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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO. 67,159
FRANK MARS, Respondent.	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Respondent was appellee and defendant respectively in those courts. In this brief the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will be used to denote the record on appeal; the symbol "SR" will be used to denote the supplemental record; the symbol "SSR" will denote the second supplemental record, and "A" to denote the Petitioner's appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Frank Mars was indicted by the grand jury for the alleged first-degree murder of Willie Berry, on or about January 30, 1983 (SR 1). The state narrowed the time of the offense by a statement of particulars which alleged that the crime took place between 5:00 p.m. January 29, 1983 and 12:59 a.m. January 30, 1983 (R 29-32). At trial, although the state's proof conflicted with the time period alleged in the statement of particulars, an instruction was given to the jury without objection by the state, requiring that the state prove that the offense took place within the specific time constraints set out in the statement of particulars (SSR 26-27, Appendix III). After the case was submitted to the jury, and after the jury repeatedly raised questions about the importance of the the time constraints (SSR 2-5, 13, 16-17, 27-28, 54), the state sought to amend the statement of particulars to conform the allegations of time to the proof actually presented at trial (SSR 22-27, 30-34, 48-49). The state claimed a secretary's typographical error was responsible for the conflict in times (SSR 18, 22, 25, 58). Upon Mars' objection (SSR 30-31, 37-47), the court denied the state's motion to amend (SSR 49). The court stated that the defendant would clearly be prejudiced by the state's motion since the jury foreman had already indicated that the jury was ready to acquit if it was bound by the time constraints imposed by the statement of particulars (SSR 33). Mars, however, did

not move for a judgment of acquittal on the grounds that the state's proof varied from the statement of particulars (SSR 35). The jury, after being told that it would have to follow the earlier instruction mandating proof that the offense took place within the time constraints in the statement of particulars, returned a general verdict finding Mars not guilty (SSR 54-55, 60).

Subsequently, Mars was again indicted, this time for the second-degree murder, on or about January 30, 1983, of Willie Berry (R 33-34). Again, the state narrowed the time by a statement of particulars, this time to a period between 1:00 a.m. January 30, 1983 and 1:00 a.m. January 31, 1983 (R 35-38). Mars then moved to dismiss the charges on the grounds of former jeopardy because of the prior trial and acquittal (R 39-40). The court dismissed the second-degree murder charge finding that Mars had previously been placed in jeopardy for the same offense (R 25, 51-52).

The state appealed, contending that the offenses were not the same and that the effect of the allegations of different time periods set out in the statements of particulars rendered the offense in the second indictment separate and distinct from the offense in the first indictment (Appendix I).

On December 12, 1984, the Fourth District issued its opinion, reluctantly reversing the order of the trial court dismissing the subsequent charges (Appendix I). The court held that the defendant's affirmative actions of: a) seeking and

receiving a jury instruction on the materiality and binding nature of the statement of particulars and b) opposing the state's motion to amend the statement of particulars, established the materiality of the variance sufficiently to bar the appellee from later asserting the variance was insufficient to constitute a different crime (Appendix I).

On May 8, 1985, the Fourth District issued its opinion on rehearing, vacating its prior opinion and affirming the trial court's order of dismissal (Appendix II). The court stated that upon being apprised that the appellee had not requested the instruction on the binding effect of the bill of particulars, the appellee's objection to the state's motion to amend the bill of particulars was insufficient affirmative action by appellee to bar him from objecting on double jeopardy grounds to the subsequently filed charges (Appendix II).

The Fourth District certified the following question as one of great public importance requiring resolution by this court:

> Does the rule of State v. Beamon permitting the filing of subsequent charges apply in a case where the defendant was acquitted by general verdict in the initial proceedings and the defendant did not seek a directed verdict of acquittal or request an instruction to the jury as to the binding nature of a bill of particulars in those proceedings?

(Appendix II)

The state timely filed its Notice of Intent to Invoke Discretionary Jurisdiction and this appeal follows.

POINT INVOLVED ON APPEAL

WHETHER THE RULE OF STATE v. BEAMON WHICH PERMITS THE FILING OF SUBSEQUENT CHARGES APPLIES IN A CASE, LIKE THE INSTANT CASE, WHERE THE DEFENDANT WAS ACQUITTED BY GENERAL VERDICT IN THE INITIAL PROCEEDINGS WITHOUT THE DEFENDANT SEEKING A DIRECTED VERDICT OF ACQUITTAL OR REQUESTING AN INSTRUCTION TO THE JURY AS TO THE BINDING NATURE OF A BILL OF PARTICULARS IN THOSE PROCEEDINGS?

SUMMARY OF THE ARGUMENT

The decision of the Fourth District should be reversed in light of the holding of this Court in State v. Katz, 402 So.2d 1184 (Fla. 1981), that the import of the Beamon decision is that if a variance between the proof at trial and the charges brought against the defendant is substantial enough to form the basis of an acquittal, despite the defendant never having affirmatively sought the acquittal, the variance is material and may form the basis for new charges against the defendant.

ARGUMENT

THE RULE OF STATE v. BEAMON WHICH PERMITS THE FILING OF SUBSEQUENT CHARGES APPLIES IN A CASE, LIKE THE INSTANT CASE, WHERE THE DEFENDANT WAS ACQUITTED BY GENERAL VERDICT IN THE INITIAL PROCEEDINGS WITHOUT THE DEFENDANT SEEKING A DIRECTED VERDICT OF ACQUITTAL OR REQUESTING AN INSTRUCTION TO THE JURY AS TO THE BINDING NATURE OF A BILL OF PARTICULARS IN THOSE PROCEEDINGS.

The state asserts the rule of this Court in State v. Beamon, 298 So.2d 376 (Fla. 1974), cert. denied 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975), as interpreted by this Court in State v. Katz, 402 So.2d 1184 (Fla. 1981) and Stang v. State, 421 So.2d 147 (Fla. 1982) does apply to the instant case such that it was proper for the state to refile charges against the defendant, alleging different times in the statement of particulars. The state asserts the Fourth District and the trial court failed to consider prejudice to the defendant when the state sought to amend the bill of particulars at trial and the Fourth District misinterpreted the holdings of this Court in State v. Bentley, 81 So.2d 750 (Fla. 1955) and Driggers v. State, 188 So. 118 (1939).

In the initial proceeding, the defendant was charged with first-degree murder on January 30, 1983 (SR 1). The state narrowed the time of the offense by filing a bill of particulars which alleged the crime took place between 5:00 p.m. January 29, 1983 and 12:59 a.m. on January 30, 1983 (R 29-32). The trial court of its own volition and without objection by either

party gave the standard jury instruction on the binding nature of the bill of particulars (SSR 26-27, Appendix III). The case was submitted to the jury who repeatedly raised questions about the importance of the time constraints (SSR 2-5, 13, 16-17, 27-28, 54-55). The jury foreman indicated that although they did not have doubts about the facts of the case, they had grave doubts about the time constraints within the bill of particulars and would strictly construe them unless instructed otherwise (SSR 27-28). The state sought to amend the bill of particulars (SSR 22-27, 30-34, 48-49), arguing that the defense could show no prejudice which would result from the amendment (SSR 9-10, 20-21, 22-26). The defense opposed the state's motion to amend, but never indicated how they would be prejudiced by the amendment (SSR 8-9, 30-31, 37-47). The trial court stated that the prejudice was that the defendant was "looking at a not guilty right now . . ." (SSR 33), and denied the state's motion to amend (SSR 49).

In Lackos v. State, 339 So.2d 217 (Fla. 1976) this Court held that a showing of prejudice to the defendant was necessary before a trial court denied the state's motion to amend an indictment or information.

In Stang v. State, supra, this Court agreed with the dissenting opinion of Judge Anstead in Stang v. State, 403 So.2d 542 (Fla. 4th DCA 1981), that the defendant was prejudiced by allowing the state to amend the bill of particulars after the defendant had advised the jury that the state would be

unable to prove its case on the date in question. As the defendant relied on the mistaken date as his defense, stripping him of that defense and forcing him to face the same jury with no defense left was held by this Court to be prejudicial. Stang, supra, at 150. However, this Court noted that the state could properly recharge the defendant.

In Hoffman v. State, 397 So.2d 288 (Fla. 1981), this Court citing Lackos, supra, held that the modern trend is to excuse technical defects which have no bearing on the substantial rights of the parties. Id. at 290. This Court further held that where it is clear the defense was neither misled by the incorrect date nor would be prejudiced by amendment, it is proper to allow the state to amend. See also Beamon, supra; State v. Mayor, 378 So.2d 1324 (Fla. 3d DCA 1980). Rule 3.140(o) Fla. R.Crim.P. (1977).

Clearly below, the defense was in no way misled by the incorrect time set out in the bill of particulars, nor did they present an alibi defense. Indeed it appears the first persons to note the time discrepancy were the jurors.

While the state recognizes it did not and cannot appeal the trial court's denial of the motion to amend as the defendant was acquitted, the state asserts that the issue of prejudice is relevant in situations where, as here, there is no prejudice to the defendant in allowing the amendment, and the defendant is acquitted due to the denial of the amendment; if no prejudice can be shown in allowing the amendment, then clearly there can be no bar to reprosecution if the amendment

is denied.

In its opinions, the Fourth District expressed concern as to whether some sort of affirmative action by the defendant to establish the materiality of the variance between the allegations and the proof was necessary before the state could recharge the defendant under proper allegations. In Bently, supra, this Court stated that reprosecution in Driggers, supra, was improper because "from all that appears in the record, the jury could have found them [the defendants] not guilty on the actual merits of the case." Driggers, at 751. Thus, the Bently court reasoned, where the defendant took advantage of the variance to obtain an acquittal, i.e., based not on the merits but only on the variance, he could not later claim the variance was not material.

Below, while the defendant did not argue the variance to the jury, it is clear the jury's verdict was based on the variance and not on the facts/merits of the case (SSR 27-28). The defendant below did argue against allowing the state to amend the bill of particulars and specifically declined to move for a directed verdict (SSR 35-38). Indeed, defendant recognizing the "little technicality" might allow him to get off, repeatedly opposed the state's motion to amend as the variance was sufficiently material to warrant acquittal.

This Court in State v. Katz, supra, at 1186, specifically rejected the defendant's argument that since he did not affirmatively seek a judgment of acquittal based on the variance,

the Beamon rule could not apply to prevent him from denying its materiality when the second accurate charges were filed. This Court stated:

> The import of the Beamon, Bently and Driggers decisions is that if a variance is substantial enough to form the basis for an acquittal, it must be deemed a material variance.

Id. at 1186.

Clearly the jury below acquitted the defendant due to the variance between the time alleged in the bill of particulars and the proof of time adduced at trial. Equally clearly this Court in Katz, supra, stated that where the variance was substantial enough to form the basis of an acquittal, as it was here, the variance is substantial enough to allow the state to recharge and retry the defendant adducing proof of the proper time. Thus the decision of the Fourth District must be quashed.

CONCLUSION

Based on the foregoing argument, supported by the circumstances and authorities cited therein, Petitioner respectfully requests this Honorable Court REVERSE the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 8th day of July, 1985, by Courier to: MARGARET GOOD, ESQUIRE, Assistant Public Defender, 224 Datura Street, Harvey Building, 13th Floor, West Palm Beach, Florida 33401.

Of Counsel