

STATE of Arkansas v. Marvin Eugene BROOKS
CR 89-189 783 S.W.2d 368
Supreme Court of Arkansas
Opinion delivered February 5, 1990

CONSTITUTIONAL LAW — TRIAL JUDGE ENCROACHED ON PROSECUTOR'S CONSTITUTIONAL DUTY AND BREACHED SEPARATION OF POWERS DOCTRINE BY AMENDING THE CHARGE FROM A FELONY TO A MISDEMEANOR. — The duty of charging an accused with a felony is reserved either to the grand jury or the prosecutor; by amending the charge from a felony to a misdemeanor over the state's objection, the trial judge encroached upon the prosecutor's constitutional duties and breached the separation of powers doctrine.

Appeal from Pulaski Circuit Court, Second Division; *Perry V. Whitmore*, Judge; error declared.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellant.

Hurley, Whitwell & Shepherd, by: *Stephen R. Cobb*, for appellee.

DARRELL HICKMAN, Justice. The trial judge, upon learning the circumstances of the forgery charge levied against Marvin Eugene Brooks, decided Brooks should not be convicted of a felony and entered the following order: "Whereupon, the Court over the objection of the State amends the charge to THEFT OF PROPERTY, a misdemeanor. . . ." The state appeals seeking a

declaration of error under a statute and rule that permit that procedure. Ark. Code Ann. § 16-91-112(b) (1987); A.R.Cr.P. Rule 36.10(c); *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984).

We deem the question sufficiently important to the administration of justice to warrant review.

[1] The duty of charging an accused with a felony is reserved either to the grand jury or the prosecutor. Ark. Const. amend. 21, § 1. The trial judge encroached upon the prosecutor's constitutional duties and breached the separation of powers doctrine.

In a similar case, *United States v. Edmonson*, 792 F.2d 1492 (9th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987), a federal judge treated a felony charge as a misdemeanor and the appeals court stated:

[T]he decision whether to prosecute, and the decision as to the charge to be filed, rests in the discretion of the Attorney General or his delegates, the United States Attorneys. The Executive Branch has 'exclusive and absolute discretion to decide whether to prosecute.' The discretion to prosecute carries with it the discretion to choose the statute that will be charged. The district court has no power to deny the United States Attorney his prerogative under the Separation of Powers doctrine. (Citations omitted.)

See also *Petition of United States*, 306 F.2d 737 (9th Cir. 1962); *State v. Laury*, 397 So.2d 960 (Fla. App. 1981).

Error declared.