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September 6, 2016
Court of Appeals
Division I
State of Washington

NO. 73358-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL REZENE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. RCW 46.61.024 provides that a driver who fails to stop a motor vehicle after being given a visual or audible signal to stop by a uniformed police officer, and drives recklessly while eluding a pursuing police vehicle (equipped with lights and siren), is guilty of attempting to elude a police vehicle. Should this Court follow State v. Pittman¹ and conclude that statutory language providing that, “The signal given by the police officer may be by hand, voice, emergency light, or siren” does not create an additional essential element of the offense?

2. Should this court impose appellate court costs (if the State prevails and requests imposition) where there is no information indicating that the defendant, who is now 29 years old and who had completed his sentence at the time of sentencing, will not have the future ability to pay those costs?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Samuel Neguse Rezene, was charged with attempting to elude a pursuing police vehicle, contrary to RCW

¹ 185 Wn. App. 614, 341 P.3d 1024 (2015).

46.61.024. CP 1. Rezene waived his right to a trial by jury and received a bench trial before the Honorable Monica Benton. RP 1, 9.² The court found Rezene guilty as charged. CP 25; RP 163. At sentencing, Rezene received credit for 125 days served and no further confinement was imposed. CP 13.

2. SUBSTANTIVE FACTS

This statement of facts is a summary of facts in the trial court's findings of fact and conclusions of law. CP 20-25; RP 160-63. Rezene has not assigned error to any of these findings, so they are verities on appeal. State v. Ross, 141 Wn.2d 304, 309-11, 4 P.3d 130 (2000); RAP 10.3(g).

On April 22, 2014, Rezene was driving a BMW automobile in the city of Seattle at 1 a.m. CP 24; RP 163. He was signaled to stop by uniformed police officers in a police car equipped with emergency lights and sirens. CP 24.

Rezene was signaled to stop by the use of activated red and blue emergency lights and sirens on the police car. CP 24; RP 161. He failed to stop, and while fleeing, drove recklessly at

² The Report of Proceedings is in one volume containing two days, December 8, 2014, and February 5, 2015. It is referred to in this brief simply as "RP."

speeds of 70 to 100 miles per hour, through wet city streets, driving through a red traffic light during this pursuit. CP 23-24; RP 163.

C. ARGUMENT

1. THE CHARGING LANGUAGE INCLUDED ALL ESSENTIAL ELEMENTS OF THE CRIME.

For the first time on appeal, Rezene asserts that the charging language was defective. This claim is meritless. Rezene contends that it is an element of the crime of attempting to elude a pursuing police vehicle (hereafter “attempting to elude”) that the visual or audible signal to stop was given by hand, voice, emergency light, or siren. The plain meaning of the statute is that the list does not create an additional element, it is illustrative.

A charging document must include all essential elements of a crime, to apprise the accused of the charges and allow preparation of a defense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). When the sufficiency of a charging document is first raised on appeal, it is more liberally construed in favor of validity. Id. at 105. The test is: (1) do the necessary facts appear in any form in the charging document, or can they be found in that document by fair construction; 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. Id. at 105-06.

- a. It Is Not An Essential Element Of Attempting To Elude That The Visual Or Audible Signal To Stop Was Made In A Particular Manner.

An “essential element is one whose specification is necessary to establish the very illegality of the behavior.” State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The Supreme Court has repeatedly rejected the claim that simply because language appears in the statutory definition of a crime, that language is an essential element of the crime. State v. Goss, No. 92274-8, 2016 WL 4401905 (Wash. S. Ct. August 18, 2016) at *3, 4; State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006); Tinker, 155 Wn.2d at 222-24; State v. Ward, 148 Wn.2d 803, 812-14, 64 P.3d 640 (2003). In the case of attempting to elude, the illegality of the behavior is established by recklessly attempting to elude a pursuing police vehicle after having been given a visual or audible signal to stop.

In statutory construction, the court’s objective is to determine and carry out the legislature’s intent. State v. Jacobs, 154 Wn.2d

596, 600, 115 P.3d 281 (2005); In re Det. of Boynton, 152 Wn. App. 442, 451, 216 P.3d 1089 (2009). If the statute's meaning is plain, the court will give effect to that meaning as the expression of legislative intent. Jacobs, 154 Wn.2d at 600.

In discerning the plain meaning of a statute, courts will construe the statute as a whole, relying on the ordinary meaning of the language used, any related provisions, and the statutory scheme as a whole. Id. All of the language in the statute should be given effect, and none of the language rendered meaningless. Boynton, 152 Wn. App. at 451-52. Language is ambiguous if subject to more than one reasonable meaning, but not simply because different interpretations are conceivable. Id. at 452.

The statute will be interpreted in a manner that best advances the legislative purpose. Morris v. Blaker, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). Unlikely, absurd, or strained results must be avoided. Id.

The interpretation suggested by Rezene should be rejected because it is a strained interpretation that is contrary to the legislative purpose of the statute. His argument that the legislature plainly intended to protect the community only from those fleeing police when the officer uses a specifically listed method to signal

the driver to stop is absurd. The legislature's use of the word "may" in the sentence at issue makes it clear that the list of signals is nonexclusive, particularly when the following sentence uses "shall" when the legislature's meaning was mandatory.

Attempting to elude is prohibited in RCW 46.61.024, which provides in relevant part:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her 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) (emphasis added).

Count 1 of the information in this case provided:

That the defendant SAMUEL NEGUSE REZENE in King County, Washington, on or about 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 sirens;

Contrary to RCW 46.61.024, and against the peace and dignity of the State of Washington.

CP 1 (emphasis added).

Division Two of the Court of Appeals recently rejected Rezene's argument in State v. Pittman, 185 Wn. App. 614, 341 P.3d 1024 (2015). That case is analytically indistinguishable from the case at bar. Rezene concedes that it is not distinguishable, arguing instead that its holding is incorrect and harmful.

In Pittman, the majority opinion held that the plain language of the statute was ambiguous, but it rejected the interpretation suggested by the defendant because it would create an absurd result and would be contrary to "transparent legislative intent." 185 Wn. App. at 621-22. The court identified the legislative goal, "prevent[ing] 'unreasonable conduct in resisting law enforcement activities.'" Id. (quoting State v. Treat, 109 Wn. App. 419, 426, 35 P.3d 1192 (2001)). The statute makes it a felony to fail to stop if a person drives recklessly while attempting to elude a pursuing police vehicle; the court concluded that it was contrary to legislative intent to interpret the statute to apply only if specific methods of signaling are used. Id. at 622.

The concurring judge in Pittman concluded that the statute is not ambiguous and its plain meaning is that the listed methods of signaling an order to stop, by inclusion in a sentence with the permissive "may," is a nonexclusive list and not an essential

element of the crime. Id. at 623 (Johanson, C.J., concurring). This reasoning is reinforced by the legislature's use of "may" in the sentence at issue, listing signals, and the contrasting use of "shall" in the sentence immediately following: "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).

A general rule of statutory construction is that when different words are used in the same statute, it is presumed the legislature intended a different meaning to attach to each. State ex rel. Pub. Disclosure Comm'n v. Rains, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976). Where a statute contains both the words "shall" and "may," it is presumed that the legislature intended different meanings: "shall" is construed as mandatory and "may" as permissive. Scannell v. City of Seattle, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982); Rains, 87 Wn.2d at 634. Use of the word "may" is "strong evidence" that the legislature intended a permissive meaning. Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 55-56, 821 P.2d 18 (1991). If the legislature had intended to require the listed methods be used and no others, it would have used the directive "shall" in this sentence, as it used "shall" in the following sentence, which mandates that the signaling officer be in

uniform and that the pursuing vehicle be equipped with lights and siren.

The legislature's intent in enacting this statute was to protect the community from reckless driving by individuals who are attempting to evade police. That purpose is not served by a reading of the sentence in question as an exclusive list, and there is no indication that the legislature intended it to be an exclusive list.

The legislative history of the statute supports this conclusion. Legislative history may provide guidance in construing the statute to give effect to the intent of the Legislature. State v. Bash, 130 Wn.2d 594, 601, 925 P.2d 978 (1996). The Supreme Court has frequently looked to final bill reports as part of that legislative history. Id.

In 2003 the legislature amended RCW 46.61.024, replacing language prohibiting driving "in a manner indicating a wanton or wilful [sic] disregard for the lives or property of others" with a prohibition on driving "in a reckless manner," and replacing the requirement that the signaling officer's vehicle must be a marked police vehicle with the requirement that the vehicle be equipped with lights and sirens. 2003 Wash. Laws ch. 101, § 1. The Final Bill Report includes the statement that the misdemeanor offense of

willfully failing to stop on order of a police officer “can increase to a felony if the driver willfully refuses to stop while attempting to elude a police vehicle.” Senate Comm. on Judiciary, House Comm. on Criminal Justice & Corrections, Final Bill Report, ESHB 1076, 58th Legislature (2003). The misdemeanor of failing to obey an officer extends to failure to stop “when requested or signaled to do so.” RCW 46.61.022. The bill report includes no indication that the legislature intended to restrict the signals as to the more serious crime, when the driver is reckless.

In a recent unpublished decision,³ the Court of Appeals followed Pittman, concluded that the list in the second sentence of RCW 46.61.024(1) is illustrative, and rejected the argument that the holding in Pittman was incorrect and harmful. State v. Tolman, No. 46632-5-II (unpublished), 192 Wn. App. 1009, 2016 WL 181571 (Jan. 12, 2016).⁴ The court in Tolman observed that the legislative intent in the statute “is not to allow defendants to freely ignore certain types of law enforcement signals”; thus, the specific manner

³ This unpublished decision is cited and discussed for its persuasive value only, pursuant to RAP 14.1(a) (Sept. 1, 2016).

⁴ A petition for review of Tolman is pending, stayed pending a decision in State v. Porter, No. 92060-5. State v. Tolman, S. Ct. No. 92814-2 (order of 6/1/2016). The decision in Porter was issued on July 14, 2016; it addressed a different issue. State v. Porter, __ Wn.2d __, 375 P.3d 664 (2016) (holding essential elements of possessing a stolen vehicle do not include statutory definition of “possess”).

by which a police officer signals is not an essential element of the crime. Slip. Op. at *5. It held that the State need only prove the defendant “disregarded some signal by the police to stop.” Id. The court found that an allegation that the signal was “visual or audible” included the essential elements of the crime. Id.

Rezene argues that the list of signals in the second sentence of the statute must be exclusive, relying on the principle of statutory construction that all of the language in a statute should be given effect. State v. Johnson, on which Rezene relies, illustrates the situation to which this rule applies, which is when the language will have no meaning at all under a proposed statutory construction. 179 Wn.2d 534, 543-47, 315 P.3d 1090 (2014). Determining that a list is illustrative does not deprive that list of all meaning. Rezene’s proposed construction itself would violate this rule, as it would render superfluous the earlier language referring to a “visual or audible signal” to stop.

Even if the second sentence is interpreted as an exclusive list, in order to give the term “visual or audible signal” meaning, the second sentence must be construed as providing a definition of “visual or audible signal,” as used in the first sentence, which establishes the elements of the crime. Definitions of terms that

establish the elements of a crime are not essential elements. State v. Smith, 159 Wn.2d 778, 787-88, 154 P.3d 873 (2007); State v. Lorenz, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004).

The legislature did not intend that a defendant avoid prosecution for attempting to elude because the signal to stop was made in a manner not within the illustrative list in the second sentence of RCW 46.61.024(1). The legislature intended to elevate the misdemeanor of failure to stop to a felony when a person drives recklessly in trying to elude police pursuit. The State is not required to prove the signal used was on the illustrative list in order to obtain a conviction, and is not required to allege that fact in the charging document.

- b. If It Is An Essential Element That The Signal To Stop Was By Hand, Voice, Emergency Light, Or Siren, The Charging Language Sufficiently Alleged That Fact.

In the alternative, even if it is an essential element of attempting to elude that the signal to stop was given by hand, voice, emergency light, or siren, the charging language here adequately alleged the nature of the signal. Because Rezene has not alleged any actual prejudice due to any inartfulness in the

allegation, this claim fails under the liberal standard of review adopted in Kjorsvik, supra.

Under the first prong of the Kjorsvik test, there must be “some language in the document giving at least some indication of the missing element.” City of Auburn v. Brooke, 119 Wn.2d 623, 636, 836 P.2d 212 (1992); State v. Pineda-Pineda, 154 Wn. App. 653, 670, 226 P.3d 164 (2010). The charging document is read as a whole, construed based on common sense, and read to include facts that are necessarily implied. State v. Goodman, 150 Wn.2d 774, 788, 83 P.2d 410 (2004) (citing Kjorsvik, 117 Wn.2d at 109). This permits the court to “fairly infer the apparent missing element from the charging document’s language.” Goodman, 150 Wn.2d at 788 (citing Kjorsvik, 117 Wn.2d at 104).

The charging language here alleged that Rezene was given a “visual and audible signal” to stop, by a uniformed police officer, and then drove recklessly while attempting to elude a police vehicle that was “equipped with lights and sirens.” CP 1. The court can fairly infer that the officer signaled by hand, voice, emergency light, or siren. While it is possible that a signal to stop can be given by using a whistle or a sign, methods arguably not in the illustrative

list, in the context of a pursuing police vehicle, those methods are not a reasonable inference.

Because the information in this case satisfied the first prong of the Kjorsvik standard, to obtain reversal Rezene must show that he was actually prejudiced by any vagueness in the language used. Kjorsvik, 117 Wn.2d at 106. Video recordings of the pursuit demonstrated the use of police emergency lights and sirens. RP 161. Rezene did not dispute that police lights and siren were used. See RP 148-57 (defense closing). The trial court found that the pursuing police officers signaled Rezene to stop with emergency lights and sirens. CP 23, 24; RP 163. Because the additional sentence listing methods of signaling was unrelated to the defense and the judge made a finding that the signal to stop was given by lights and siren, there is no prejudice. See State v. Kosewicz, 174 Wn.2d 683, 696, 278 P.3d 184 (2012) (no prejudice where the allegedly missing element is unrelated to the defense and was included in the jury instructions).

In any event, Rezene has not alleged any actual prejudice. When a defendant does not argue that he was actually prejudiced by the charging language, once the first prong of the Kjorsvik standard has been satisfied, the information is deemed

constitutionally sufficient. State v. Nonog, 169 Wn.2d 220, 231, 237 P.3d 250 (2010). Because the first prong of the Kjorsvik standard is satisfied, this challenge to the sufficiency of the charging document should be rejected on this basis as well.

2. THERE IS NO BASIS TO DENY APPELLATE COSTS.

Rezene asks that this Court deny any State request for imposition of costs of this appeal, in the event the State prevails, on the grounds that there is nothing in the record showing he has the ability to pay them and he was permitted to pursue this appeal in forma pauperis. This claim should be rejected. Because the record contains no information from which this Court could reasonably conclude that Rezene has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

As in most cases, Rezene's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. The record contains almost no information about his financial status and no information about his employment prospects, and the State did not have the right to obtain that information.

On December 18, 2015, Rezene obtained an ex-parte order authorizing appeal in forma pauperis. CP 27. There is no record of any information that may have been presented to the judge in support of that finding. There is no information in the record about Rezene's employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding his likely future ability to pay financial obligations.

It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments). The record is devoid of any information that would support a finding that the defendant is unlikely to have any future ability to pay appellate costs.

Rezene is now only 29 years old, and he received a sentence that involved no additional confinement after sentencing.⁵ CP 4, 13-14. He thus has the vast majority of his working years

⁵ At sentencing, the court was informed that Rezene would remain in custody pending trial on other cases, but the outcome of those cases is not in the record. RP 168.

ahead of him. He has pursued a meritless appeal based on an alleged defect in the charging document to which he did not object at trial and which he does not claim caused him any prejudice. Because the record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

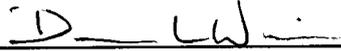
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Rezene's conviction and sentence.

DATED this 6TH day of September, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jared B. Steed, containing a copy of the Brief Of Respondent in State v. Samuel Rezene, Cause No. 73358-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

09-06-16

Date