

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEYION KASEEN TERRY,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

Case No. F-2007-432
NOT FOR PUBLICATION

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 17 2008

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

CHAPEL, JUDGE:

Keyion Kaseen Terry was tried by jury and convicted of Possession of Controlled Drug in Jail (marijuana) AFCF, under 57 O.S.2001, § 21, in Tulsa County District Court, Case No. CF-2005-5470. In accordance with the jury's recommendation, the Honorable Thomas C. Gillert sentenced Terry to imprisonment for ten (10) years. Terry appeals his conviction and his sentence

Terry raises the following propositions of error:

- I. JUDGE THORNBROUGH LOST JURISDICTION IN THE CHARGE OF POSSESSION OF MARIJUANA IN JAIL WHEN HE SUSTAINED DEFENSE COUNSEL'S MOTION TO QUASH FOR INSUFFICIENT EVIDENCE.
- II. THE DISTRICT COURT'S REFUSAL TO CONSIDER A SUSPENDED SENTENCE WAS AN ABUSE OF DISCRETION AND AN IMPROPER PUNISHMENT FOR APPELLANT ASSERTING HIS RIGHT TO TRIAL BY JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
- III. SHOULD THIS COURT REFUSE TO GRANT RELIEF ON THE BASIS OF THE ARGUMENTS PRESENTED IN APPELLANT'S SECOND PROPOSITION OF ERROR, HE WOULD NONETHELESS ASK THAT HIS SENTENCE BE MODIFIED.

In Proposition I, Terry maintains that the district court lost jurisdiction over the charge upon which he was convicted (originally Count II in the case), when

the court sustained his motion to quash this charge.¹ In order to properly evaluate this claim, we review some of the procedural history of this case.

Terry was originally charged with possession of both marijuana and cocaine in jail, which were found together in a package in his left sock. Reserve Deputy Mike Davis testified at preliminary hearing that he recognized the green leafy substance found in Terry's sock as marijuana.² On cross examination, Davis acknowledged that he did not have any "formal training" in drug recognition or in performing field tests. At the conclusion of the hearing, the Honorable Clifford Smith sustained defense counsel's motion to strike Davis's testimony regarding the results of the field test and then sustained the defense "demurrer" to Count II. The State objected, noting that Count II also involved marijuana. The court recalled that the other officer who had testified (Hetherington) did have training in the recognition of marijuana and then modified his ruling on Count II, ordered the State to amend it to refer only to marijuana, and bound Terry over on this modified charge.³

On January 10, 2006, defense counsel filed a generic Motion to Quash the

¹ The State dismissed Count I, Possession of Firearm by a Felon, which was based upon an entirely separate incident on a different date, just before the start of Terry's trial.

² Davis also testified that he had been involved with law enforcement for approximately 9 years; that he had received "training" in the recognition of illegal drugs like marijuana and cocaine; that he had substantial experience in recognizing both; that he performed the field test on the off-white, hard substance found in the baggie, which tested positive for the presence of crack cocaine; and that this was the first time he had actually performed a field test for cocaine.

³ In fact, Hetherington did not give any testimony about recognizing the "green leafy substance" found in Terry's sock as marijuana or his training in this area. And Officer Creekmore did not testify at all. On the other hand, defense counsel failed to present any legal authority for Terry's underlying claim that only "formal training" in the recognition of marijuana can support such a charge, particularly at preliminary hearing. *Cf. State v. Tolle*, 1997 OK CR 52, ¶ 6, 945 P.2d 503, 505 ("(L)ay testimony and circumstantial evidence have been found sufficient to identify a green,

Information. On February 28, 2006, at a motions hearing before the Honorable P. Thomas Thornbrugh, defense counsel again argued that the preliminary hearing evidence couldn't support Count II, because only Davis testified that the substance found appeared to be marijuana, and he had no formal training in the recognition of marijuana. The district court sustained the motion to quash Count II and announced that this count was dismissed.

The docket for the next day, March 1, 2006, records that, with all parties present, Judge Thornbrugh scheduled a "rehearing" on the dismissal of Count II for March 6, 2006, and that a "motion to reconsider" was being taken under advisement.⁴ Similarly, the docket for March 6, 2006, records that, with all parties present, Judge Thornbrugh sustained the State's motion reversing the dismissal of Count II, over the objection of Terry.⁵

Terry maintains that when Judge Thornbrugh sustained his motion to quash Count II and dismissed this charge, he lost jurisdiction to proceed on this count, *i.e.*, that he was prohibited from reconsidering or reversing this ruling. The State correctly notes that the sustaining of a motion to quash is not a bar to further prosecution on the offense at issue.⁶ The State also argues, citing *Tilley*

leafy substance as marijuana." (citing *Swain v. State*, 1991 OK CR 15, 805 P.2d 684, 685-86)).

⁴ The record does not contain any written "motion to reconsider" or "motion for rehearing," nor was the March 1, 2006, hearing or the subsequent March 6, 2006, hearing transcribed.

⁵ The record does not indicate that Terry was ever actually arraigned on Count II. Yet Terry does not challenge this failure herein. This Court notes that this error occurred, but also notes that it was waived when Terry proceeded to trial without raising it (and also that he failed to raise it on appeal). See *Fuller v. State*, 106 P.2d 832, 835 (Okla.Crim. 1940) ("[R]ight to arraignment is waived by the defendant going to trial without objection." (citing cases)).

⁶ See 22 O.S.2001, § 504.1(C) ("The indictment or information must be set aside by the court, in which the defendant is formally arraigned, if judgment for the defendant on a motion to quash for insufficient evidence beyond the face of the information is granted."), and 22 O.S.2001, § 504.1(D)

v. State ex rel. Scaggs,⁷ that in this situation, our Court “has held that the State has two options: either appeal the sustaining of the motion to quash or refile the case based upon new information obtained since the dismissal.” We agree with the State’s interpretation of *Tilley*, however, *Tilley* does not support the State’s position in the current appeal.⁸

In *Tilley*, this Court recognized that motions to quash had been authorized by statute in 22 O.S.1991, § 504.1, and also that 22 O.S.1991, § 1053 allowed the State to appeal a district court order sustaining a motion to quash for insufficient evidence on a felony charge.⁹ This Court ruled that the State had only two choices after the motion to quash was sustained: “We agree the State should have been required to either appeal the decision on the motion to quash through Section 1053(4) or to refile the case based upon ‘new information’ acquired since the dismissal.”¹⁰ Hence we held that “the District Court had *no power to stay its order* exonerating bail and dismissing the action.”¹¹

Because the current procedural situation so closely parallels *Tilley*, we must again conclude that once the district court granted Terry’s motion to quash

(“An order to set aside an indictment or information on judgment for the defendant on a motion to quash for insufficient evidence, as provided in this section, shall not be a bar to a further prosecution for this same offense.”).

⁷ 1993 OK CR 52, 869 P.2d 847.

⁸ *Tilley* dealt with a situation that parallels the current case in many ways. *Tilley* involved a first-degree murder case, in which after the defendant had been bound over for trial and arraigned, the district court sustained the defendant’s motion to quash and ordered the charge dismissed, but then stayed its order of dismissal. After a new autopsy was performed on the victim, the State filed a “motion to reconsider” with the district court. The court determined that it had maintained jurisdiction over the case, since it had stayed its dismissal order, and remanded the case for further preliminary hearing. *Id.* at ¶¶ 1-4, 869 P.2d at 848.

⁹ *Id.* at ¶ 5, 869 P.2d at 849; *see also* 22 O.S.1991, § 504.1 (quoted *supra*); 22 O.S.1991, § 1053.

¹⁰ *Tilley*, 1993 OK CR 52, ¶ 6, 869 P.2d at 849 (citations omitted).

Count II (the drug possession count) and dismissed this count, it no longer had any power, *i.e.*, jurisdiction, to grant the State's "motion to reconsider" or to change its ruling on this issue. While we acknowledge the State's argument that allowing the district court to change its ruling in such situations, at least where little time has passed, will often be "in the best interests of judicial economy," we cannot ignore *Tilley* and the jurisdictional basis for that decision.¹² The State had two options after the district court granted the motion to quash and dismissed Count II. It failed to pursue either of these options.

The dissenters express frustration with the "absurd and wasteful result" of this case and even suggest that there is "no error here, jurisdictional or otherwise." Yet this Court's holding in *Tilley* (which the dissenters do not openly propose to overturn) clearly establishes that the district court committed plain and fundamental error, by acting when it had no remaining jurisdiction to act, when it attempted to reverse its earlier decision (which was a final, appealable order¹³) of sustaining the defendant's motion to quash and dismissing the only remaining count against him. In *Tilley*, this Court clearly stated that it "agree[d]" with the petitioner/defendant in that case that once the district court had sustained a motion to quash for insufficient evidence, the State had only two options: either appeal to this Court or refile the case based upon "new

¹¹ *Id.* (emphasis added).

¹² It is particularly unappealing to find in favor of the defendant in a case like the current one, where the district court's original ruling on the motion to quash appears manifestly incorrect.

¹³ Neither the State nor the dissenters deny that the district court's ruling on the motion to quash and its resulting dismissal of the only remaining count in the case constitute a "final order" that was appealable to this Court.

information.”¹⁴ In particular, the district court had “no power,” *i.e.*, no jurisdiction, “to stay its order exonerating bail and dismissing the action.”¹⁵

Tilley cannot be distinguished on the ground attempted by the dissent, *i.e.*, by asserting that its holding was based upon the fact that “the State already had an appeal pending at the time it moved the district court to reconsider its decision sustaining *Tilley*’s motion to quash.” A careful reading of *Tilley* reveals that although the State announced its *intention* to appeal the district court’s order sustaining the defendant’s motion to quash at the time the decision was announced,¹⁶ the State did not actually do so—at least not until much, much later.¹⁷ The jurisdictional holding in *Tilley* was *not* based upon the fact that the State had appealed the district court’s ruling to this Court, since it was not until September 10, 1993—almost eight months after the time at which we held that the district court no longer had the “power” to reconsider its decision—that the State actually attempted to appeal the district court’s order, by filing an application for extension of time in which to perfect its appeal.¹⁸

¹⁴ *Id.* at ¶ 6, 869 P.2d at 849.

¹⁵ *Id.*

¹⁶ *Id.* at ¶ 2, 869 P.2d at 848.

¹⁷ *Tilley* came before this Court on the petitioner/defendant’s application for a writ of prohibition, which was filed in this Court on March 12, 1993, asking that the district court be prevented from proceeding in his case, after the district court (on February 23, 1993) reversed its decision (made on January 13, 1993) on the defendant’s motion to quash. *See id.* at ¶¶ 2-4, 869 P.2d at 848.

¹⁸ *Id.* at ¶ 8, 869 P.2d at 849. Although the opinion contains some potentially misleading or confusing language on this issue, *see id.* at ¶ 7, 869 P.2d at 849 (“Once the State filed its appeal, the District Court had no authority to revisit its order.”), the remainder of the opinion makes clear that the filing of an appeal by the State was *not*, and could not have been, the basis for this Court’s jurisdictional ruling in that particular case. In fact, the opinion concludes by granting the State an additional 30 days “in which to perfect its appeal.” *Id.* at ¶ 8, 869 P.2d at 849. The ¶ 7 statement quoted herein is undoubtedly legally correct; it simply does not properly refer to or summarize the factual basis for the decision in *Tilley*.

The dissenters desire to overrule the holding of *Tilley* and to carve out a special exception for motions to quash, by allowing the district court some undefined amount of “extra time” to “change its mind” and “ungrant” such a motion. While such a result may seem efficient and desirable in a case like the current one, it is not provided for or consistent with the law of this State; nor would it seem so efficient and desirable when the district court’s original grant of the motion to quash was the *correct* ruling, which the court then erroneously reversed—thereby forcing the accused to go to trial on a charge that should rightly have remained dismissed, without any review by this Court until after a possible (and inappropriate) future conviction. Many of the most fundamental and defining rights of our criminal justice system—such as the inability of the State to “appeal” even the most nonsensical verdict of acquittal in a criminal case—will seem “absurd” and appear to violate “commonsense” in an individual case. Nevertheless, they are the foundation of the system of law within which we all operate. A court without jurisdiction to act has no power to act—no matter how desirable and efficient it may appear to be, at least in an individual case, to allow that court to act.

Hence we must conclude that the district court did not have jurisdiction to reconsider its ruling on the motion to quash in this case and that the trial court did not have jurisdiction over the trial of Terry on the charge of possession of controlled drug in jail. We do note that nothing in this Court’s ruling herein shall prevent the State from refileing this charge against Terry in the future.

Regarding Propositions II and III, this Court's resolution of Proposition I renders these claims moot.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Terry's conviction for Possession of Controlled Drug in Jail (marijuana) AFCF must be reversed and dismissed.

Decision

Keyion Kaseen Terry's conviction for Possession of Controlled Drug in Jail (marijuana) AFCF is hereby **REVERSED** and **DISMISSED**, but without prejudice to the refiling of this charge. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.: DISSENT

C. JOHNSON, V.P.J.: CONCUR

A. JOHNSON, J.: DISSENT

LEWIS, J.: CONCUR

A. JOHNSON, JUDGE, DISSENTING:

The District Judge, improvidently, granted a defense motion to quash Count 2 of the Information in this case. Six days later he reconsidered his ruling and reinstated the charge. The case proceeded to jury trial and the defendant was convicted.

In reversing that conviction, the majority finds that once a district court rules in favor of a defendant on a motion to quash an information, it immediately loses jurisdiction over that case and is not authorized to reconsider its decision even if the decision to quash is manifestly incorrect and the district court realizes its error before this Court accepts jurisdiction on appeal.

The majority finds no violation of a constitutional or statutory right here, nor does it find any miscarriage of justice in the district court's reinstatement of a count it dismissed under a motion to quash six days earlier. The majority agrees, in fact, that the district court's dismissal of the count was erroneous. Indeed, the majority finds the district court's initial decision to quash to be "manifestly incorrect" and laments ("[i]t is particularly unappealing to find in favor of the defendant in a case like the current one, where the district court's original ruling on the motion to quash appears manifestly incorrect"). Slip Op. at 5, n.12. Furthermore, the majority recognizes that its action will not bar the State from re-prosecuting this case because it sets aside the judgment of conviction with the explicit proviso that the reversal and dismissal are "without prejudice to the re-filing of this charge." Slip Op. at 6. *See also*, 22 O.S.2001, §

504.1 (expressly stating that setting aside an information on judgment for defendant on a motion to quash for insufficient evidence “**shall not** be a bar to a further prosecution for the same offense”)(emphasis added).¹

I find no error here, jurisdictional or otherwise. In my view, the district court retained jurisdiction to correct its own judgment until such time as the State invoked this Court’s jurisdiction by initiating an appeal or until the judgment otherwise became final.² The fallacy of the majority’s contrary jurisdictional conclusion is shown by the absurdity of the resulting remedy. Specifically, the Court sets aside the judgment of conviction in this case, a case the majority agrees should not have been dismissed in the first place, just so the State may retry it. I respectfully dissent.

I am authorized to state that Judge Lumpkin joins in this dissent.

¹ The majority’s reasoning appears almost circular on this point. The majority holds on one hand that once the district court sustained Terry’s motion to quash, the State had just two options: (1) appeal the decision, or (2) refile the case based on new evidence. On the other hand, while the majority faults the State for not exercising either option, it inexplicably invites the State to refile the charge without prejudice. *Op.* at 6. No doubt, in the wake of this decision the State will simply re-file the case based on new evidence that was obtained after the count was quashed (i.e., the same evidence produced at trial that positively identified the substance found on Terry as marijuana) and then retry the case, a case that could have been refiled and prosecuted at the time the district court erroneously quashed the charged offense. This absurd and wasteful result can be avoided by simply recognizing the commonsense notion that the district court retained jurisdiction to correct its own judgment until such time as this Court assumed jurisdiction in an appeal of the case, or until the time had passed for any such appeal.

² The majority contends that the result in this case is compelled by our holding in *Tilley v. State, ex rel. Scaggs*, 1993 OK CR 52, 869 P.2d 847. *Tilley* differs from the instant case, however, in one very important respect. Unlike the instant case, in *Tilley*, the State already had an appeal pending at the time it moved the district court to reconsider its decision sustaining *Tilley*’s motion to quash. Clearly, with an appeal pending in this Court, the district court in *Tilley* had no jurisdiction to reconsider its ruling on the motion to quash because jurisdiction over the case had long-since passed to this Court by virtue of the State’s appeal.