Third District Court of Appeal

State of Florida

Opinion filed July 10, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-456
Lower Tribunal No. 05-39150

Tajhon Wilson,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Jose Fernandez, Judge.

Tajhon Wilson, in proper person.

Ashley Moody, Attorney General, for appellee.

Before HENDON, MILLER, and LOBREE, JJ.

HENDON, J.

Tajhon Wilson appeals from the trial court's denial of his petition for writ of habeas corpus filed pursuant to Florida Rule of Criminal Procedure 3.850(m). We affirm.

In this appeal, the defendant seeks to reverse his 2008 conviction for armed robbery and to gain immediate release from incarceration, arguing that the trial court committed fundamental error by convicting him of an uncharged crime. Wilson asserts that the information charging him with one count of robbery with a firearm did not specifically state that the property he took was money.[1] Thus, he argues, when he was convicted of robbery for "taking money," he was convicted of an uncharged crime because he was only charged with "taking property."

[1] The information reads:

> TAJHON BODERICK WILSON, on or about September 19, 2005, in the County and State aforesaid, did unlawfully, by force, violence, assault or putting in fear, take certain property, to wit HUGO ISAS, said property being the subject of larceny, and of the value of less than three hundred dollars ($300.00), the property of HUGO ISAS and/or CLOVERLEAF ADULT VIDEO, as owner or custodian, from the person or custody of HUGO ISAS, with the Intent to temporarily or permanently deprive the above-named owner(s) or custodian(s) of the said property, and during the commission of the offense, said defendant possessed a firearm or destructive device, In violation of s. 812.13(2)(A) and 775.087, Fla. Stat., contrary to the form of the statute. In such cases made and provided, and against the peace and dignity of the State of Florida.

For an information to sufficiently charge a crime, it must follow the statute,[2] clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged. See Rosin v. Anderson, 21 So. 2d 143, 144 (Fla. 1945). A charging document that substantially but imperfectly charges a crime is not fundamentally deficient. Such imperfections should therefore be deemed harmless when not attacked by motion to dismiss. Green v. State, 414 So. 2d 1171 (Fla. 5th DCA 1982). More importantly, if a defendant does not timely and properly raise his objections to the information by a motion to quash before or at the time he pleads, he is deemed to have waived them. Shifrin v. State, 210 So. 2d 18, 20 (Fla. 3d DCA 1968). As the Court in McMillan v. State, 832 So. 2d 946, 947-48 (Fla. 5th DCA 2002), explains,

> Where a defendant waits until after the State rests its case to challenge the propriety of an indictment, the defendant is required to show not that the indictment is technically defective but that it is so fundamentally defective that it cannot support a judgment of conviction. This rule is designed to discourage defendants from waiting until after a trial is over before contesting deficiencies in charging documents which could have easily been corrected if they had been pointed out before trial. Where the charging document is merely imperfect or imprecise, the failure to challenge it by motion to dismiss waives defect. . . . The overriding concern is whether the defendant had sufficient notice of the crimes for which he is being tried.

[2] In this case, section 812.13(1), Florida Statutes (2005), which provides, in pertinent part: "'Robbery' means the **taking of money or other property** which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property . . . ." (Emphasis added).

(internal citations omitted). By failing to challenge the information in the proceedings below, Wilson waived his right to do so on appeal. See Gaskin v. State, 420 So. 2d 366, 367 (Fla. 1st DCA 1982).

Wilson argues that because the information wholly fails to allege that he "took money," it is fundamentally defective, and the conviction arising from that fundamentally defective information is manifestly unjust. We disagree. Where an information totally omits an essential element of the crime, or is so vague, indistinct or indefinite that the defendant is misled or exposed to double jeopardy, it is fundamentally defective. Fla. R. Crim. P. 3.140; McMillan, 832 So. 2d at 948. The determinative question is whether the information charged every element of the offense of robbery, and whether Wilson was misled. There is nothing in the record showing that Wilson was misled as to what he was charged with or that he was prejudiced in the preparation of his defense. At trial, Wilson did not claim the information was defective, nor did he file a motion to dismiss under Florida Rules of Criminal Procedure. There is nothing in the record that shows actual prejudice to the fairness of Wilson's trial. We find that the information did not wholly fail to allege the elements of the offense, and sufficiently notified Wilson that he was charged with committing a robbery at gunpoint.

The record on appeal further provides that Wilson was fully apprised of the charges against him. The record shows that the jury was presented with competent

and substantial evidence that the defendant committed the crime that he was convicted of. The victim was deposed pretrial, and during the trial, the victim testified that the defendant took money from him at gunpoint. The defendant's argument that he was unaware of the specific charges he faced is without merit.

We find no prejudice to the fairness of Wilson's trial and no fundamental error on this record. See Price v. State, 995 So. 2d 401, 404 (Fla. 2008). Finally, there is no ineffective assistance of counsel for failing to raise this issue, as counsel cannot be deemed ineffective for failing to object to a non-existent error.

Affirmed.