

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Appellant,

vs.

JAMES MICHAEL SPEARS

Appellees.
_____ /

CASE NO. CJAP 09-048

County Court Case No. 09-MM-1547B

[Consolidated with]

STATE OF FLORIDA,

Appellant,

vs.

TAMERA LEE SPEARS,

Appellee.
_____ /

CASE NO. CJAP 09-47

County Court Case No. 09-MM-1547A

Appeal from the County Court
of Orange County, Florida

Honorable W. Michael Miller,
County Court Judge

Esther M. Whitehead, Assistant State Attorney
for Appellant

Janice D. Kerr for Appellees

Before, Powell, Lauten, and Shea, J.J.

FINAL ORDER REVERSING LOWER COURT

On our own motion we consolidate these two cases for decision and all further
proceeding since appellees were jointly charged in the same case below, were represented there

and here by the same attorney, and their motions and answer briefs dealt with the same issue. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

The State Attorney filed an information against defendants/appellees, parents of a minor child, charging them with contributing to the delinquency or dependency of a minor, in violation of *section 872.04, Florida Statutes*, a first degree misdemeanor punishable by one year in the county jail. Appellees filed a written verified motion to dismiss asserting two grounds: (1) the undisputed material facts did not establish a prima facie case against appellees, and (2) by charging the greater crime rather than the lesser offense under *section 1003.27, Florida Statutes*, a second degree misdemeanor punishable by sixty days in the county jail, the appellees' due process rights were violated. Appellant filed a written response to the motion

After conducting a hearing, the trial judge granted the motion. His decision was based on the second ground of the motion. He made no ruling on the first ground.¹ At the conclusion of the hearing, he stated

I find in this case that this is not properly charged, that this is not what the Legislature intended, that these cases were meant to be handled under section 1003.27, that's the only place the Legislature intended for them to be handled and its been overcharged, being charged as a first degree misdemeanor. So I am going to grant the Defense Motion to Dismiss. I'm going to dismiss the case with leave for the State to file this under 1003.27 if the State so desires. And I will give the State ten days to make that decision.

The written signed order is found on a form entitled "Disposition"and states "Defense motion to dismiss is granted. State has 10 days to refile/amend under Florida Statute 1003.27."

From this order the State appeals. We reverse.

The law is well settled that the prosecutor has discretion whether and what charge to file. *U.S. v. Batchelor*, 442 U. S. 114 (1979). Where an act violates more than one criminal

¹ Since the trial judge made no ruling on the motion's first ground, and neither party argued it in their briefs, we need not address it here.

statute, he may prosecute under either subject to judicial limitation where certain well defined constitutional or legal constraints² are present. *Id*; *State v. Cogswell*, 521 So. 2d 1081 (Fla. 1988); *State v. Ngo Lan Nguyen*, 980 So. 2d 1189 (Fla. 5th DCA 2008). The prosecutor may be influenced by penalties available upon conviction, but this alone does not give rise to a violation of the equal protection or due process clauses. *Batchelor*, 442 U. S. at 114.

It is patently obvious from the trial judge's comments at the hearing that he based his ruling on the second ground of appellees' motion. This was error.

Consequently, this case is **REVERSED**, the information is reinstated, and this case is **REMANDED** for further proceedings consistent with this opinion.

DONE and ORDERED at Orlando, Florida this 23rd day of August, 2010.

_____/S/_____
Rom W. Powell, Senior Judge

_____/S/_____
Frederick J. Lauten, Circuit Court Judge

_____/S/_____
Tim Shea, Circuit Court Judge

² The constitutional and legal constraints are: selective enforcement based upon race, religion or other arbitrary classification, bad faith or prohibitory statute. *See Batchelor*, 442 U. S. at 1124; *Gasset v. State*, 490 So.2d 97 (Fla. 3d DCA 1986). Appellees do not argue that any of these are present in this case.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to the Office of the State Attorney, attorney for appellant, 415 N. Orange Avenue, Orlando Florida 32801, and to Janice D. Kerr, attorney for appellee, 20 South Rose Ave., Suite 7, Kissimmee, Florida 34741, by mail, this 23rd day of August, 2010.

_____/S/_____
Judicial Assistant