supreme Court has now settled the question in Blackledge v. Perry,

Id. at 414.

The Circuit Court of Appeals held:

The question for us, therefore, is whether to differentiate between attacks which defendants make on the fairness of criminal proceedings before and after they are complete. We decline to draw such a distinction, primarily because of its 'implications ... for sound administration of justice.' United States v. Tateo, supra, 377 U.S. [463] at 466, 84 S.Ct. [1587] at 1589 [12 L.Ed.2d 448]. Imposing a ceiling on subsequent indictments after reversals but not after mistrials would discourage defendants from seeking mistrials when error prejudicial to them has occurred, whereas mistrial in such cases may represent a significant saving of judicial resources. At the same time it would encourage prosecutorial efforts to 'overreach' and induce mistrials on defendant's motion in exactly the way that the Supreme Court deplored in United States v. Tateo, supra, and United States v. Jorn [400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543], supra.

We conclude then that Pearce and Blackledge require restrictions on increased charges after mistrials. This does not mean that a higher charge can never be brought. Such a flat prohibition was explicitly rejected in Pearce..

Id. at 416 (Emphasis supplied).

In Weed v. State, 411 So.2d 863 (Fla. 1982), the defendants were arrested and charged on September 15, 1977 with possession of marijuana and possession of hashish. The trial on the charges was held on December 28-29, 1977 which resulted in a mistrial when the jury could not reach a verdict. Subsequently, the prosecutor moved to amend the marijuana count in order to allege that the defendant possessed more than five grams, the amount necessary to constitute a felony. The trial court allowed the amendment over the defendant's objection. Thereafter the trial court granted the defendant's motion to discharge the newly amended information. Subsequently, the state's motion to reinstate the misdemeanor marijuana charge was denied by the trial judge.

One issue resolved by this Court involved the application of the Fla.R.Crim.P. 3.171, speedy trial rule. In addition, this Court found it necessary to resolve a second question. That question was "whether the trial court's denial of the state's motion to reinstate the charge as a misdemeanor was correct." Id. at 864. Judge Adkins writing for the Court on the effect of the enhanced charge stated:

In the case sub judice, the state apparently made an error in the charging information by omitting a necessary element for the charge of felony possession of marijuana. After the mistrial the state attempted to amend the information to include all the elements of the felony. The trial court correctly analyzed applicable precedent, e.g. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), and properly allowed the amendment since the state had justified the harsher treatment in a way which negated the possibility of vindictiveness

Id. at 865 (emphasis supplied).

This Honorable Court correctly applied the presumption of vindictiveness test as delineated in North Carolina v. Pearce, supra to the situation in Weed. In turn, the Fourth District correctly ruled in the present case that the effect of this Court's decision in Weed was to raise a presumption of vindictiveness which the State must dispel by justification of the increased charges. This the State failed to do in the instant case.

Respondent substantially increased the charges from attempted robbery to attempted robbery with a deadly weapon under Count I and simple battery to aggravated battery under Count II. In the meantime nothing had occurred except that Respondent exercised his constitutional right to a jury trial. There was absolutely had no justification for the increase in the degree of offenses initially charged after the trial commenced because the prosecutor's assessment for the proper extent of the prosecution should have been established by the time Respondent's trial commenced. In Respondent's Motion to Dismiss, Respondent's trial counsel noted that prior to the original trial a deposition of the alleged victim was taken by defense counsel which was attended by the prosecutor. R 23. During this deposition, the victim stated that a large rock was used to hit him. R 23. The facts in the instant case clearly demonstrated that the State Attorney's Office was aware of the use of a deadly weapon from the time the probable cause affidavit was filed. R 27-28.

The prosecutor in the trial court failed to supply the trial judge with any basis for the increase. Petitioner does not suggest otherwise. Here the prosecutor failed to sustain the state's burden to overcome the presumption of vindictiveness which the state must dispel by justification of the increased charges. State v. Weed, 373 So.2d 42, 44 (Fla. 1st DCA 1979), reversed on other grounds, 411 So.2d 863 (Fla. 1982). When the prosecutor below failed to justify the harsher treatment of Respondent in a way which negates the possibility of vindictiveness the trial court was correct in granting Respondent's Motion to Dismiss the information. Weed.

The thrust of Petitioner's argument is that the State, in this circumstance, is utterly free to charge any additional enhanced offense without any due process constraints or restrictions. This extreme position is even labeled "the modern, enlightened view on the issue of prosecutorial vindictiveness under circumstances such as are present in the instant case." (Petitioner's brief, P. 10). However Petitioner has utterly failed to acknowledge that Pearce and Blackledge require restrictions on increased charges after a mistrial. There is no question in the instant case of the increased harshness of the enhanced charges filed against Respondent after the mistrial was declared.

The shelter afforded by Pearce and Blackledge was logically extended to deter prosecutorial vindictiveness following the declaration of a mistrial in Weed. As the Weed court indicated there is no constitutional bar prohibiting the filing of enhanced

offenses after a mistrial rather a presumption of vindictiveness is created which the State is given an opportunity to rebut. The Weed decision strikes a delicate balance between the rights of the defendant and the prosecution. Petitioner seeks to destroy this delicate balance and replace it with carte blanche for the prosecution. The judicial history of decisions involving judicial and prosecutorial vindictiveness is now clear enough to teach that it is a mistake to measure cases in this area of the law against fixed guages. The balance struck in Weed must be preserved.

Petitioner's "fall-back" position concerning Respondent's failure to swear to the facts in the motion to dismiss is without merit. First this issue was not raised by the prosecutor in the trial court and thus waived now on appeal. In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on review must be part of that presentation if it is to be considered preserved for review. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985). Second, there is a presumption of vindictiveness due to the increased charges, it was incumbent upon the prosecution to rebut the presumption.

Therefore based on the arguments contained herein, the trial court did not err in granting Respondent's Motion to Dismiss the information. The decision of the Fourth District Court of Appeal should be affirmed.

CONCLUSION

Therefore based on the Argument contained herein, the trial court did not err in granting Respondent's Motion to Dismiss the information. The opinion of the Fourth District Court of Appeal in the instant case should be affirmed.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 820-2150

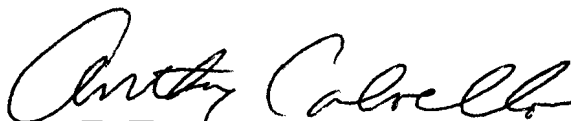
BY



ANTHONY CALVELLO
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Robert S. Jaegers, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, this 26th day of April, 1988.


Of Counsel