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IN THE

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SUPREME COURT OF THE UNITED STATES

United States Supreme Court Case No.:
Supreme Court of Florida Case No.: SC21-1460
Second District Court of Appeals Case No.: 2D21-1405

IN RE JASON FEISTER
PETITIONER

v.

THE STATE OF FLORIDA
RESPONDENT

On Petition for Writ of Certiorari the Petitioner named above, Jason Feister, respectfully applies, pursuant to Article III of the Constitution of the United States, for Writ of Certiorari to the Second District Court of Appeals of Florida.

In support of this petition, Petitioner states as follows:

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ORIGINAL

Date filed or docketed:

Date leave was granted or jurisdiction postponed:

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REB13030903

ISSUES BEING PRESENTED

THE ISSUE BEING PRESENTED IS WHETHER THE SECOND DISTRICT'S ORDER VIOLATES THE PETITIONER'S RIGHT TO DUE PROCESS.

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LIST OF PARTIES

All parties do not appear in the caption of the case. A list of all parties to the proceeding in the Court subject to this petition is as follows:

The Supreme Court of Florida
Supreme Court Building
500 S. Duval Street
Tallahassee, Florida
32399

The Second District Court of Appeals of Florida
P.O. Box 327
Lakeland, Florida
33802

The Attorney General's Office
3507 E. Frontage Rd. Suite #200
Tampa, Florida
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RELATED CASES

Feister v. State No.: 2D21-1405 Second District Court of Appeals of Florida

Feister v. State No.: SC21-1460 The Supreme Court of Florida Judgment
Entered January 27, 2022.

Feister v. State No. SC22-10 The Supreme Court of Florida

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the highest state court appears at Appendix B to the petition and is unpublished. The decision was entered on January 5, 2022. (PG. 25)

The order of the Second District Court of Appeals for Florida appears at Appendix A to the petition and is unpublished. A copy of the order denying rehearing appears at Appendix C. (PG. 24 AND 26)

THIS PETITION SEEKS REVIEW OF THE DECEMBER 15, 2021 ORDER WHICH APPEARS AT APPENDIX A. (PG. 24)

JURISDICTION

The date on which the highest state court decided my case was February 23, 2022.

A copy of that decision appears at Appendix C.

A motion for review of the order was filed with the Supreme Court of Florida and a copy of that decision appears at Appendix B, and this petition is timely, under 28 U.S.C.A. § 2101.

The jurisdiction of this Court is invoked under Article III United States Constitution and 28 U.S.C.A. § 2101(e).

The Petitioner's assertions of individual autonomy have been disregarded, and efforts to press his contention unsuccessful.

The Petitioner's federal constitutional rights have been, and are being, violated. There exists no other adequate means to attain relief, and unless action to bring the lower court within its jurisdiction is promptly taken the Petitioner's substantial rights will be irrevocably damaged.

This error is capable of repetition and the Petitioner believes this issue raises an important question of federal law which has not been, but should be, settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to Article 7 of the United States Constitution

Section 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, property without due process of law; nor deny any person within its jurisdiction equal protection of the laws.

STATEMENT OF FACTS

On September 28, 2020, Officer Tyler Busch, of the Pinellas County Sheriff's Office, investigated a disturbance and, after determining that no crime had been committed, everyone left the scene.

In his report he stated that nothing physical had occurred and indicated no one was injured.

About three weeks later during an unrelated investigation the same officer responded and when he arrived at the scene did an about face and claimed that he had witnessed an injury.

Subsequently, the prosecuting officer of the court swore to the facts of the alleged crime which Officer Busch gave him.

On the day of trial, an assistant prosecuting officer made an instant oral motion to eliminate the element of bodily harm from the information and, more importantly, failed to explain any lawful reason for the so called amendment.

The amendment was not verified, and the circuit court began trial on a separate offense without a valid charging document.

During trial the prosecuting officer claimed the Defendant had caused bodily harm and expressly stated he was not being required to prove it.

STATEMENT OF THE CASE

On October 12, 2020, officers arrested the Petitioner based on an injury which he had allegedly caused on September 27.

Based upon this allegation of bodily harm the Petitioner was arraigned and the prosecuting officer of the court filed an information charging the Petitioner with a violation of Florida Statute § 784.03(1)(a)(2).

After the trial proceedings began, the State under the guise of an amendment, made an instant oral motion to eliminate a substantial portion of the statute from the charging document, and charge the Defendant with a separate offense.

The amendment was not under oath and, being an amendment of substance, the information should have been refiled.

A circuit court must confine itself strictly to the allegation in the charging document and a new information must be drawn and filed to make an amendment which changes the statement of the offense, so absent a valid charging document the trial court lacked jurisdiction to proceed.

The procedure employed was contrary to law and allowing a substantial alteration to the information after it was sworn to and filed had the legal effect of a nolle prosequi.

FAILURE TO SIGN OR SWEAR

When an informal alteration is made to the statement of the offense the oath no longer holds¹ and in this case the record undisputedly demonstrates that the State made an instant oral motion to amend the elements of the offense after it was filed.

A circuit court can have jurisdiction over the subject matter and parties in a fundamental sense but lack power to hear or determine a particular matter without the occurrence of the procedural prerequisites set forth in Article I Section 15(a) of the Florida Constitution.

Therefore, if a Defendant is tried on an information which does not conform with the signature and oath requirement, he is entitled to reversal of his conviction.²

¹ '[An] instant amendment to the information after it was sworn to and filed does not conform to Art. I, Sec. 15(a) Florida Constitution which requires an information under oath filed by the prosecuting officer of the court.'

Polakoff v. State, 586 So. 2d 385 (Fla. 5th DCA 1991)

² *Alba v. State*, 541 So. 2d 747 (Fla. 3d DCA 1989).

THE EFFECT OF AN UNAUTHORIZED AMENDMENT

A substantive alteration to the elements of the offense after the information has been sworn to and filed serves as the legal equivalent of a nolle prosequi.

An existing information may not be amended unless the change merely a matter of form so a revision which does not clarify or correct a formal defect but rather restates the elements of the offense reduces the charging instrument to a nullity, and therefore the court has no judicial power to proceed to trial. *See State ex rel. Wentworth v. Coleman*, 121 Fla. 13, 163 So. 316, 317 (1935).

SUBSTANTIVE AMENDMENT

In this case the State's tactical revision to the elements of the offense was crucial to the case and was one of substance and not form.

"If an information be amended in a matter of substance such information should be resigned resworn and refuted with the clerk." *See Alvarez v. State*, 25 So. 2d 661 (Fla. 1946).

"When this information was amended by the assistant county solicitor so as to change a material allegation (even though he had the consent of the trial court) that constituted an amendment which entirely vitiated the information and when the trial was proceeded with under the information as so amended the constitutional rights of the defendant were violated in that he was being tried on a purported information which did not comply with the requirements of the

constitution and the defendant was thereby denied due process of law.” *Alvarez v. State, Id.*

RELATES TO JURISDICTION

The power of courts to hear and act in criminal proceedings is determined by the allegation made in the information, and the existence of a valid charging document is an essential requisite of jurisdiction which cannot be cured by a failure to object. *See L.L.H. v. State*, 873 So. 2d 1252 (Fla. 5th DCA 2004). “Absent a valid charging document the trial court lacks the jurisdiction to proceed to the merits.” *See Wilcox v. State*, 248 So. 2d 692 (Fla. 4th DCA 1971).

As the Supreme Court of Florida has said ‘[it] is also clear ... that jurisdiction to try an accused does not exist under Art. I, Sec. 15 of the Florida Constitution unless there is an extant information, indictment, or presentment filed by the state.’ (citations omitted)

An alteration to the elements of the offense after it has been sworn to and filed reduces the original information to a nullity as if a nolle prosequi had been filed leaving the State without a charge pending against the Defendant. And a failure to cure prior to conviction renders the judgment void because the court did not acquire jurisdiction of the subject matter and therefore authority to enter a judgment was not within the court’s power.

ANTECEDENT JURISDICTION

An appeal per se cannot confer jurisdiction over the subject matter if it was not possessed by the trial court³ so an appellate court has no authority to make a decision on the merits of a case if the lower tribunal initially did not have jurisdiction to enter the order.⁴

Defects in subject matter jurisdiction require correction and cannot be waived. The existence of a valid charging instrument is an essential requisite to acquiring jurisdiction of the subject matter so, upon an adequate showing that the charging document on record is of no legal effect, the courts have the inescapable duty to correct the defect,⁵ and if a court insists upon retaining jurisdiction it is the duty of the supervisory court to bring the lower court within its jurisdiction.

Once a defendant who wishes to challenge jurisdiction files a motion and an attached affidavit the burden shifts to the adverse parties to demonstrate that the basis on which the courts antecedent jurisdiction rests are effectual and appear in the record.⁶

³ Fla. Jur. 2d 'Courts and Judges' § 64 at 464.

⁴ Florida Appellate Practice Vol. II at 4 2021 Ed.

⁵ "Courts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage ... the court should notice the defect and enter an appropriate order." Fla. Jur. 2d 'Courts and Judges' § 30 at 432.

⁶ Fla. Jur. 2d 'Courts and Judges' § 39 at 439.

In the present case the Petitioner has asked the District Court of Appeals of Florida to take cognizance that, as a matter of law, the charging instrument on file is a nullity, and the judicial proceedings are being taken without jurisdiction.

AN ABUSE OF POWER

Officers of the court have a duty to make trial the event where the issue of guilt or innocence is fairly resolved no matter how fervently they believe in the righteousness of their cause.

It was not until becoming aware the Defendant had predicated his defense upon the allegation that he had caused bodily harm⁷ and that testimonial evidence favoring the Defendant would be forthcoming that the State intentionally created a situation in which the Defendant faced an unlawfully enhanced risk of conviction by manipulating the tracking of the penal statute to eliminate a statutory required element which had presented a separate and independent basis for a defense.

No reason was offered for the State's failure to amend earlier or any lawful justification that necessitated eliminating a very serious prong of the offense and the Petitioner wishes to raise the question of the State's motive..

The Petitioner believes that the disparate and adverse impact of the alteration was foreseeable and directed the State's course of action. Under the guise of an amendment, the Defendant was charged with a separate offense which was subject to immediate adjudication. This culminated in the use of an inaccurate and less stringent jury instruction inevitably presenting a much lower hurdle than envisioned by due process.

⁷ As there were no eyewitnesses the allegation of bodily harm was the only apparent means of disproving the accusation.

Using an amendment to overcome the existence of exculpatory evidence is a misuse of the procedure and powers so confided and exhibits a disregard for due process or any notion of fairness.

The critical nature of the prejudicial tactic pervaded the trial and effected the Petitioner's rights to equal protection of the law, and substantive due process.

REASONS FOR GRANTING THE WRITS

The dispute here centers on the district court denying the Petitioner the right to counsel of his own choosing in violation of equal protection and due process.

I. DUE PROCESS

On becoming aware that members of a local church intended to testify on the Petitioner's behalf the State made an end-run around due process by making an oral motion to eliminate an essential element of the alleged crime from the written information, and thereby reduce the Petitioner's ability to demonstrate that he is innocent.

The record establishes beyond dispute the court diverted from the offense which had been filed and proceeded to trial as though the State had followed the procedure and formalized the so called amendment.

The decision of the trial court was fatally flawed because it failed to recognize that the design of the State was to change the allegation rather than correct an error.

After the trial the Defendant moved for a new trial arguing that a new trial was warranted in the interest of justice due to the unplanned change in his trial based upon, *inter alia*, a violation of Fla. R. Crim. P. 3.140(M).

A motion for new trial is a less expensive and less complex alternative to an appeal presenting a rapid means of access to the court for issues in matters of law

arising on the day of trial and would also have the effect of preserving the issues for appellate review.

Appellate counsel had not yet been appointed but even had the appointment begun appellate counsel lacked standing to abandon the motion as they had no legal claim to either the motion or its contents and therefore the Petitioner had a right to have his motion for new trial heard on its merits.

After the Petitioner was notified that the State had not refiled the information, and therefore that a legally effective formal allegation conferring jurisdiction over the subject matter is absent from the record, the Petitioner submitted the circuit court had not providently acquired jurisdiction of the cause of action and he was entitled to have his conviction reversed as a matter of law.

The State is concealing the fact that the information on record was legally dismissed during the colloquy which took place May 4, 2021 prior to the commencement of trial and that the Defendant was tried and sentenced upon a charge that was never made.

Efforts to press his claim in the state courts have been made, however the state courts have not considered the claim on its merit as the Petitioner's access to the court to redress his grievance is being limited by procedural barriers.

The Petitioner is the victim of a fundamental miscarriage of justice and his efforts to bring this to light have been lost in procedural labyrinth. He has

exhausted state remedies and is being required to bear the risk of appellate procedural default as a result of a barrier of form.

But for barring the Petitioner's ability to obtain adjudication of his claim astute counsel would have relied upon *Polakoff v. State*, *Id.* to assert that the conviction is invalid.

So the Petitioner concludes that the character of the claim, rather than status of representation, should be the central issue to ensure that a miscarriage of justice has not occurred, and that such is a necessary component of a fair appellate proceeding.

II. THE SIXTH AMENDMENT

The decision to appoint appellate counsel was made by the trial court.

At the time, the Petitioner had no means of knowing he was being saddled with overburdened counsel.⁸

On August 12, 2021 court appointed counsel notified the court of difficulties preparing the appeal due to his ‘workload.’ (App. D).

Soon thereafter, the Petitioner expressed concern about the likelihood of omissions by counsel, and asserted his desire to control the conduct of his case and present the case in his own way.

The trial court has imposed the services of counsel on a party who has established, as a matter of law, that they are eligible for self-representation.

It is a settled point of law that, once a person establishes they are eligible for self-representation, any doubts as to wisdom or efficacy of the decision must be resolved in favor of the right to choose, so a trial court asserting control over the possible alternatives from which a defendant lawfully may choose to be represented is a violation of the Sixth Amendment to the United States Constitution, and the circuit court has no authority to require the accused to “accept” the services of counsel.

⁸ “Counsel with an overburdened case load are unable to spend sufficient time on any one particular case.” Effective Ineffective: The Failure of the Courts to Address Underfunded Indigent Defense Systems 118 Harv. L. Rev. 1731 (2005).

III. EQUAL PROTECTION

Another issue being presented is that the State of Florida is providing one class of persons more protection than another as a result of their economic status.

The District Court of Appeals of Florida does not impose the services of court selected counsel on those who can afford counsel that are not for public use. If the court is permitted to regulate the only available alternative for those whose economic status does not permit them to hire a lawyer at their own expense, and mandate the representation of a particular attorney for one person but not another, due to solvency status, then the practice violates equal protection of law under the Fourteenth Amendment to the United States Constitution.

The individual autonomy of one class of persons is being curtailed and the protection they are receiving is of a lesser quality due to varying degrees of financial rank and the practice is discriminatory.

CONCLUSION

In recapitulation, the Petitioner respectfully submits that the lower court's practice of discarding formal allegations of the incompetency of counsel, without a Nelson-type inquiry or setting forth a basis for denial, violates the due process clause.

Secondly, the Petitioner believes that, because the Sixth Amendment uses inclusive language and expressly limits only the right to a jury trial, the rest of the rights should be interpreted as plenary.

Finally, the Petitioner argues that affording one class of persons the right to choose their own counsel while denying that right to another class violates the equal protection clause.

On another note, if the Petitioner's non-core claim is meritorious then he is entitled to be discharged,⁹ and competent counsel would raise such a defense.

For these reasons, the Petitioner respectfully asks for relief, in pursuance with the all writs statute under 28 U.S.C.A. § 1651, in the form of an order to discharge the Petitioner from custody and an order directing the State of Florida to provide those who cannot afford to hire counsel at their own expense an equal right to counsel of their own choosing.

⁹ *State ex rel Wentworthy v. Coleman*, 121 Fla. 13, 163 So. 316, 317 (1935).

Respectfully submitted,



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