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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2006-2007

CR-05-2156

John Henry Patton

v.

State of Alabama

Appeal from Jefferson District Court
(DC-89-8713.60; DC-90-4489.60)

McMILLAN, Judge.

The appellant, John Henry Patton, appeals the district court's denial of his Rule 32, Ala.R.Crim.P., petitions for postconviction relief, in which he attacked his February 23, 1990, guilty-plea conviction for first-degree receiving stolen

property and his resulting sentence of two years' imprisonment, and his August 27, 1990, guilty-plea conviction for unlawful possession of a controlled substance and his resulting sentence of one year and one day in prison. Patton stated in his petitions that he did not appeal his convictions and sentences.

Patton filed his Rule 32 petitions on November 30, 2004. In his petitions, Patton alleged that the district court was without jurisdiction to accept his guilty pleas and to impose the sentences because, he claimed, there is no indication in the record that the informations against him were given under oath. After receiving a response from the State, the district court conducted evidentiary hearings on February 17, 2005, and June 25, 2005. The district court issued separate orders denying the petitions on August 28, 2006.

On appeal, Patton argues: (1) that he raised a jurisdictional claim that was not subject to the procedural bars in Rule 32.2; and (2) that he was denied the opportunity to establish his entitlement to relief when the district court refused to enforce Patton's subpoena of Jefferson County District Attorney David Barbour, who submitted an affidavit to

the district court. Because we answer the first question adversely to Patton, the second claim is moot because the lone claim in the petitions was procedurally barred.[1]

Patton argued that although he allegedly entered his guilty pleas to informations filed by the district attorney, the trial court record did not contain properly signed or notarized informations in either case. Patton correctly avers that jurisdictional claims are not subject to the limitations period in Rule 32.2(c), the prohibition against successive petitions in Rule 32.2(b), or the grounds of preclusion in Rule 32.2(a). See, e.g., Edmond v. State, [Ms. CR-04- 2392,

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[1]At the first hearing, the district court heard argument from the parties, and set the second hearing to allow the parties time to obtain additional evidence on the matter. Patton's argument was generally that the trial court record and the district attorney's file did not contain a properly signed information in either case. The State argued generally that the signed copy would have been sent to the court, and that had an information not been prepared, the file would reflect grand jury proceedings; the State further noted that the case action summary in both cases contained a notation by the trial court indicating that Patton was pleading guilty to the respective offenses as charged in the information filed by the district attorney. Although we do not address the merits of Patton's claims, we note that the evidence presented in this case closely mirrors the evidence elicited and found to be sufficient to support the district court's determination that an information had been properly filed in Coleman v. State, 843 So. 2d 237 (Ala. Crim. App. 2001).

April 28, 2006] ___ So. 2d ___ (Ala. Crim. App. 2006); and Grady v. State, 831 So. 2d 646, 648 (Ala. Crim. App. 2001). Patton also cites the following excerpt from Ross v. State, 529 So. 2d 1074 (Ala. Crim. App. 1988):

> "Because Ross's plea of guilt does not rest upon an indictment or information, Ross's conviction and sentence are void.
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> > "'It is well settled, at common law and from the earliest colonial days in this country, that a prosecution for a crime must be preceded by a formal accusation. Thus, a legally effective criminal prosecution requires that a formal charge be openly made against the accused by an indictment or presentment of a grand jury, or by an information of a prosecuting attorney.'
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> "2 Wharton's Criminal Procedure § 225 (C.Torcia 12th ed. 1974).
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> > "'Jurisdiction of the offense and of the person must concur to authorize a court of competent jurisdiction to proceed to final judgment in a criminal prosecution. [Citations omitted.]
> >
> > "'To this end, a formal accusation sufficient to apprise the defendant of the nature and cause of the accusation is a prerequisite to jurisdiction of the offense. Const. 1901, § 6; Butler v. State, 130 Ala. 127, 30 South. 338 [(1901)]; Miles v. State, 94 Ala. 106, 11 South. 403 [(1892)]; 12 Cyc. 221 (VI, H).

> "'Irregularities in obtaining jurisdiction of the person may be waived, but a formal accusation by indictment, or information, or complaint supported by oath is essential to complete jurisdiction, and cannot be waived. 12 Cyc. 221; Butler v. State, supra; Johnson v. State, 82 Ala. 29, 2 South. 466 [(1887)].'
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> "Sherrod v. State, 14 Ala.App. 57, 59-60, 71 So. 76, 78, rev'd on other ground, 197 Ala. 286, 72 So. 540 (1916)."

Ross v. State, 529 So. 2d at 1077-78. We note further that the Alabama Supreme Court has held that "because a sworn information is essential to confer on a trial court jurisdiction to accept a guilty plea, the district attorney's failure to make the information under oath cannot be waived." Ex parte Looney, 797 So. 2d 427, 429 (Ala. 2001). Were Ex parte Looney or Ross the latest statement of the law regarding jurisdiction, Patton's contention that he has raised a jurisdictional claim that entitles him to relief may have been meritorious. However, neither Ex parte Looney nor Ross are the latest statement of the law.

The Alabama Supreme Court recently held that "a trial court derives its jurisdiction from the Alabama Constitution and the Alabama Code." Ex parte Seymour, [Ms. 1050597, June

30, 2006] ___ So. 2d ___, ___ (Ala. 2006). The Alabama Supreme Court continued:

> "Jurisdiction is '[a] court's power to decide a case or issue a decree.' Black's Law Dictionary 867 (8th ed. 2004). Subject-matter jurisdiction concerns a court's power to decide certain types of cases. Woolf v. McGaugh, 175 Ala. 299, 303, 57 So. 754, 755 (1911) ('"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought."' (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316 (1870))). That power is derived from the Alabama Constitution and the Alabama Code. See United States v. Cotton, 535 U.S. 625, 630-31 (2002) (subject-matter jurisdiction refers to a court's 'statutory or constitutional power' to adjudicate a case). In deciding whether Seymour's claim properly challenges the trial court's subject-matter jurisdiction, we ask only whether the trial court had the constitutional and statutory authority to try the offense with which Seymour was charged and as to which he has filed his petition for certiorari review.
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> "Under the Alabama Constitution, a circuit court 'shall exercise general jurisdiction in all cases except as may be otherwise provided by law.' Amend. No. 328, § 6.04(b), Ala. Const. 1901. The Alabama Code provides that '[t]he circuit court shall have exclusive original jurisdiction of all felony prosecutions ....' § 12-11-30, Ala. Code 1975. The offense of shooting into an occupied dwelling is a Class B felony. § 13A-11-61(b), Ala.Code 1975. As a result, the State's prosecution of Seymour for that offense was within the circuit court's subject-matter jurisdiction, and a defect in the indictment could not divest the circuit court of its power to hear the case.

"The United States Supreme Court has long held that 'defects in an indictment do not deprive a court of its power to adjudicate a case.' Cotton, 535 U.S. at 630. As Justice Holmes stated in Lamar v. United States, 240 U.S. 60, 64 (1916), '[t]he objection that the indictment does not charge a crime ... goes only to the merits of the case.'

"A number of states agree. See Sawyer v. State, 327 Ark. 421, 938 S.W.2d 843 (1997); Howell v. State, 421 A.2d 892, 895 (Del. 1980); Ford v. State, 330 Md. 682, 625 A.2d 984 (1993); Roth v. State, 714 P.2d 216 (Okla.Crim.App. 1986); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Studer v. State, 799 S.W.2d 263 (Tex.Crim.App. 1990); but see State v. Byington, 135 Idaho 621, 21 P.3d 943 (2001). The Supreme Court of Missouri, addressing this precise issue, framed the issue succinctly: 'Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. The blending of these concepts serves only to confuse the issue to be determined.' State v. Parkhurst, 845 S.W.2d 31, 34-35 (Mo. 1992). We find this approach persuasive and consistent with both the Alabama Constitution and the Alabama Code.

"The validity of Seymour's indictment is irrelevant to whether the circuit court had jurisdiction over the subject matter of this case. A defect in an indictment may be error, see Rule 15.2(d), Ala.R.Crim.P. -- or even constitutional error, see Ala. Const., Art. I, § 8 -- but the defect does not divest the circuit court of the power to try the case. A defendant who challenges a defective indictment is thus subject to the same preclusive bars as one who challenges any other nonjurisdictional error, such as an illegal seizure or a violation of the Confrontation Clause."

Ex parte Seymour, ___ So. 2d at ___.

Just as a circuit court, which was the trial court in Seymour, derives its jurisdiction from the Alabama Constitution and the Alabama Code, so too do the district courts in Alabama's court system. Under the Alabama Constitution, the district court is a "court of limited jurisdiction," Amend. No. 328, § 6.01, Ala. Const. 1901, (Art. IV, § 143 (Official Recomp.)) and "shall exercise uniform original jurisdiction in such cases, and within such geographical boundaries, as shall be prescribed by law ...." Amend. No. 328, § 6.05, Ala. Const. 1901, (Art. IV, § 143 (Official Recomp.)). Thus, as this Court has previously noted, except in cases involving certain municipal ordinance infractions as is discussed more fully in Amend. No. 328, § 6.05, Ala. Const. 1901, "the district court has original jurisdiction only in such cases as the legislature provides." Henderson v. State, 616 So. 2d 406, 408 (Ala. Crim. App. 1993) (emphasis omitted). The Alabama Legislature has so acted; the Alabama Code provides that "[t]he district court may exercise original jurisdiction concurrent with the circuit court to receive pleas of guilty in prosecutions of offenses defined by law as felonies not punishable by sentence of

death." § 12-12-32(b)(1), Ala. Code 1975. Receiving stolen property in the first degree is a Class B felony, see § 13A-8-17(b), Ala. Code 1975; the offense of unlawful possession of a controlled substance is a Class C felony, see § 13A-12-212(b), Ala. Code 1975. Thus, based on the rationale expressed in Ex parte Seymour, we conclude that the district court had subject-matter jurisdiction to accept Patton's guilty pleas to those offenses, and any defects in the informations could not divest the district court of its power to accept the pleas. Therefore, Patton's claim, although couched in jurisdictional terms, is not truly jurisdictional, and Patton is not entitled to any relief because his petition was filed well beyond the limitations period in Rule 32.2(c), Ala.R.Crim.P.[2]

Based on the foregoing, the judgment of the district court is affirmed.

AFFIRMED.

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[2]The limitations period in Rule 32.2(c) is "mandatory and jurisdictional," Arthur v. State, 820 So. 2d 886, 889 (Ala. Crim. App. 2001), and "[a]n Alabama court has no authority to excuse a procedurally defaulted claim." Davis v. State, [Ms. CR-03-2086, August 25, 2006] ___ So. 2d ___, ___ (Ala. Crim. App. 2006), (opinion on application for rehearing).

Baschab, P.J., Shaw, and Wise, JJ., concur; Welch, J., concurs in the result with opinion.

WELCH, Judge (concurring in the result).

In 1990, the appellant, John Henry Patton, pleaded guilty in the district court to two felonies pursuant to two informations allegedly filed by the district attorney. He appeals from the denial of two Rule 32, Ala. R. Crim. P., petitions, claiming that the district court abused its discretion when it denied his petitions because, he says, the district attorney's office failed to prepare and present an information signed under oath by the district attorney in each case, as required by § 15-15-21, Ala. Code 1975,[3] and

[3]In 1996 §§ 15-15-20 through 15-15-22 were repealed and replaced by § 15-15-20.1, Ala. Code 1975. See Ex parte Hambrick, 774 So. 2d 535 (Ala. 2000). At the time Patton pleaded guilty, § 15-15-21 provided:

> "When the desire of a defendant to plead guilty is made known to the court, it shall direct the district attorney of such court to prefer and file an information against such defendant, under the oath of such district attorney or some witness, which information shall accuse the defendant, with the same certainty as an indictment, of the criminal

therefore, Patton contends, the district court did not have jurisdiction to convict and sentence him in either case.

The State responded and produced from its files unsigned copies of the informations underlying each conviction. The State asserted that in each case an information, signed by the district attorney, had been properly filed in the district court before the entry of Patton's plea. The State also asserted that the original informations had been lost after the plea was entered.

In this case the majority determined that Patton's claim that the absence of an information, signed under oath by the district attorney, was a nonjurisdictional claim pursuant to the rationale set forth in Ex parte Seymour, [Ms. 1050597, June 30, 2006] ___ So. 2d ___ (Ala. 2006). Thus, according to the majority, the claim was procedurally barred. See Rule 32.2(c), Ala. R. Crim. P.

In so holding, the majority ruled that Seymour had implicitly overruled Ex parte Looney, 797 So. 2d 427 (Ala.

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offense for which he is being held."

Section 15-15-20.1, Ala. Code 1975, contains essentially the same requirements as former § 15-15-21, Ala. Code 1975.

2001). Looney held that an information signed under oath by the district attorney was "essential to confer on a trial court jurisdiction to accept a guilty plea." Looney, 797 So. 2d at 429.

I disagree with the majority's conclusion that Looney has been overruled by Seymour.

Seymour held that an indictment that was defective because it failed to allege a culpable mental state did not deprive a trial court of subject-matter jurisdiction. It overruled cases that had held that a valid indictment is the source of a trial court's subject-matter jurisdiction. Ash v. State, 843 So. 2d 213 (Ala. 2002), and Ex parte Lewis, 811 So. 2d 485 (Ala. 2001). Seymour did not address the question of whether a trial court has subject-matter jurisdiction over a case in which the indictment was void ab initio, e.g., an indictment not preferred as the result of 12 or more grand jurors -- or as in the instant case, an information not signed under oath by the district attorney.

The Alabama Supreme Court in Seymour stated:

> "In deciding whether Seymour's claim properly challenges the trial court's subject-matter jurisdiction, we ask only whether the trial court had the constitutional and statutory authority to

> try the offense with which Seymour was charged and as to which he has filed his petition for certiorari review."

Seymour, ___ So. 2d at ___.

The authority for a district court to proceed by information derives from the Alabama Constitution and the Alabama Code. Article I, § 8, of the Alabama Constitution of 1901, provided that an information could not be used to proceed against an individual for an indictable offense except in limited circumstances. This provision was amended by Amendment No. 37, which provided:

> "No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established. Provided further that in all felony cases, except those punishable by capital punishment, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings in such manner as may be provided by law if the defendant, after having the advice of counsel of his choice or in the event he is unable to employ counsel, the advice of counsel which must be appointed by the court, makes known in open court to a judge of a court having jurisdiction of the

> offense that he desires to plead guilty, provided, however, the defendant cannot plead guilty within fifteen days after his arrest."

§ 8, Ala. Const. 1901, as amended by Amendment No. 37.

Amendment 37 was implemented by the legislature in § 15-15-20.1, Ala. Code 1975.[4] That section prescribes procedures for using informations as follows:

> "(a) In any criminal proceeding for a non-capital felony offense commenced by complaint, the defendant may give written notice three days after his or her arrest to a judge of the district or circuit court of the county having jurisdiction of the offense charged that the defendant desires to plead guilty as charged or as a youthful offender upon the granting of youthful offender status.
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> "(b) Upon receipt of the written notice from the defendant stating his or her desire to plead guilty, the court shall direct the district attorney to prefer and file an information against the defendant. The information shall be made under oath of the district attorney or a witness, and shall accuse the defendant with the same specificity as required in an indictment of the offense or offenses for which the defendant is charged. This section shall not be construed to preclude the district attorney from amending or dismissing a pending charge against a defendant before the defendant pleads guilty.
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> "c) Upon the filing of an information, the court shall ascertain whether the defendant has retained counsel, and, shall appoint counsel if the defendant is indigent. The court shall set an arraignment date

[4]See note 1.

to enable the defendant to formally enter a plea of guilty in open court. Arraignment may be held and the guilty plea entered at any time after the filing of an information.

"(d) The court shall receive and enter the plea of guilty of the defendant, and shall immediately pronounce and enter a judgment of conviction, set a date for sentencing, and thereafter proceed as provided by law.

"(e) Upon acceptance from the defendant [of a] plea of guilty and pronouncement and entry of judgment and sentencing, the defendant shall have a right of appeal from the action of the court.

"(f) In district court, a record of the defendant's plea of guilty shall be kept by mechanical or electronic device. Any exhibits shall be preserved by the court. The record shall be preserved by the court and shall be transcribed by the designee if the defendant gives notice of appeal. The transcript of the defendant's plea of guilty shall be certified as directed by the court or as required by the Alabama Rules of Appellate Procedure.

"(g) If the court does not accept plea of guilty of the defendant or if youthful offender status of the defendant's application is denied, the court shall:

> "(1) Order the defendant discharged.
>
> "(2) Order the defendant released as provided by law.
>
> "(3) Order the defendant held in custody pending action of the grand jury, or until released on bail.

"(h) This section supersedes Rule 2.2.(e) of the Alabama Rules of Criminal Procedure.

"(i) This section applies to all persons charged with non-capital felonies after its effective date.

A district court derives its authority to take a guilty plea in a felony case in which an information is filed from the Alabama Constitution and the Alabama Code, if the information is filed in accordance with the Alabama Constitution and the Alabama Code. The district court does not have jurisdiction to accept a plea to a felony offense as to which the defendant has not been indicted, except by virtue of the provisions of those documents.

In Seymour, the Alabama Supreme Court cited Butler v. State, 130 Ala. 127, 30 So. 338 (1901). Butler concerned a conclusory affidavit that failed to set out any elements of larceny. It was held that the solicitor's complaint failed to charge an offense because it was founded on a void complaint. The Alabama Supreme Court also cited Kyser v. State, 22 Ala. App. 431, 117 So. 157 (1927). In Kyser a circuit judge issued a warrant alleging a violation of the prohibition law and tried the case. The court there held that without an indictment or an appeal from a lower court conviction, the circuit court did not have subject-matter jurisdiction to try

a criminal case. The Court in Seymour did not explicitly overrule Butler or Kyser.

Thus, I believe that Seymour stands for the proposition that a flaw in an otherwise properly returned indictment or information does not impugn the trial court's jurisdiction. However, I do not believe that Seymour permits a trial court to pronounce judgment were an indictment or information has not, in essence, been properly considered, executed, and brought forward from the grand jury. Likewise, I do not believe that an information presents charges against a defendant until it is properly signed under oath by the district attorney.

Notwithstanding my opinion regarding Seymour, I agree with the majority's conclusion that Patton is not entitled to relief from his convictions. Here, the trial court conducted an evidentiary hearing and explicitly found that the an information signed by the district attorney, under oath, was present in each 1990 case to which Patton pleaded guilty. The trial court found that the informations had been lost following the entry of Patton's plea. The trial court then

correctly disposed of Patton's Rule 32 petitions on the merits.

Though not addressed in the majority opinion, I note that Patton also argued in the circuit court and on appeal that he was denied the right of confrontation because the district court refused to require the district attorney to respond to a subpoena duces tecum that Patton had filed seeking to have the district attorney produce notary public logs related to his cases. The district court found affidavits from the district attorney regarding standard practices of the district attorney's office and its handling of informations to be sufficient. Rule 32.9, Ala. R. Crim. P., allows the court broad discretion in taking evidence by deposition, by interrogatories, and by testimony, or by any combination of these. I do not believe that the district court abused its discretion by receiving the affidavit in lieu of notary public logs.

Therefore, unlike the majority, I would affirm the judgment of the circuit court denying Patton's Rule 32 petitions because I believe that Patton's claim is without merit.