IN THE SUPREME COURT OF THE STATE OF FLORIDA

EDWARD ADAM FRIDOVICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,921

ON REVIEW OF A CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Table of Citations ii

Preliminary Statement iii

Argument 1

I. ISSUES I AND II--THE ARGUMENT REGARDING THE CERTIFIED QUESTION. 1

11. ISSUES III AND IV--THE ARGUMENT REGARDING THE TRIAL COURT'S ADMISSION OF "MURDER" EVIDENCE AND FAILURE *TO* GRANT FRIDOVICH A MISTRIAL. 8

Conclusion 12

Certificate of Service 13

TABLE OF CITATIONS

Cases	Page(s)
Akers v. State, 370 So.2d 81 (Fla. 1st DCA 1979)	6
Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 4469 (1970)	8
Febre v. State, 30 So.2d 367 (Fla. 1947)	8
Maguire v. State, 453 So.2d 438 (Fla. 2d DCA 1984)	6, 7
Mead v. State, 101 So.2d 373 (Fla. 1958)	3, 4, 6
Preston v. State, 342 So.2d 852 (Fla. 2d DCA 1977)	11
Reyes v. Kelly, 204 So.2d 534 (Fla. 2d DCA 1967)	7
Rubin v. State, 390 So.2d 322 (Fla. 1980)	2
State ex rel. Manucy v. Wadsworth, 293 So.2d 345 (Fla. 1974)	5
State ex rel. Pope v. Joanos, 278 So.2d 305 (Fla. 1st DCA); cert. denied, 283 So.2d 564 (Fla. 1973)	7
State v. King, 282 So.2d 162 (Fla. 1973)	6
Sturdivan v. State, 419 So.2d 300 (Fla. 1982)	7
Tucker v. State, 459 So.2d 306 (Fla. 1984)	6
Wingate v. Wainwright, 464 F.2d 209 (5th Cir. (1972)	10

PRELIMINARY STATEMENT

Edward Adam Fridovich ("Fridovich") was the defendant at trial and the appellant in the Fourth District Court *of* Appeal. The State of Florida (the "State") prosecuted Fridovich at trial and was the appellee in the Fourth District Court of Appeal.

ARGUMENT

I. ISSUES I AND 11--THE ARGUMENT REGARDING THE CERTIFIED QUESTION.

In the answer brief, the State does not refute that the State is barred from prosecuting a defendant if a new information, filed after the statute of limitations has run, is not properly linked to a timely filed charging document. Instead, the State claims that (1) "the instant information provides a sufficient relation back to the first charging document," and (2) Fridovich was on notice that the State would prosecute him a second time because this Court remanded the case for a new trial. The State's arguments are both factually inaccurate and legally unsupported.

First, the State fails to demonstrate how the second information "relates back" to the first. In fact, the second charging document bears little resemblance to the first. The State originally charged Fridovich by indictment but later charged Fridovich by information. Therefore, the nature of the second charging document differs substantially from the original charging document. Most significantly, each charging document alleges a substantively different offense. Specifically, the indictment charged murder although the information charged only manslaughter. Each offense charged requires a different level of scienter--premeditation as opposed to culpable negligence or intent in the "heat of passion". Each is punishable by different sanctions--death or a life sentence

as opposed to a short prison term. Each is defensible by different evidence--evidence to disprove premeditation as opposed to evidence to disprove culpable negligence or intent in the "heat of passion." Therefore, the State's failure to incorporate the original indictment in the "Refile Information" is understandable--the State obviously recognized that, because of the many distinctions between the two charging documents, the second charging instrument could not be a mere continuation of the timely initiated prosecution. Because the second charging document did not properly "relate back" to the first, the statute of limitations on the State's manslaughter action was not tolled by the State's filing of the original indictment.

None of the cases relied on by the State hold that the State may prosecute a defendant for a crime that is time barred if a different crime is charged in a timely filed instrument. Like all the cases on which the State relies, Rubin v. State, 390 So.2d 322 (Fla. 1980), is factually inapposite to the instant case. In Rubin, the State refiled an information to correct a "slight inaccuracy"' in the original information. The new information, however, alleged the same crime as the original information. This Court held that the

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The only distinction between the original information and the refiled information was a modification of the corporate victim's name from "Riverside Memorial Chapel, Inc., a subsidiary of Service Corporation International," to "Riverside Memorial Chapel, Alton Road, Inc., a subsidiary of Service Corporation International." A fair conclusion is that a technical name change is an amendment of somewhat less dignity than a change from murder to manslaughter.

refiled information was not barred by the statute of limitations because it was identical in crime charged to the original information:

> Since the crimes charged and the two informations are identical, we find that the refile notation on the second information was sufficient indication that the State was pursuing the same prosecution begun by an information which contained a slight inaccuracy as to the name of the corporate victim of the . . . charges.

390 So.2d at **324.**

In the instant case, the crimes charged and the facts alleged in the two charging instruments are far from identical. Unlike the refiled information in Rubin, the refiled information in the instant case changed the substance of the crime charged. Indeed, the refiled information contains none of the "linking language" found critical in Rubin and in the other cases on which the State relies. Therefore, the second charging document was not properly linked to the first and the second prosecution was barred by the statute of limitations.

Equally unavailing is the State's second retort, that this Court's remand of the case for new trial automatically links the second charging document to the first. Apparently, the State neglected to review Mead v. State, **101** So.2d **373** (Fla. **1958),** discussion of which is conspicuously absent from the State's answer brief. In Mead, the State refiled an information after the Supreme Court reversed the defendant's first conviction and remanded the case for a new trial. The

State, however, failed to link the refiled information to the original timely filed information by either case number or date. Mead holds that the State cannot prosecute a defendant pursuant to an untimely refiled or amended information, even if the information is refiled pursuant to a remand. In Mead, the refiled information, although entitled "Amended Information," contained no reference to the original information. Therefore, the court stated:

> Having concluded that there was nothing in the last information to link it with the first and that the appellant could not have been legally convicted in the absence of proof that the offense, was committed within two years of 29 August 1956, we are impelled to reverse the judgment.

101 So.2d at 375. Thus, this Court has already addressed the question certified in the instant case and has concluded that, even if a case is remanded for a new trial, the State has a duty to timely refile an amended information that is properly linked to the original, timely filed, charging document.

Although the State suggests that a "Catch 22" will result from a requirement that the State strictly comply with the statute of limitations, that "Catch 22" is purely illusory. The State could have protected its right to prosecute Fridovich for manslaughter by simply following this Court's directive in Mead--that is, by including the critical "linking" information, such as the case number and date of the original indictment, in the second charging document.

The State's failure to properly "link" the refiled information to the original indictment is not merely an insignificant procedural error. The statute of limitations vests substantive rights in a defendant because the State cannot lawfully prosecute an accused for a crime on which the statute of limitations has expired. In State ex rel Manucy v. Wadsworth, **293** So.2d **345, 347** (Fla. **1974),** this Court explains:

> There is as much a denial of what we have called the first right of every accused person, by holding him to answer an offense for which he cannot be lawfully prosecuted, as there is for one wholly unsupported by proofs. . . . The right of protection [afforded by the statute of limitations] is not a mere procedural one, but is a substantive right.

(citation omitted) (emphasis in original). Thus, the State's prosecution of an accused pursuant to an information that is precluded by the statute of limitations is tantamount to the State's prosecution of an accused for a crime of which the State wholly lacks evidence.

The substantive import of the statute of limitations is evidenced by the numerous cases that establish that, unlike a plaintiff in a civil case, the State in a criminal prosecution bears the burden of proving that the statute of limitations has not expired. This Court explains:

> In fact, a most significant burden of proof is placed upon the State in order to proceed once the jurisdiction of the Court is questioned through the raising of the Statute of Limitations.

State v. King, 282 So.2d 162, 164 Fla. 1973). See also Akers v. State, 370 So.2d 81 (Fla. 1st **DCA** 1979). In the answer brief, the State ignores Fridovich's argument that the State failed to meet its burden of proof on the statute of limitations issue. Similarly, the State ignored its significant burden of proof at trial. Because the State failed to prove that it prosecuted Fridovich for manslaughter within the statute of limitations, the trial court should have acquitted Fridovich.

The State's suggestion in the answer brief that Fridovich waived his right to raise the statute of limitations defense wholly lacks foundation. A criminal defendant may raise a statute of limitations defense at any time, including in a motion for a new trial or on appeal. See Mead v. State, 101 So.2d 373 (Fla. 1958); Maguire v. State, 453 So.2d 438 (Fla. 2d **DCA** 1984). A criminal defendant is precluded from raising a statute of limitations defense only if the defendant knowingly and explicitly waives that defense. Pursuant to Tucker v. State, 459 So.2d 306, 309 (Fla. 1984):

> [A]n effective waiver may only be made after a determination on the record that the waiver was knowingly, intelligently and voluntarily made; the waiver was made for the defendant's benefit and after consultation with counsel; and the waiver does not handicap the defense or contravene any of the public policy reasons motivating the enactment of the statute [of limitations].

The State has neither alleged nor proved any of these elements. Fridovich's mere failure to raise the defense before trial certainly does not constitute a waiver.

Furthermore, the State's reliance on Sturdivan v. State, 419 So.2d 300 (Fla. 1982), is sorely misplaced. Noting that the defendant failed to show prejudice arising from the State's failure to afford the defendant a speedy trial, the court in Sturdivan held that the defendant was not denied his constitutional right to a speedy trial. Sturdivan does not, however, suggest that a criminal defendant must show prejudice from the State's failure to prosecute within the statute of limitations. That prejudice is self-evident.

Finally, by claiming that Fridovich's only method to assert the statute of limitations defense was to seek a writ of prohibition, the State demonstrates the its fundamental misunderstanding of the writ and of the defense. Although Fridovich could have attempted to obtain a writ of prohibition to prevent the prosecution, cf. Reyes v. Kelly, 204 So.2d 534 (Fla. 2d DCA 1967), Fridovich was free to assert the statute of limitations as a defense once the prosecution began. See, e.g., Maguire v. State, 453 So.2d 438 (Fla. 2d DCA 1984). Once the prosecution was complete, Fridovich was precluded from seeking prohibition because an appeal could provide complete relief. See State ex rel. Pope v. Joanos, 278 So.2d 305 (Fla. 1st DCA), cert. denied, 283 So.2d 564 (Fla. 1973). Simply put, resort to the extraordinary writs is never mandatory. Any error can be asserted on appeal from a final judgment.

11. ISSUES III AND IV--THE ARGUMENT REGARDING THE TRIAL COURT'S ADMISSION OF "MURDER" EVIDENCE AND FAILURE TO GRANT FRIDOVICH A MISTRIAL.

Arguing that it was attempting to prove Fridovich's intent in shooting his father, the State defends the trial court's admission of the blood spatter evidence and the trial court's failure to give the jury a curative instruction when the State improperly attempted to elicit "murder" testimony from the medical examiner. The State contends that Fridovich was charged with manslaughter by act or procurement as well as by culpable negligence so that Fridovich's intent was relevant to the manslaughter charge. However, the State mischaracterizes the nature of the evidence presented as simply proving Fridovich's intent. Instead, the evidence could have been relevant only to prove Fridovich's premeditation in shooting his father--a crime for which he was acquitted. Pursuant to Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed. 2d 469 (1970), and its progeny discussed in the initial brief, this evidence was patently inadmissible.

Although the State correctly notes that manslaughter by act or procurement requires a showing of some intent of the accused, that intent need not rise to the level of premeditation necessary to support a murder conviction. Manslaughter by act or procurement is a "heat of passion" offense by which the defendant becomes so aroused by some provocation that he can no longer control his emotions and actions. See Febre v.

State, 30 So.2d 367 (Fla. 1947). Therefore, intentional manslaughter by act or procurement is not a crime of premeditation but rather is a crime of passion. A review of the evidence adduced by the State reveals that the only possible probative value of the evidence was to attempt to prove that Fridovich calmly and thoughtfully killed his father, not that Fridovich killed him in the heat of the moment. Indeed, the record contains no evidence whatsoever of "heat of passion."

The trial court allowed the State to introduce blood spatter evidence--that is, evidence of where the decedent's blood was located--to determine from what distance and at what angle the wound was inflicted. The State's blood spatter expert testified that, based on the location of the decedent's blood, the shotgun must have been within one inch of the decedent's head when the gun discharged. (This evidence was wholly refuted by Fridovich's testimony that he was approximately six feet from his father when the gun discharged and by the medical examiner's testimony that [1] the gun was four to six feet from the decedent when it discharged and [2] the death was accidental.) In addition, and most blatantly, the State interrogated the medical examiner, over objection, regarding the possibility that Fridovich thoughtfully and intentionally shot his father:

> Q. (By the State] Now I would ask, would you rule out someone taking a weapon and thoughtfully getting it in the position where you believe it was fired and pulling the trigger? Would you rule that out?

R 164 (emphasis supplied). The State obviously hoped to improperly convince the jury, through the use of both the blood spatter testimony and the State's question to the medical examiner, that Fridovich, with premeditation, aimed his gun at his father and pulled the trigger. This testimony is unquestionably "murder" testimony. Because Fridovich was acquitted of murder in the first trial, that testimony should have been excluded.

The prejudicial nature of the evidence offered by the State is manifest. The State, lacking evidence that Fridovich's father's death was occasioned by an act in the heat of passion or by culpable negligence, elected to attempt to prove murder in an effort to inflame the jury and galvanize the jurors' emotions against Fridovich. In Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972), the court held that the trial court should exclude evidence of crimes of which the defendant had already been acquitted, stating:

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded did not commit. Otherwise, a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime.

Once the State inflicted this fundamental unfairness upon Fridovich, the court abused its discretion in failing to give the jury a curative instruction as Fridovich requested.

Pursuant to Preston v. State, 342 So.2d 852, 853 n.1 (Fla. 2d DCA 1977):

> An improper remark is ordinarily an error which could be cured by objection and cautionary instruction. (citation omitted) It hardly bears repeating, however, that a mistrial is properly requested and granted where the error complained of or the aggregate of errors previously objected to is so prejudicial to a defendant's substantial rights including his right to a fair and impartial trial that a cautionary instruction to the jury would not be sufficient. (citations omitted) As correctly stated in [Mabery v. State, 303 So.2d 369 (Fla. 3d DCA 1974)], a motion for a mistrial may also be based on a denial of a cautionary instruction or an inadequate cautionary instruction.

In the instant case, the trial court, in response to Fridovich's motion in limine, prohibited the State from introducing any evidence for the purpose of proving any "act" other than an act that constitutes manslaughter. However, at trial, the court admitted evidence that suggested that Fridovich shot his father with premeditation. The trial court then refused to give the jury a cautionary instruction as requested by Fridovich and refused to grant Fridovich a mistrial to alleviate the prejudice imposed by the State's improper evidence. Because defense counsel relied on the trial court's pretrial order prohibiting the State's use of "murder" evidence,

Fridovich was left unprepared to counter this evidence[2] and was forced to answer twice to the charge of murder. The trial court's failure to grant Fridovich a mistrial under these circumstances constituted a patent abuse of discretion.

CONCLUSION

For these reasons and for the reasons set forth in the initial brief, Fridovich requests that this Court answer the certified question in the negative and reverse the decisions of the trial court and the Fourth District Court of Appeal.

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[2] If Fridovich's counsel had known that the trial judge's previous ruling on the murder evidence issue would effectively be reversed at trial by the trial court's admission of the blood spatter testimony, defense counsel would have had sufficient time to secure the services of a pathologist to perform the time consuming blood analysis work and to give expert testimony to refute the blood spatter testimony. The trial judge's rulings foreclosed this possibility.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 23rd day of October, 1989, to Deborah Guller, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

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