

FLORIDA SUPREME COURT

FILED
THOMAS D. HALL
JAN 18 2002
CLERK, SUPREME COURT
BY _____

JAMES KING,

Appellant,

CASE NO. : SC01-1883

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF ON THE MERITS

On appeal from a question certified by
the Fifth District Court of Appeals
in Case No. 5D00-1518

NEAL T. MCSHANE, ESQUIRE
Florida Bar No. 273740
836 North Highland Avenue
Orlando, Florida 32803
(407) 648-1500
Fax (407) 648-2027
E-mail MCSHANELAW@aol.com
Attorney for Appellant/Defendant
James King

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	6
CERTIFICATE OF COMPLIANCE	8
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

	Page
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	4-6
<i>Winter v. State</i> , 781 So.2d 1111 (Fla. 1 st DCA 2001)	2-3
<i>Zanger v. State</i> , 548 So.2d 746 (Fla. 4th DCA 1989)	1
Art. IV, § 4(c), Florida Constitution	1
§ 16.56(1)(a), Florida Statutes	1

ARGUMENT

The State has done an artful job, attempting to obscure and confuse the issues and facts in this case in its Answer Brief. Nevertheless, the Office of the Statewide Prosecutor [OSP] is a creature of the Florida Constitution and statutes that specify and limit the OSP's jurisdiction and authority to prosecute. See Art. IV, § 4(c), Fla. Const.; §16.56(1)(a), Fla.Stat.; *Zanger v. State*, 548 So.2d 746 (Fla. 4th DCA 1989). Under the applicable constitutional provision, the Statewide Prosecutor has "concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is affecting or has affected two or more judicial circuits as provided by general law." Art. IV, § 4(c), Fla. Const. Despite the State's attempt to expand the OSP's "concurrent jurisdiction with the state attorneys" over purely local crimes, § 16.56(1)(a), Florida Statutes, expressly provides that the OSP "may ... [i]nvestigate and prosecute" several enumerated crimes, but "[t]he office shall have such power *only* when such offense is occurring, or has occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits." [Emphasis added.]

Although the State claims that there was evidence to support the Statewide Prosecutor's jurisdiction and authority to prosecute King for the charged Orange County crimes in this case, the State erroneously relies on purported "findings" by the Fifth District that are not supported by any competent, admissible evidence presented at trial. In fact, as the State repeatedly admitted in its Answer Brief, no evidence was presented to the jury during King's trial to prove that the charged crimes were part of related transactions in other counties. Indeed, there was no competent, admissible evidence submitted to the judge in the proffer the Statewide Prosecutor made outside the presence of the jury to prove that the charged offenses were actually related to other uncharged crimes or related transactions in other counties.

The State's erroneous, confusing arguments about subject matter jurisdiction that have little, if anything, to do with the issues in this case, spans several pages of its Answer Brief. But, both the Fifth District, in King's case, and the First District, in *Winter v. State*, 781 So.2d 1111 (Fla. 1st DCA 2001), consistent with prior case law, recognized that the Statewide Prosecutor may generally allege jurisdictional facts in the charging document sufficient to invoke the subject matter jurisdiction of the court. King does not dispute that general concept. However, in the prior cases, multiple counties were actually identified in the charging document

and, thus, there was no basis for challenging the Statewide Prosecutor's jurisdiction because the crimes charged were all "local offenses." In King's case, none of the three informations filed against him either identified any other county supposedly connected to the charged Orange County crime by "related transactions" or the supposedly "related transactions."

Nevertheless, the basic question in this case is whether the judge or the jury must decide disputed facts when the OSP's jurisdiction and authority to prosecute a case are challenged at trial because of an alleged failure of proof. In *Winter*, the First District expressly recognized that, in cases like King's and Winter's, a defendant has a right to challenge disputed jurisdictional facts alleged by the Statewide Prosecutor. A defendant is not limited to challenging just the sufficiency of the allegation of jurisdictional facts pleaded in an indictment or information by pretrial motions, as the State suggests in its Answer Brief. Thus, contrary to the State's attempts to conjure up images that the Court's ruling on the issues in this case will somehow open a floodgate of jurisdictional challenges by defendants previously convicted by the Statewide Prosecutor on technical pleading grounds, that is simply not the case.

King asserts that, as a matter of due process, *when a defendant asserts a failure of proof or disputes the factual basis of the Statewide Prosecutor's*

generally-alleged jurisdiction and authority to prosecute a case at trial, the Statewide Prosecutor must prove the requisite jurisdictional facts beyond a reasonable doubt, by competent, admissible evidence submitted to the jury. Relying on the U. S. Supreme Court's due process analysis in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), King asserts that both the Fifth and First Districts were wrong in holding that factual disputes concerning the Statewide Prosecutor's jurisdiction and authority to prosecute are to be determined by a judge, outside the jury's presence.

In challenging King's reliance on *Apprendi*, the State attempted to limit *Apprendi*'s application by misconstruing and focusing solely on the U.S. Supreme Court's ultimate conclusion that "... [i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." The State apparently expects this Court to now ignore the U.S. Supreme Court's lengthy analysis of the concepts of fundamental due process that led to its conclusion. Indeed, according to the State, "*Apprendi* provides no basis upon which to conclude that a jury must find, beyond a reasonable doubt, that subject-matter jurisdiction lies in the circuit where the case is tried. To rule otherwise would result in an additional essential element to be proven in all criminal cases...." [Answer Brief, p. 17]

The U.S. Supreme Court's often-quoted conclusion in *Apprendi* is not, however, the sum of the substance of that court's examination of the basic due process concepts that underlie our criminal justice system, as the State would now have this Court interpret it. In *Apprendi*, the U.S. Supreme Court found the New Jersey hate-crime statute at issue was unconstitutional because the statute set up a bifurcated system that delegated part of the fact-finding process of a defendant's conviction and sentencing to the judge. The New Jersey statute permitted the judge to make findings of fact necessary to classify a crime as a hate-crime at a defendant's sentencing, by a mere preponderance of the evidence. The U.S. Supreme Court recognized that such a bifurcated system denied the defendant his right to be informed of the allegations against him before trial and a full and fair opportunity to adequately challenge the competence, admissibility and reliability of the evidence and witnesses presented at trial.

The U.S. Supreme Court recognized that the delegation of a jury's traditional fact-finding role to the trial judge essentially relieves the state of its burden to prove the defendant's guilt of the crime for which he was sentenced, but not necessarily charged, by competent, reliable evidence demonstrating his guilt beyond a reasonable doubt, as required by the due process clause of the U.S. Constitution. The court found that delegation of fact-finding responsibility to the judge in a criminal

case does not carry with it the indicia of reliability required by the due process clause to support a conviction. The court's ultimate conclusion that prior convictions may be used to enhance a defendant's sentence without being submitted to the jury was based on the court's recognition that there is a presumption that the defendant was provided due process when he was previously convicted.

Contrary to U.S. Supreme Court's reasoning and examination of due process requirements in *Apprendi*, both the Fifth and First Districts would unconstitutionally relieve the Statewide Prosecutor of the burden of proving all the disputed facts alleged in informations and indictments filed by the OSP beyond a reasonable doubt to the jury. Both Districts have unconstitutionally authorized the Statewide Prosecutor to prove a general jurisdictional allegation to the trial judge by some lesser, unidentified standard of proof, without examination of the admissibility of the evidence proffered, in much the same manner as the unconstitutional New Jersey hate-crime statute did. Notwithstanding the State's dire predictions, requiring the Statewide Prosecutor to prove disputed jurisdictional facts to the jury is no more of an onerous burden on the OSP than requiring the state to prove the facts that justify the enhancement of a defendant's sentence to the jury.

CONCLUSION

The Court should not be misled by the State's obfuscation. This Court must

examine the Fifth District's decision in King's case in light of the applicability of both *Winter* and *Apprendi* and reject the Fifth District's public policy justification for upholding his conviction. This Court must recognize and apply the basic due process concepts reiterated in *Apprendi* and reject both the First and the Fifth Districts' determinations that it is sufficient for the OSP to demonstrate its jurisdiction to prosecute a case by a proffer of incompetent, inadmissible evidence to the trial judge, outside the presence of a jury. As the United States Supreme Court recognized in *Apprendi*, such a process as that now urged by the State, does not bear the same indicia of reliability as a jury's fact-finding beyond a reasonable doubt, as required by the due process clause to support a conviction.

This Court must recognize that the facts necessary to confer jurisdiction on the OSP to prosecute any case are an essential element of any offense prosecuted by the OSP and, therefore, must be sufficiently alleged in an indictment or information to put a defendant on notice of the actual charges he is facing. When those facts are disputed, or when a failure of proof is alleged, the OSP must be required to prove requisite jurisdictional facts to a jury beyond a reasonable doubt by competent, admissible evidence. Just as the First District did in *Winter*, this Court must reverse appellant James King's conviction because the OSP did not sufficiently allege or prove the facts necessary to demonstrate its jurisdiction to prosecute King in this

case. THEREFORE, JAMES KING respectfully requests that the Court reverse and vacate his conviction.

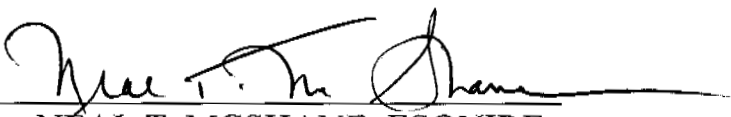
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellant's Initial Brief on the Merits was provided to AGA Carmen F. Corrente, Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118 this 16th day of January, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been produced in compliance with the requirements of Rule 9.210(a)(2), Fla.R. App.P., in 14 pt. Times New Roman font. In accordance with the Court's February 5, 1999 Administrative Order, a copy of Appellant's Reply Brief on the Merits is contained on the 3 1/2" computer disk, in WordPerfect 9 format, that was filed together with this brief.

LAW OFFICES OF NEAL T. MCSHANE, P.A.


By: NEAL T. MCSHANE, ESQUIRE
Florida Bar No. 273740
836 North Highland Avenue
Orlando, Florida 32803
(407) 648-1500
Fax (407) 648-2027
Attorney for Appellant/Defendant
James King