

73358-3

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FILED
June 6, 2016
Court of Appeals
Division I
State of Washington

NO. 73358-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL REZENE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Monica Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The information omitted an essential element of the crime of attempting to elude a pursuing police vehicle, in violation of the appellant's right to due process.

Issue Pertaining to Assignment of Error

A criminal information must set forth all of the essential elements of an offense. Where the information failed to allege that an officer signaled appellant by hand, voice, emergency light or siren, did the information omit an essential legal element of attempting to elude thereby requiring reversal and dismissal of the charge?

B. STATEMENT OF THE CASE

The King county prosecutor charged appellant Samuel Rezene with one count of attempting to elude a pursuing police vehicle for an incident that occurred on April 22, 2014. CP 1-7. Rezene waived his right to a jury trial. CP 9; RP 6-9. The trial court found Rezene guilty following a bench trial. CP 10-16, 20-25; RP 160-63.

The trial court imposed four months imprisonment, with credit for time already served. CP 10-16; RP 170. The trial court waived all non-mandatory legal financial obligations (LFOs). CP 12; RP 170. Rezene timely appeals. CP 18-19, 26.

C. ARGUMENT

1. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF ATTEMPT TO ELUDE A PURSUING POLICE VEHICLE.

The charging document failed to notify Rezene that an attempt to elude a pursuing police vehicle required that the police signal to stop be made by “hand, voice, emergency light, or siren.” Because the information omitted this essential element of the crime, this Court should reverse and dismiss the charge.

a. Applicable Law.

A charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10);¹ State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). An “essential element is one whose specification is necessary to establish the very illegality of the behavior[.]” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552

¹ U.S. Const. amend. VI provides, “In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation” Const. art. I, § 22 provides in part, “In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation.”

(1989). Citation to the correct statute, even if the statute contains each element, is insufficient. State v. Naillieux, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010).

Where, as here, the adequacy of an information is challenged for the first time on appeal, this Court engages in a two-pronged inquiry: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” Kjorsvik, 117 Wn.2d at 105-06. If the necessary elements are neither found nor fairly implied in the charging document, this Court presumes prejudice and reverses without further inquiry. McCarty, 140 Wn.2d at 425.

- b. The Information Failed to Notify Rezene of an Essential Element of Attempting to Elude and State v. Pittman’s Contrary Reasoning is Incorrect and Harmful because it Misinterpreted RCW 46.61.024.

RCW 46.61.024 criminalizes an attempt to elude a pursuing police vehicle. That statute provides in part that:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The

officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1).

That the driver be signaled to stop by a uniformed police officer using “hand, voice, emergency light, or siren” is an element of the crime.

Id.; see also 11A. Washington Practice: Washington Pattern Jury Instructions: Criminal 94.02, at 332 (3rd ed. 2008).

Here, the information alleged:

That . . . [Rezene], in King County, Washington, on or about the April 22, 2014, while driving a motor vehicle and *having been given a visual and audible signal by a uniformed police officer to bring the vehicle to a stop*, willfully failed and refused to immediately stop and drove the vehicle in a reckless manner while attempting to elude a pursuing police vehicle that was equipped with lights and siren; contrary to RCW 46.61.024...

CP 1 (emphasis added).

The information therefore omitted the requirement the signal to stop be accomplished by “hand, voice, emergency light, or siren.” This provision clearly limits what “visual or audible signal” an officer may use. In State v. Pittman, Division Two concluded the specific manner by which police signal someone to stop is not an essential element of the crime of attempting to elude a police vehicle and therefore need not be included in the information. 185 Wn. App. 614, 623, 341 P.3d 1024, rev. denied, 184 Wn.2d 1021 (2015). Because Pittman misinterpreted RCW 46.61.024 and

rendered a portion of the statute superfluous, that court's holding is incorrect and harmful. This Court should decline to adopt the erroneous reasoning of Pittman.

When interpreting any statute, the court's duty is to "discern and implement the legislature's intent." State v. Williams, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." State v. Christensen, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Where the language of the statute is clear, legislative intent is derived from the language of the statute alone. Jametsky v. Rodney A., 179 Wn.2d 756, 762-63, 317 P.3d 1003 (2014). The court may not add language to a clearly worded statute, even if it believes the legislature intended more.² In re Detention of Martin, 163 Wn.2d 501, 509, 182 P.3d 951 (2008). A statute should not be interpreted in a way that renders some language superfluous. State v. Johnson, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014).

RCW 46.61.024(1) provides a uniformed officer with choices as to how to signal a motorist to stop: the visual or audible signal "may be by hand, voice, emergency light, or siren." While giving the officer options,

² A court may not rewrite a statute even if the legislature intended something else but failed to express it adequately. Martin, 163 Wn.2d at 509. The judiciary may only correct inconsistencies that render a statute meaningless. Martin, 163 Wn.2d at 512-13.

this language makes clear that not every signal would suffice for purposes of satisfying the statute. The officer may choose any of the listed means, but may not resort to other means. But here, nothing about the information informed Rezene of that limitation.

The language regarding the means of signaling must be given effect; otherwise, it is entirely superfluous. Johnson, 179 Wn.2d at 546-47. Each of the listed means qualify as either visual or audible. Had the legislature meant *any* visual or audible signal to suffice, it would have omitted the entire sentence. The statute's use of the word "may" does not change this. There is no ambiguity in the statute: the word "may" provides the officer with a choice as to the mode of signaling. The Pittman court's contrary ruling is a distortion of the statutory language. 185 Wn. App. at 620-22.

By interpreting the mode of signal as purely optional, the Pittman court rendered the language entirely superfluous. Id. Under the Pittman court's reading of the statute, any visual or audible signal qualifies as a predicate to the offense. Id. The legislature could have omitted the sentence outlining the method by which the signal may be given and achieved the same result. The fact that the legislature included the language shows that the legislature's intent was to limit the kinds of visual

or audible signals essential to the offense, while still giving officers some degree of flexibility.³

Because the statutory language is unambiguous, the Pittman court erred by ignoring its plain meaning. Pittman was incorrectly decided. Because the Pittman decision can result in prosecution and conviction of persons whose conduct was not meant to qualify as eluding, it is also harmful. For example, under Pittman, a person who fails to stop after an officer beeps her horn could be accused of eluding. As demonstrated by the statute's plain language, this is not what the legislature intended.

The State is required to provide notice of the elements of the crime so an accused can properly prepare his case. Kjorsvik, 117 Wn.2d at 101-02. The charging document failed to notify Rezene that an attempt to elude a pursuing police vehicle required that the police signal to stop be made by "hand, voice, emergency light, or siren." This court should decline to adopt Pittman's reasoning, reverse Rezene's conviction, and

³ The Pittman court ignored the plain language of the statute, in part because the plain language would prohibit eluding charges based on "certain types of law enforcement signals such as whistles, flares, or written signs." 185 Wn. App. at 622. But the court may not expand the statute simply because it believes the legislature may have intended more. Martin, 163 Wn.2d at 509, 512-13. Moreover, motorists must obey signals such as whistles, flares, and written signs, and may be charged with infractions or other offenses if they ignore them. See chapter 46. RCW.

dismiss the charge without prejudice. McCarty, 140 Wn.2d at 425-26, 428.

2. APPEAL COSTS SHOULD NOT BE IMPOSED

The trial court found Rezene was entitled to seek review at public expense, “by reason of poverty,” and therefore appointed appellate counsel at public expense. CP 27-28. If Rezene does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant’s brief). RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State’s request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Rezene’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding.

Instead, the trial court waived all non-mandatory fees, including court costs and fees for a court-appointed attorney. RP 170; CP 12.

Without a basis to determine that Rezene has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

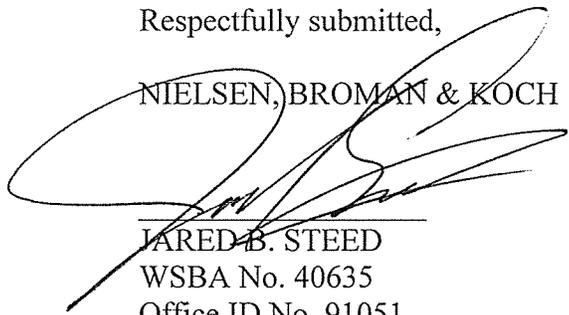
D. CONCLUSION

For the reasons discussed above, this Court should reverse and dismiss the attempt to elude charge because the information omitted an essential element of the offense. This Court should also exercise its discretion and deny appellate costs.

DATED this 6th day of June, 2016.

Respectfully submitted,

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