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NO. 34208-1-II

STATE OF WASHINGTON
BY CM
COUNSEL

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA M. ICE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-01916-1

HONORABLE RICHARD D. HICKS, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Where the Third Amended Information was filed to implement a plea agreement between the parties rather than to provide notice to the defendant of the charges against him, whether the defendant can seek dismissal of the charge of vehicular assault by alleging that the language of the Third Amended Information was defective, even though no prejudice is alleged.

2. Since the Third Amended Information was filed on the day of the defendant's guilty plea to implement the plea bargain, and no claim of insufficiency has been raised in regard to the original Information, First Amended Information, or Second Amended Information, and the claim of insufficiency regarding the Third Amended Information was raised for the first time on appeal, whether in this context the essential elements of vehicular assault can be found in some form in the Third Amended Information, even though inartfully stated.

3. Where the court found that neither drugs nor alcohol contributed to the offenses for which the defendant was convicted, whether the court erred in requiring the defendant to obtain a substance abuse treatment evaluation as a condition of his community custody.

B. STATEMENT OF THE CASE

On October 25, 2004, an Information was filed in Thurston County Superior Court in Cause No. 04-1-01916-1 charging the defendant, Joshua Michael Ice, with: Count 1, Vehicular Homicide and Count 2, Vehicular Assault. CP 3. The charging

language for Count I was as follows:

That the defendant, JOSHUA MICHAEL ICE, on or about the 9th day of May, 2004, then and there operating a motor vehicle in Thurston County, State of Washington, on Vail Road in said County and State, and being in discharge of his duties as such driver and operator did then and there operate said motor vehicle in a reckless manner, with disregard for the safety of others, and as a proximate result of said act or acts the said defendant thereby mortally injured one STEPHANIE MICHELLE WHITE, a human being, and from which mortal wounds the said STEPHANIE MICHELLE WHITE languished and died on the 23rd day of May, 2004, in the State of Washington.

CP 3. Count 2, vehicular assault, was charged in the following manner:

That the defendant, JOSHUA MICHAEL ICE, in the State of Washington, on or about the 9th day of May, 2004, did commit vehicular assault by operating or driving a vehicle in a reckless manner and his conduct is the proximate cause of serious bodily injury to RACHEL ONITHA GOMEZ, and that conduct was the proximate cause of serious bodily injury to RACHEL ONITHA GOMEZ.

CP 3.

Also on October 25, 2004, a Certification of Probable Cause was filed by the prosecution in support of the Information. That document detailed how three witnesses had observed the defendant driving at approximately 70 miles per

hour in a 50 mile per hour zone while proceeding through a series of "S" curves on a two-lane road. According to the Certification, one witness had observed the defendant pass that witness's vehicle at that speed in the lane for opposing traffic in a legal passing zone, but then observed the defendant pass another vehicle ahead in the "S" curves by pulling into the lane for opposing traffic at high speed in a marked no-passing zone. CP 4-5.

The Certification further detailed that the driver of that vehicle ahead confirmed the defendant had passed him at high speed in a no-passing zone, and that when the defendant sought to bring his vehicle back into the proper lane of travel after the pass, the defendant lost control and was fishtailing, and was immediately then involved in a head-on crash with another car.

The Certification further summarized that a third witness had been driving from the opposite direction, observed the defendant driving toward him at high speed, and saw that the defendant's

vehicle was out of control. This witness observed the defendant's vehicle swerve toward the ditch on the right side of the defendant's proper lane, then swerve the other way heading into the lane for opposing traffic where the third witness's vehicle was. That witness was able to get by the defendant, but the defendant then struck the vehicle traveling behind that witness. CP 4-5.

The Certification stated that the driver of the struck vehicle, Rachel Gomez, suffered blunt force trauma to her chest and abdomen, six stitches to her knee, whiplash, bruises to her body, and bruised lungs. A female passenger in the defendant's vehicle, Stephanie White, died from her injuries. CP 4-5.

On October 28, 2004, a First Amended Information was filed. It contained the exact same charging language as had been in the original Information. The only change was the identified address of the defendant. CP 6.

On July 22, 2005, a Second Amended Information was filed, in which the defendant

continued to be charged with one count of vehicular homicide and one count of vehicular assault. CP 68. However, the charging language for Count 2, Vehicular Assault, now read as follows:

That the defendant, JOSHUA MICHAEL ICE, in the State of Washington, on or about the 9th day of May, 2004, the above-named defendant (sic) did cause substantial bodily harm to another, to wit: RACHEL ONITHA GOMEZ, and did operate or drive a vehicle in a reckless manner and/or operate or drive a vehicle with disregard for the safety of others.

CP. 68. Thus, the charge now alleged two alternative means of committing the crime of vehicular assault, the first being that the defendant drove his vehicle in a reckless manner and caused substantial bodily harm to another, and the second being that the defendant drove his vehicle with disregard for the safety of others and cause substantial bodily harm to another. In the Second Amended Information, the two alternatives were separated by the phrase "and/or". CP 68.

A Third Amended Information was filed on

November 8, 2005, pursuant to a plea agreement of the parties. CP 25. It maintained the two charges of vehicular homicide and vehicular assault. However, in the vehicular homicide charge, the allegation that the defendant had driven in a reckless manner was dropped, and so the allegation now was that the defendant had driven a vehicle in disregard for the safety of others. The elimination of the alternative means of "driving in a reckless manner" precluded the defendant from facing the higher standard sentencing range that would accompany conviction on that basis, as opposed to the alternative means of "driving a vehicle with disregard for the safety of others". RCW 9.94A.510 and RCW 9.94A.515.

Similarly, in the vehicular assault charge, the allegation that the defendant had driven in a reckless manner was dropped, and so the remaining allegation was that the defendant had driven a vehicle in disregard for the safety of others. Inadvertently, despite the fact that only one of

the alternative means was now charged for vehicular assault, the phrase "and/or" which had previously separated the two alternative means was left in the language of the charge. Thus, the charge of vehicular assault now read as follows:

That the defendant, JOSHUA MICHAEL ICE, in the State of Washington, on or about the 9th day of May, 2004, the above-named defendant (sic) did cause substantial bodily harm to another, to wit: RACHEL ONITHA GOMEZ, and/or did operate or drive a vehicle with disregard for the safety of others.

CP 25.

The elimination of the alternative means of "driving in a reckless manner" in the vehicular assault charge not only made that charge consistent with the allegations in the vehicular homicide charge, but also provided additional support for the State's agreement to recommend the low end of the sentence range for the vehicular homicide charge. Thus on 11-8-05, the same day the Third Amended Information was filed, the defendant entered pleas of guilty to both counts pursuant to his plea bargain with the State. CP 15-21.

In the defendant's Statement on Plea of Guilty, the defendant acknowledged he was entering his guilty pleas freely and voluntarily, and that he had discussed the Information with his attorney and understood the nature of the charges to which he was pleading guilty. CP 20. At the change of plea hearing on 11-8-05, defense counsel stated that he had met with the defendant and the defendant's family on numerous occasions, had discussed the case with them in a great amount of detail, and that he had reviewed the plea form with the defendant and believed the defendant understood what he was doing at this hearing. 11-8-05 Hearing RP 4-5.

The defendant stipulated to the court reviewing the prosecution's probable cause statement in order to establish a factual basis for the plea. The court then reviewed the Certification of Probable Cause outlined above. 11-8-05 Hearing RP 5, CP 4-5. The court found that the Certification did provide a factual basis for the pleas. 11-8-05 Hearing RP 5.

A sentence hearing in this case was held on December 1, 2005. The State and defense presented a joint sentence recommendation of 26 months in prison on the vehicular homicide charge, which was the low end of the applicable sentence range, pursuant to the plea agreement between the parties. 12-1-05 Hearing RP 8-9. However, defense counsel objected to the State's recommendation for a drug and alcohol evaluation. 12-1-05 Hearing RP 10.

The court imposed a sentence of 26 months in prison for the vehicular homicide conviction, and a concurrent sentence of 12 months for vehicular assault. CP 36-44.

C. ARGUMENT

1. Given that the Third Amended Information was filed to implement a plea agreement between the defendant and the State, that the circumstances of this case show the defendant had full notice of the essential elements of vehicular assault, and that there was a sufficient factual basis for the guilty plea, the alleged defect in the Third Amended Information was a technical defect only, the defendant should be held to terms of the plea bargain he benefited from, and his complaint against the Third Amended Information should be rejected.

Pursuant to the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington Constitution, the charging document must include all essential elements of the crime charged in order to apprise the defendant of the nature of the alleged offense so that the defendant can prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When a deficiency in the Information is alleged for the first time on appeal, the court will construe the document more liberally in favor of validity, applying the following test: (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 actual prejudice by the inartful language in the document. Kjorsvik, 117 Wn.2d at 105-106.

In this case, the defendant contends that the Third Amended Information was defective as to the charging language for vehicular assault. However, he does not argue that any essential element of that charge was omitted from that charging

document. Rather, he contends that the presence of the phrase "and/or" connecting the elements was misleading because "and" would have been the accurate connecting phrase.

Typically, when a charging document is first challenged on appeal, it is after the defendant has been found guilty at trial and the concern is that the failure of the Information to state an essential element constituted a lack of notice to the defendant and hindered the defendant's ability to prepare an adequate defense. State v. Tandecki, 153 Wn.2d 842, 846-847, 109 P.3d 398 (2005). Here, in contrast, the defendant chose to waive trial and plead guilty to the vehicular assault and vehicular homicide charges.

For a defendant's guilty plea to have been voluntary, he must have had sufficient notice of the elements of the charge against him. In re Personal Restraint of Hews, 108 Wn.2d 579, 590-591, 741 P.2d 983 (1987). Thus, a plea of guilty does not generally preclude a defendant from raising on appeal a collateral question as to the

sufficiency of the Information. State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). However, where circumstances surrounding the guilty plea demonstrate the defendant had sufficient notice of the charge, where the challenged Information was the result of a plea bargain of the parties, where there was a factual basis for the guilty plea, and where the Information can be accurately described as being only technically defective, a defendant can be held to the terms of his plea agreement despite that technical defect. Majors, 94 Wn.2d at 357-359.

In Majors, the defendant was originally charged with first-degree murder. Pursuant to a plea agreement, an amended Information was filed charging him with second-degree murder and alleging he was an habitual criminal, which afforded Majors with a lesser minimum term than would follow from a first-degree murder conviction. The defendant's guilty plea to the lesser charge was accepted and sentence was imposed. On appeal, Majors contended the amended

Information was defective because one of the alleged prior convictions cited therein as a basis for habitual criminal status had occurred after the murder. Majors, 94 Wn.2d at 355-356.

Initially, the appellate court noted the general rule that a guilty plea will not preclude a challenge to the sufficiency of the Information. However, the court then noted that the facts in Majors presented a somewhat different situation because the challenged charging document had been filed as the result of a negotiated plea agreement. Id. at 356. The court reasoned that, even assuming the amended Information was defective, the court needed to consider the circumstances of the plea. Id. at 357.

In Majors, the appellate court noted that there was no question the defendant was aware of the consequences of his agreement and that there was a factual basis for his plea to the charge in the amended Information. The defect in the amended Information was termed a "technical defect" because it was clear that it had not

affected the defendant's knowledge of what he was admitting to by pleading guilty. Majors, 94 Wn.2d at 357-358. Therefore, Majors was held to the terms of his agreement despite the defect in the Information and his conviction was affirmed. Majors, 94 Wn.2d at 359.

The present case is analogous. The challenged Third Amended Information was filed to implement a plea bargain of the parties. A period of over 13 months passed between the filing of the original Information and the filing of the Third Amended Information. In evaluating the notice provided by the charging document, the only accurate way of considering such notice is to interpret the term "charging document" to include as a whole the collective Informations filed during the pendency of this case.

The defendant does not claim that the original Information, First Amended Information, or Second Amended Information failed to accurately set forth the elements of vehicular assault, and they thereby provide the required notice.

Pursuant to that sufficient notice, defense counsel discussed the case many times with the defendant "in a great amount of detail". 11-8-05 Hearing RP 4-5. Ultimately, with the benefit of such notice, the parties came to an agreement to resolve this case. It was only then that the Third Amended Information was filed, and the defendant pled guilty that same day.

Under these circumstances, the inadvertent presence of the term "and/or" in the Third Amended Information, where no essential element of the crime of vehicular assault was omitted, was a technical defect that could not have impacted the defendant's notice of those essential elements. In addition, the defendant stipulated to the Certification of Probable Cause, which provided a factual basis for his plea to vehicular assault.

Under these circumstances, as in State v. Majors, supra, the defendant should be held to his bargain and his attack upon the sufficiency of the Third Amended Information should be rejected.

2. Since the charging document which provided notice to the defendant in this case was

actually the combination of the original Information, First Amended Information, Second Amended Information, and finally the Third Amended Information, the last of which was filed to implement the plea agreement of the parties, it is in this context that the court should consider whether the necessary elements for vehicular assault appear in any form in the Third Amended Information, and determine the defendant was given sufficient notice of those elements to enter a knowing and voluntary guilty plea.

Above, the Court of Appeals has been urged to adopt an analysis in this case pursuant to that held appropriate in State v. Majors, supra, view the challenged Third Amended Information as a product of the plea agreement the defendant knowingly and voluntarily entered into, and therefore reject a sufficiency of the Information challenge in this context. However, even if a sufficiency of the evidence challenge is appropriate in this case, there is no question that the sufficiency of the charging document has been challenged for the first time on appeal. Therefore, the court must consider whether the necessary facts appear in any form, or by fair construction can be found, in the charging document. Kjorsvik, 117 Wn.2d at 105-106. The

second issue, whether the defendant can demonstrate actual prejudice, is not relevant here because the defendant on appeal has not claimed any such prejudice.

As noted above, typically the issue of sufficiency is framed in terms of a trial; that is, did the charging document provide sufficient notice of the essential elements of the crime to allow the defendant to adequately prepare for trial. In the context of the present case, where the defendant pled guilty, the relevant issue would therefore be whether the charging document provided sufficient notice to the defendant to allow him to enter a knowing guilty plea.

As noted above, the only realistic manner in which to evaluate this issue is to consider all the Informations in this case as the collective "charging document". Since notice is the concern, clearly that notice was provided by these Informations as a whole. To artificially focus on the Third Amended Information as the charging document and ignore the rest would fly in the face

of reality in this case.

The original Information and the First Amended Information contained the exact same language charging the crime of vehicular assault. Both charged that the defendant drove in a reckless manner and caused substantial bodily harm to another. CP 3 and 6.

The Second Amended Information, in charging vehicular assault, alleged that the defendant caused substantial bodily harm to another and either drove a vehicle in a reckless manner or drove a vehicle with disregard for the safety of others. The defendant argues it would be better to have reversed the order of stating these elements to specify causation. However, under a liberal analysis asking whether the essential elements appear in any form, clearly those elements were all present.

These are the Informations which led to the plea agreement. That plea agreement focused on the vehicular homicide charge, since it carried the heavier penalties. Clearly, a key factor of

that agreement was amending the vehicular homicide charge to allege only the alternative means of driving with disregard for the safety of others, and thereby reducing the standard range for that offense. There is no contention that the vehicular homicide charge in the Third Amended Information was insufficient in any way.

In the Third Amended Information, the amendment of the language pertaining to the charge of vehicular assault, which led to the problem raised by the defendant on appeal, was not to provide notice but rather to implement the plea agreement. The amendment made the vehicular assault charge conform to the amended vehicular homicide charge by narrowing the allegations to just the one alternative means of the crime. All the essential elements of the charge of vehicular assault by driving with disregard for the safety of others were included in that amended language.

Given that context, the inclusion of the phrase "and/or" instead of "and" in the Third Amended Information's charge of vehicular assault,

should not prevent a finding that all the essential elements of the crime are present under a liberal construction. There was sufficient notice of the elements of the offense for a knowing and voluntary guilty plea under these facts.

3. Since the court found that neither alcohol nor drugs contributed to the offenses in this case, it was error to order the defendant to undergo a substance abuse evaluation as part of the defendant's community custody.

As part of the conditions of community custody in the Judgment and Sentence, the court ordered that the defendant undergo a substance abuse evaluation and comply with all recommended treatment. CP 40. At the time of sentencing, the defendant objected to this requirement. 12-1-05 Hearing RP 10.

Under RCW 9.94A.700, the court may order an offender to engage in crime-related treatment or counseling as a condition of community custody. RCW 9.94A.700(5)(c). Thus, to require a defendant to undergo a substance abuse evaluation and

treatment, substance abuse must be found to have contributed to the offenses for which the defendant is being sentenced. State v. Jones, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003).

In the present case, the court found that neither drugs nor alcohol contributed to the offenses committed by the defendant. 12-1-05 Hearing RP 10. Therefore, the State agrees on appeal that it was error to include a condition for substance abuse evaluation and treatment in the Judgment and Sentence.

D. CONCLUSION

Based on the above, the State respectfully requests that the defendant's convictions for vehicular homicide and vehicular assault be affirmed. The State agrees that the Judgment and Sentence must be modified to omit the requirement for a substance abuse evaluation.

DATED this 23rd day of October, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY



NO. 34208-1-II

CLERK OF COURT OF APPEALS
STATE OF WASHINGTON THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
JOSHUA M. ICE,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 23rd day of October, 2006, I caused to be mailed to appellant's attorney, THOMAS E. DOYLE, a copy of the Respondent's Brief, addressing said envelope as follows:

Thomas E. Doyle,
Attorney at Law
P.O. Box 510
Tacoma, WA 98340-0510

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 23^d day of October, 2006 at Olympia,
WA.


James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney