

SEAL OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON
CLERK OF COURT
JENNIFER L. HARRIS
BY: *Yn*

NO. 35976-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADAM J. HOCKADAY

Appellant.

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

The Honorable James E. Warme

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

2136 S 260th Street, BB304
Des Moines, Washington 98198
(253) 945-6389

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to demand the nature and cause of the accusations against him by allowing the state to amend the information after the state rested its case.

Issue Pertaining to Assignment of Error

Is reversal required because the trial court violated appellant's right to demand the nature and cause of the accusations against him, under article 1, section 2 of the Washington State Constitution, by allowing the state to amend the information after the state rested its case?

B. STATEMENT OF THE CASE

1. Procedural Facts

On October 25, 2006, the state charged appellant, Adam J. Hockaday, with one count of assault in the third degree, "for assaulting Longview Police Officer Ferris," and one count of resisting arrest, for intentionally attempting to prevent "Officer Ferris, a peace officer, from lawfully arresting him." CP 1-2; RCW 9A.36.031(1)(g), RCW 9A.76.040(1). Following a trial on February 9, 2007, before the Honorable James E. Warne, a jury found Hockaday guilty as charged. CP

51, 52; 2RP¹ 137-38. The court sentenced Hockaday to concurrent sentences of 25 days confinement on count one and 90 days confinement with 65 days suspended on count two. CP 60-61; 2RP 142. Hockaday filed this timely appeal. CP 66.

2. Substantive Facts

Officer Jason Ferris testified that on October 22, 2006, he and three other officers went to a residence at 2914 Louisiana. They were looking for Jason Austin, Randi Beck, and Tony Cavossos in an investigation for assault and malicious mischief. 2RP 28-30. Ferris knocked on the door, and Austin and Hockaday came outside. He talked to Austin and took him into custody. Hockaday appeared intoxicated and asked several questions about why the officers were there. 2RP 30-31. When Hockaday started to go back inside, Ferris asked him about Beck and Cavossos because he heard other voices in the house. Hockaday said he was the only one at home and went inside. 2RP 34-35.

Ferris knocked on the door again and he could hear people talking. Hockaday came out again and tried to close the door behind him. When Ferris put his hand up against the door to keep it from closing, Hockaday shoved him in the chest and knocked him off balance. 2RP 35-38. Ferris

¹ There are two volumes of verbatim report of proceedings: 1RP (pre-trial) - 10/23/06, 10/26/06, 12/14/06, 1/11/07, 1/16/07, 1/18/07, 2/8/07; 2RP (trial and sentencing) - 2/9/07, 2/13/07.

told Hockaday that he was under arrest and when he reached to grab his right arm, Hockaday hit him "alongside the right side of my head." 2RP 39. Officers Buchholz and Johnson came to his aid and during the struggle they all went through the front door and fell onto a bed. Ferris saw a male on the bed. Hockaday started throwing punches and Johnson punched him in the cheek. Johnson and Buchholz got Hockaday off the bed, took him outside, and arrested him. 2RP 42-47.

Officer Alan Buchholz testified that when Officer Ferris reached around Hockaday to block the open door, Hockaday shoved Ferris in the chest and knocked him backwards. 2RP 65. He and Officer Johnson tried to get a hold of Hockaday who was flailing his arms, trying to pull away. Johnson told Hockaday that he was under arrest and to stop resisting. 2RP 66-67. They all collapsed onto a futon inside the doorway and he saw a male on the futon. Buchholz and Johnson picked Hockaday up from the futon and took him outside where Hockaday pulled away from their grasp. Johnson did a "takedown" and Buchholz handcuffed him. 2RP 68-69.

Officer Jeremy Johnson testified that Officers Ferris and Buchholz were scuffling with Hockaday and when he tried to assist, Hockaday grabbed his coat and they all went through the open door of the house and fell onto a bed. 2RP 81-82. Johnson noticed "another individual" on the

bed. 2RP 83. Johnson and Buchholz tried to gain control of Hockaday who kept breaking free so "I did one jab to the face with my right hand." 2RP 84. The blow stunned Hockaday enough that he and Buchholz could lift him up off the bed and take him outside. Johnson forced Hockaday down to the ground on his stomach and Buchholz handcuffed him. Johnson transported Hockaday to the jail. 2RP 84-86.

At the conclusion of Johnson's testimony, the state rested its case and the court excused the jury. During the 15-minute recess, the state moved to amend the information:

MS. HUNT: Your Honor, I think we need to put something on the record that the three of us discussed earlier, and probably should have been done before the State rested, so I would move to be able to do this now, which would be orally amend the information as to Count 2 to eliminate the reference to Officer Ferris. I discussed this with counsel earlier. She indicated that would not be a problem.

MS. TABBUT [defense counsel]: That's true.

THE COURT: All right.

MS. TABBUT: Okay, we're going to take 15.

THE COURT: Yes.

2RP 92-93.

The court allowed the oral amendment without arraigning Hockaday on the amended information.²

Hockaday did not testify but David Andrews testified for the defense. 2RP 97. Andrews was visiting Hockaday and some friends at the house located on Louisiana. 2RP 98-99. The police arrived and knocked on the door and Hockaday answered the door. When the police tried to enter, Hockaday told them they could not come in. 2RP 99-100. The three officers grabbed Hockaday, came into the house, and forced him onto a bed. Andrews was lying on the bed and saw one of the officers punch Hockaday in the face a couple of times. 2RP 101. Acting in self-defense, Hockaday moved his arms around to protect his face because the officer was "swinging at him." 2RP 101-02. The officers arrested Hockaday and took him outside. 2RP 101.

² It should be noted that an amended information was never filed according to the record.

C. ARGUMENT

THE TRIAL COURT VIOLATED HOCKADAY'S CONSTITUTIONAL RIGHT TO DEMAND THE NATURE AND CAUSE OF THE ACCUSATIONS AGAINST HIM BY ALLOWING THE STATE TO AMEND THE INFORMATION AFTER THE STATE RESTED ITS CASE IN CHIEF.

Reversal is required because the trial court violated Hockaday's right to demand the nature and cause of the accusations against him, under article 1, section 22, of the Washington State Constitution, by allowing the state to amend the information after it rested its case.

Article 1, section 22 of the Washington State Constitution provides in pertinent part that, "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him . . ." Over a hundred years ago, our State Supreme Court recognized the underlying principles of this constitutional provision:

While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an offense necessarily included within that charged, it is also true that 'accusation must precede conviction,' and that no one can legally be convicted of an offense not properly alleged. The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Const., art. 1, sec. 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.

State v. Ackles, 8 Wash. 462, 464-65, 36 P. 596 (1894).

Accordingly, in State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987), the Supreme Court held that the trial court committed reversible error by allowing the state to amend the information after it completed its case in chief:

A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her. Such a violation necessarily prejudices this substantial constitutional right, within the meaning of CrR 2.1(e).³

Id. at 491.

Subsequently, in State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992), citing its decision in Pelkey, the Supreme Court reversed the trial court for allowing the state to amend the information after it rested, holding that permitting the amendment *necessarily prejudices* Markle's article 1, section 22 right to demand the nature and cause of the accusation against him. Id. at 437 (emphasis added by the court).

Thereafter, in State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995), the state charged Vangerpen with attempted murder in the first

³ **Amendment.** The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

Formerly CrR 2.1(e) amended as CrR 2.1(d).

degree but omitted the statutory element of premeditation in the information. After the state and defense rested, the defense moved to dismiss based upon insufficiency of the information that failed to allege the element of premeditation. The state moved to amend the information to include premeditation and over objection by the defense, the court granted the state's motion. Id. at 785-86.

The Supreme Court concluded that in amending the information and adding the element of premeditation, the state changed the crime charged from attempted murder in the second degree to attempted murder in the first degree. The Court adhered to its "bright line" rule established in Pelkey, holding that an information may not be amended after the State has rested unless the amendment is to a lesser degree of the same crime or a lesser included offense. Id. 789-91.

Here, the state moved to orally amend the information after it rested its case, admitting that it "probably should have been done before the State rested." 2RP 92. Similar to Vangerpen, but rather than adding an element, the state moved to eliminate an element on the charge of resisting arrest. 2RP 92. In the original information, the state charged Hockaday with intentionally attempting to prevent "Officer Ferris, a peace

officer, from lawfully arresting him.” CP 1-2.⁴ The court allowed the state to amend the charge to intentionally attempting to prevent a peace officer from arresting him. The jury was therefore instructed that to convict Hockaday of resisting arrest, the state must prove that he intentionally prevented or attempted to prevent a peace officer from arresting him. CP 48.

As this Court recognized in State v. Phillips, 98 Wn. App. 936, 941, 991 P.2d 1195 (2000), under Pelkey and Vangerpen, the state may not amend an information after it has rested unless the amendment is to a lesser degree of the same crime or a lesser included offense. Clearly, the amendment here was not to a lesser degree of the same crime or a lesser included offense. By allowing the state to eliminate an essential element of the crime charged, the court relieved the state of proving beyond a reasonable doubt that Hockaday intentionally attempted to prevent Officer Ferris from arresting him. The state merely had to prove beyond a reasonable doubt that Hockaday intentionally attempted to prevent an officer from arresting him. The state therefore had a lesser burden of proof given the fact that three officers were involved in the alleged struggle. Consequently, the trial court erred in allowing the state to amend the information after it rested its case in chief.

⁴ The Information is attached as an appendix.

Under Pelkey and its progeny, reversal is required because the court's error violated Hockaday's right to be apprised of the nature and cause of accusations against him pursuant to article 1, section 22 of the Washington State Constitution.

D. CONCLUSION

For the reasons stated, and in the interest of justice, this Court should reverse Mr. Hockaday's convictions.

DATED this 12th day of October, 2007.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA # 25851

Attorney for Appellant

APPENDIX

COUNT II

RESISTING ARREST

The defendant, in the County of Cowlitz, State of Washington, on or about October 22, 2006, did intentionally attempt to prevent, Officer Ferriss, a peace officer, from lawfully arresting him; contrary to RCW 9A.76.040(1) and against the peace and dignity of the State of Washington.

DATED: Wednesday, October 25, 2006.

Jeff R. Baur, #15221 (For Amic Hunt)
SUSAN I. BAUR, WSBA #15221
Cowlitz County Prosecuting Attorney

DEFENDANT INFORMATION						
NAME: ADAM JEFFERY HOCKADAY				DOB: 03/05/1982		
ADDRESS: 2221 38TH AVE., # 4				CITY: LONGVIEW		
STATE: WA		ZIP CODE:		PHONE #(s):		
DRIV. LIC. NO.	DL ST	SEX: M	RACE:	HGT: 511	WGT: 195	EYES: BRO
HAIR: RED	OTHER IDENTIFYING INFORMATION:					

STATE'S WITNESSES:

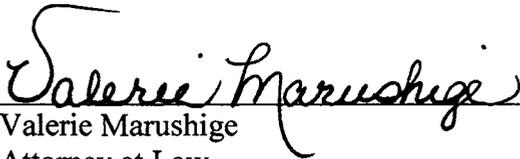
- OFFICER JAMES FERRISS - LPD
- OFFICER DEBORAH JOHNSON - LP0D
- OFFICER ALAN BUCHHOLZ - LPD

DECLARATION OF SERVICE *ym*

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Susan Baur, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626 and Adam Hockaday at 2221 38th Avenue, #4, Longview, Washington 98632.

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

DATED this 10th day of October, 2007 in Des Moines, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851