IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1995 SESSION

FILED

February 29, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9506-CC-00200**
	)	
Appellee,	)	
	)	**RUTHERFORD COUNTY**
VS.	)	
	)	**HON. JAMES K. CLAYTON, JR. ,**
	)	**JUDGE**
RICHARD N. BOUGHNER,	)	
	)	(DUI)
	)	
Appellant.	)	

FOR THE APPELLANT:

GUY R. DOTSON, JR.
102 South Maple St.
Murfreesboro, TN 37130

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

ELIZABETH T. RYAN
Assistant Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

GUY R. DOTSON
District Attorney General

JOHN PRICE
Asst. District Attorney General
Judicial Bldg.
Murfreesboro, TN 37130

OPINION FILED:____________________

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

On July 30, 1994, the defendant was stopped for driving under the influence of an intoxicant (DUI). His results from a breath test on the Intoximeter 3000 indicated a blood alcohol level of .17 of one percent. He was indicted by the Rutherford County Grand Jury for DUI during its October 1994 session. The indictment returned against the defendant recites June 30, 1994, as the date of the offense.[1]

The defendant pled not guilty and a jury trial was held. After the jury was sworn, the prosecuting attorney read the indictment as though it stated July 30, 1994, as the date of the offense. The trial court sua sponte corrected the attorney, stating, "Ladies and gentlemen [of the jury], let me make one correction in what the Attorney General just read. I believe he said 30th of July. The indictment actually reads 30th of June." The prosecuting lawyer responded that the indictment had been amended "to July," to which the defendant's lawyer responded that he was unaware of any amendment. A bench conference was then held, at which the trial court inquired as to whether the defendant had also been charged on June 30, 1994. The defense lawyer stated that, to the best of his knowledge, there was only the one charge against his client. At that point the court said, "I'm going to allow it" and the defendant's lawyer simply said, "Yes, sir." The trial proceeded and the jury convicted the defendant of a first offense DUI occurring on July 30, 1994.

After the trial, the defendant filed a motion for judgment of acquittal, complaining of the variance between the original indictment and the proof offered at trial.

---

[1]The indictment spells the defendant's last name as "Boughner." No complaint has been made about this spelling, although all of the other documents in the record of this matter spell the defendant's name "Bougher." The policy of this Court is to use the spelling as set out in the indictment.

The trial court denied this motion. The defendant did not file a motion for new trial.

The defendant now complains that his indictment was improperly amended and that his conviction ought therefore to be reversed and the charge against him dismissed.

Tenn. R. Crim. P. 7(b) states, "An indictment, presentment or information may be amended in all cases with the consent of the defendant. If no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment without the defendant's consent before jeopardy attaches." In this case, the jury had been selected and sworn prior to the amendment. Thus, jeopardy had attached. State v. Knight, 616 S.W.2d 593, 595 (Tenn. 1981). The only way the indictment could properly have been amended, then, was with the defendant's consent. However, the defendant did not consent to the amendment. The court did not ask for the defendant's consent, and the defendant's lawyer was given no opportunity to refuse consent before the court announced that it was going to allow the amendment. The court erred in this regard.

Had the amendment not been allowed, there would have existed a variance between the defendant's indictment and the proof presented at trial. That is, the indictment would have alleged that the offense occurred on June 30, 1994, while the proof focussed on events occurring on July 30, 1994. Such a variance would not, however, automatically entitle the defendant to relief. "Unless a special date is essential or time is critical to the case, the time of an offense alleged in the indictment is not material." State v. Hardin, 691 S.W.2d 578, 580 (Tenn. Crim. App. 1985). See also State v. Chance, 778 S.W.2d 457 (Tenn. Crim. App. 1989) (" 'The actual date of the

commission of the offense may be different than that charged in the indictment so long as the proof establishes that the offense occurred prior to the finding and returning of the indictment . . . .' " Id. at 462 (citation omitted)). Our Supreme Court has held that a variance between an indictment and the proof constitutes reversible error only when the variance is material and prejudices the defendant's substantial rights. State v. Mayes, 854 S.W.2d 638 (Tenn. 1993). The variance is not fatal where "(1) the indictment otherwise sufficiently informs the defendant of the charge against him such that he will not be misled and can adequately plan a defense, and (2) the variance is such that the defendant cannot be prosecuted again for the same offense due to double jeopardy principles." Id. at 641.

The defendant makes no argument here that he was misled by the date on the indictment, or that he was therefore unable to adequately plan a defense. Indeed, the scant record before us indicates that the defendant mounted a viable defense that was unaffected by the confusion over the date of the offense. The trial court specifically found in its order denying the defendant's motion for judgment of acquittal that the defendant's case had not been prepared around the incorrect date originally contained in the indictment. The jury's (apparent) rejection of the defendant's version of the facts is not proof that the defendant was either misled by the indictment or unable to adequately plan his defense.

Furthermore, had the indictment been left unamended, the variance was such that double jeopardy principles would have protected the defendant from a second prosecution. The proof presented by both the State and the defendant at the trial of this

matter related to events occurring on July 30, 1994.[2] Thus, had the defendant been acquitted and had the State then tried to reindict the defendant so that the correct date was alleged in the new indictment, the defendant could have successfully pled double jeopardy. See, e.g., State v. Goins, 705 S.W.2d 648 (Tenn. 1986) (principles of double jeopardy will prevent a subsequent prosecution unless it is clear that the offenses are " 'wholly separate and distinct.' " Id. at 650 (citation omitted)).

Therefore, there has been no showing that the defendant would have been prejudiced by the variance that would have existed had the trial court correctly denied the State's requested amendment to the indictment. Nor has there been any showing that the defendant was prejudiced by the trial court's error in granting the amendment. We find, therefore, that the trial court's error was harmless, and the defendant is not entitled to any relief. Tenn. R. Crim. P. 52(a). Accordingly, the defendant's conviction is affirmed.

JOHN H. PEAY, Judge

CONCUR:

JOE B. JONES, Judge

JOSEPH H. WALKER III, Special Judge

[2] Indeed, the State has never claimed that the defendant committed the offense of DUI on June 30, 1994. Also, the arrest warrant originally issued against the defendant correctly stated the date as July 30, 1994.