087

IN THE SUPREME COURT OF FLORIDA

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

REPLY 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 to Petitioner's Initial Brief.

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

STATEMENT OF THE CASE AND FACTS

Petitioner reasserts the recitation of the case and facts in its Initial Brief on the Merits.

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, 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.

Respondent asserts the state does not contend that the second indictment of him charges an offense different from the offense for which he was initially indicted and acquitted. Respondent asserts that only the statutory elements and not the factual elements are relevant in the determination of whether an offense is barred by double jeopardy.

However, this Court in Bell v. State, 437 So.2d 1057 (Fla. 1983) held that even where the statutory elements are the same, prosecution is proper where the offenses are based on two separate and distinct factual events. Id. at 1060. This Court in State v. Beamon, 298 So.2d 376 (Fla. 1974), held that where an offense is not a continuing one, a difference in dates on which the offenses occurred "clearly renders them two separate and distinct offenses..." Id. at 380. Likewise in State v. Katz, 402 So.2d 1184 (Fla. 1981), this Court held that a difference in the time at which the crimes occurred allowed subsequent prosecution of the defendant. In discussing Beamon, supra in Katz, supra this Court stated: "In each situation

the defendant was exonerated because proof of the time of commission of the criminal activity varied materially from the allegation of time for which the defendant had prepared his defense." Katz at 1187. [Empahsis added].

Clearly the Respondent was exonerated below because the proof of the time of commission of the criminal activity varied materially from the allegation of time. (SSR. 27-28). Hence the Respondent's subsequent prosecution was proper and the trial court erred in dismissing the second indictment and the Fourth District erred in affirming the trial court's action.

Respondent further contends that as he was charged by indictment and not by information, the state could not alter or define the offense by use of a statement of particulars. This assertion is without foundation in the law.

Rule 3.140(n) Fla.R.Crim.P. provides:

> (n) Statement of Particulars: The court, upon motion, shall order the prosecuting attorney to furnish a statement of particulars, when the indictment or information upon which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense. Such statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.

[Emphasis added]. In Stang v. State, 421 So.2d 147 (Fla. 1982), this Court quoting Beamon, supra, noted that "the effect of such a specification of date in a bill of particulars is to narrow the Indictment or Information as to the time within which the act or acts allegedly constituting the offense may be proved..." Stang at 149. Clearly a bill of particulars operates equally to an indictment as to an information.

Respondent also asserts there is a difference between a jury's verdict of acquittal and a judgment of acquittal or a directed verdict of acquittal, in that a court may not "look behind" a jury's verdict of acquittal to determine the reasons for acquittal.

However, this Court in Katz, supra stated that "injustice will result if a defendant who clearly is acquitted on the basis of a variance may later assert that the variance wasn't really material and that the offenses differentiated thereby are one and the same." Id. at 1186. The Court further stated that:

> [t]he import of the Beamon, Bentley and Driggers decisions is that of a variance is substantial enough to form the basis for an acquittal, it must be deemed a material variance. [Emphasis added] Id. at 1186.

In the trial court below the jury indicated it found the variance material by the foreman's statement; "Your Honor, we do not have great doubts about the facts of this trial,

but we do have grave doubts about the time constraints within the Statement of Particulars.... If you are unable to assist us with this question, we must, we will have to give this question strict interpretation, as we see it." (SSR. 26-27). The state asserts that a clearer statement that the variance (as to time) was material could not have been made. This is not a situation where "from all that appears in the record, the jury could have found not guilty on the actual merits of the case. State v. Bentley, 81 So.2d 750, 751 (Fla. 1955). Here injustice will result if Respondent who clearly was acquitted on the basis of a variance, is allowed to now assert the variance was not material.

As the Respondent's second indictment was for a different offense than that for which he was acquitted, and as the acquittal was clearly based upon a material variance between the time charged and the time proved, the state's subsequent prosecution of the defendant was proper.

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 26th day of August, 1985, by Courier to: MARGARET GOOD, ESQUIRE, Assistant Public Defender, 224 Datura Street, Harvey Building, 13th Floor, West Palm Beach, Florida 33401.

Of Counsel