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COURT OF APPEALS

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STATE OF WASHINGTON  
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No. 39514-2-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Appellant,

vs.

NYKOL KILIONA GARRAMONE,  
JAMES GARRMONE, and  
PAULA FERRARA,  
Respondents.

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BRIEF OF RESPONDENT'S

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01-28-10  
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## **A. COUNTER TO ASSIGNMENTS OF ERROR**

1. The Trial Court did not error in entering Conclusion of Law No. 7 and properly dismissed Count I as to each Defendant.
2. The Trial Court did not error by entering Conclusion of Law No. 8, concluding there was insufficient information in the remainder of the charging document properly advising the Defendants of the crime charged.

## **B. STATEMENT OF THE CASE**

In general, the Respondents agree with the Appellant's Statement of the Case as contained in Section D, 1 & 2 of their brief on pages one and two.

## **C. ARGUMENT**

1. The Court Did Not Error In Finding The Information Defective.

There can be no question but that the Constitutions of both this State and the United States, require that an accused person be informed of the charges against them and they cannot be tried for an offense for which they have not been charged.<sup>1</sup> In order to satisfy these constitutional provisions, the charging document, or information, must contain all of the essential elements of the crime charged. This includes both the statutory elements and common law or non statutory elements. *State v. Kjorsvik*, 177 Wash.2d 93; 812 P.2d 86 (1991) and *State v. Vangerpen*, 125 Wash.2d 782, 787; 888 P.2d 1177 (1995). In that regard, there is no presumption in favor of

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<sup>1</sup> Amendment 6 of the United States Constitution; Article 1 Section 22 Washington State Constitution

the pleading being sufficient to charge a crime, the pleading must be definite and certain. *State v. Moser*, 41 Wash.2d 29; 246 P.2d 1101 (1952).

While it is true, that all essential elements of the crime must be included in the charging document in order to advise the defendant of the charges against him or her and enabling a defendant to prepare an adequate defense, *State v. Hopper*, 188 Wash.2d 151, 155; 822 P.2d 775 (1992), it is not necessary for the charging document to speak in the precise terms of the statute. *State v. Moser*, 41 Wash.2d 29; 246 P.2d 1101 (1952).

Consequently, a defendant charged with a crime, is entitled to have all of the essential elements of the crime included in the information, to properly advise him or her of the nature of the charges against them and allowing them to defend against those charges.

The standard to review whether or not those charges are sufficient depends on when the challenge to the information is made. While the point in time for making that determination seems clear, apparently the Courts are somewhat divided. The standard itself is whether or not to apply the liberal interpretation of the charging document or the strict interpretation. The State Supreme Court determined that the distinction would be whether or not the challenge to the information was made before or after the verdict. If it was made after the verdict, the Court determined that the liberal standard would be applied and any challenge prior to the verdict would necessitate the strict standard. *State v. Kjorsvik*, 117 Wash.2d 93; 812 P.2d 86 (1991).

That timing has been followed subsequently by the Supreme Court and Division I and Division III of the Court of Appeals, only leaving Division II to disagree. *State v. Phillips*, 98 Wash.App 936; 991 P.2d 1195 (2000). Division II determined that the references to the time after verdict as stated in *State v. Vangerpen*, *supra* and *State v. Johnson*, 119 Wash. 2d 143; 829 P.2d 1078 (1992), was dicta and that the proper time to apply the liberal standard would be after the state rests, but before the verdict. That thinking has not been adopted by any court, and, in fact, has been rejected by the Courts on a number of occasions. *State v. McCarty*, 140 Wash.2d 420; 998 P.2d 296 (April 27, 2000) (when challenged for the first time on appeal); *State v. Laramie*, 141 Wash.App 332; 169 P.3d 859 (2007) (first time on appeal) and *State v. Borrero*, 147 Wash.2d 353; 58 P.3d 245 (2002) wherein the State Supreme Court, once again applied the strict standard when the defendant challenged the defective information for the first time after the State rested their case, which was precisely the timing involved in the Garramone and Ferrera cases, herein.

Consequently, a careful review of the case law in this State seems to mandate only when the challenge as to the defective information is made for the first time on appeal, or after verdict, is the liberal standard of review applied and any time prior to verdict, including between the time the State rests and verdict, the strict standard is applied. After the State rests but before the verdict, the Defendant is then able to present his or her case.

Finally, it is important to note that once the State rests, they are only allowed to amend the information if the amendment is to a lesser degree of the crime, or a lesser included offense. *State v. Pelkey*, 109 Wash.2d 484; 745 P.2d 854 (1987), *State v. Vangerpen, supra*, and *State v. Quismundo*, 164 Wash. 2d 499; 192 P.3d 342 (2008).

Although the Mason County Superior Court mistakenly applied the Phillips Standard to the timing of review, using the liberal standard, the Court correctly determined that the State was precluded from amending their information once the State had rested its case.

The statute under which the respondents were charged was RCW 74.08.055 (2). The Statute provides as follows:

“(2) Any applicant for or recipient of public assistance who willfully makes and signs any application, statement, other paper, or electronic record which contains or is verified by a written declaration that it is made under the penalties of perjury and which he or she does not believe to be true and correct as to every material matter is guilty of a class B felony punishable according to chapter 9A.20 RCW.”

Breaking that down, it would appear that the following has to occur:

1. The defendant has to be an applicant or recipient of public assistance and,
2. Willfully makes and signs an application, statement or other paper which,

3. Contains or is verified by a written declaration that it is made under the penalties of perjury and,
4. Which he or she does not believe to be true and correct as to,
5. Every material matter.

For the most part, the information in the present case, Count I, does recite much of the language of the statute, but omits the word “matter”. It simply reads “as to every material,”. When reading the charging part of the information, in trying to determine what the last element of the crime is, one is left to wonder whether that is an incomplete sentence or whether the word “material” is used as a noun. It certainly is not clear from the Information itself. If matter is used as a noun, then the information would at least look to provide a far more broad scope than the statute allows, as it would seem that almost anything could be classified under the noun “material”. If the word material is intended to be used as an adjective, as it would be under the statute, then the noun the word material describes is completely missing and could be almost anything. It certainly is not up to the defendant to guess what he or she is charged to have misrepresented. Also, “Defendant should not have to search through the rules or regulations they are accused of violating”. *Kjorsvik* at 61. It would be the same as charging someone while being armed with a deadly..., or causing someone grievous... Certainly removing the word “deadly” from a deadly weapon allegation would be constitutionally incomplete and impermissible. The State omitted

a key word in the charging document rendering it impossible to determine all the elements of the crime charged. That simply does not pass constitutional muster. As stated in *Phillips, supra*, when an essential element has been omitted, the State has in effect charged no crime at all.

In Conclusion of Law No. 8, to which the State claims error, the Court concluded that there was insufficient “information in the remainder of the charging document to properly accuse the Defendants of the crime charged”.(CP 107) While the State argues this was not true and that there was sufficient information in the remainder of the charging document, they fail to point out what that helpful information is.

The cases appear to be divided on whether the whole document is to be considered, or just the defective Count itself. This division has concluded that only the defective Count is to be considered, *State v. Clowes*, 104 Wash.App 935; 18 P.3d 596 (2001), whereas Division Three has determined the whole charging document must be considered. *State v. Laramie*, 141 Wash.App. 332; 169 P.3d 859. Unlike her reliance on Division Two’s interpretation of when the liberal standard for reviews takes effect, *State v. Phillips, supra*, the trial Court here, apparently adopted Division Three’s rationale in considering the entire Information in determining if a defect can be clarified to provide proper notice to the Defendant’s herein.

In either case, whether just Count I is considered or the Information as a whole, there is no language that would aid the Defendant's in determining what the missing element in Count I was. *State v. Chaten*, 84 Wash.App. 85, 925 P.2d 631 (1996).

The State's reliance on *Chaten* is misplaced. *Chaten* implied intent in an assault charge because assault is commonly understood to be an intentional act. There is no such crime as an accidental assault.

No such general understanding or implication exists with respect to Count I in this case. There is no common understanding about anything in the crime of False Verification of Welfare Form. There is no common law comparison. It is strictly a wrong doing created by statute and a series of very specific statutes at that. The nature of the charge and the statute is contrary to any history of common understanding.

2. The Issue Before The Court Is Moot.<sup>2</sup>

It has been stated that the Court's dismissal of Count I in this case was without prejudice meaning that the State could simply correct the information and try the case again. If the State were to prevail in this appeal, the only remedy this Court could render would be to indicate that the information, although defective did not warrant dismissal without prejudice and send the case back for a retrial. The remedy in either case is

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<sup>2</sup> This argument is a copy of the same argument entered in the Respondent's Motion on the Merits.

the same. Consequently, this Court is without the ability to provide a remedy that the State does not already have.

First of all, a Court's jurisdiction over an issue cannot be applied if there is no justiciable controversy. *Diversified Indus. Development Corporation v. Ripley*, 82 Wash.2d 811; 514 P.2d 137 (1973). In that case, the Court determined that a justiciable controversy is defined as:

“(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.”

82 Wash.2d at 815

Clearly, the judicial determination in this case was not final and conclusive, and therefore not only does the State not have a right to appeal under RAP 2.2, but there is no “justiciable controversy” to be appealed.

Clearly, a Court will not decide, with certain exceptions which are inapplicable here, moot questions. *Housing Auth. of Everett v. Terry*, 114 Wash. 2d 558; 789 P.2d 745 (1990) and *City of Seattle v. Johnson*, 58 Wash.App 64; 791 P.2d 266 (1990).

It is well settled that a case is moot if there is no longer a justiciable controversy, because the issue or issues are academic or nonexistent and that issues are academic when the Court's opinion would have no force and effect in the underlying dispute. *State v. Ross*, 152 Wash.2d 220; 95 P.3d 1225 (2004). The case is moot if the Court can no longer provide effective relief. *Orwick v. Seattle*, 103 Wash.2d 249; 692 P.2d. 793 (1984), *State v. Turner*, 98 Wash.2d 731; 658 P.2d. 658 (1983) and *State v. Ross*, 152 Wash.2d 220; 95 P.3d 1225 (2004).

Consequently, the question must be asked, what effective relief can this Court grant that the State did not already have at the time the Superior Court issued its ruling. The remedy the State's seeks is exactly the remedy that was afforded the State at the time the Superior Court dismissed Count I without prejudice. The State is simply asking this Court to commit an exercise in futility. Since the State had precisely the same remedy at the time of the dismissal that they are seeking from this Court, the issue before this Court is moot and the appeal should be dismissed.

**F. CONCLUSION**

Based upon the forgoing arguments and authorities, the State's appeal should be dismissed.

Respectfully submitted this 28<sup>th</sup> day of July, 2010.

CORDES BRANDT PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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vs.

NYKOL KILIONA  
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GARRAMONE, and PAULA  
FERRERA,

Respondents.

CASE NO. 39514-2-II

DECLARATION OF MAILING

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I, MEGAN J. HOLLEY, declare and state as follows:

On July 28, 2010, I deposited in the United States Mail, with  
proper postage affixed thereto, Brief of Respondent's to:

Monty Cobb  
Mason County Prosecutor's Office  
P.O. Box 639  
Shelton, WA 98584

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

DATED this 28<sup>th</sup> day of July, 2010

  
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