

No. 44756-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Sharples,

Appellant.

Skamania County Superior Court Cause No. 12-1-00038-5

The Honorable Judge E. Thompson Reynolds

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

I. THE COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC BY HOLDING AN IN-CHAMBERS CONFERENCE WITHOUT FIRST ADDRESSING THE *BONE CLUB* FACTORS.

Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. *State v. Bone-Club*, 128 Wn.2d 254, 258-259, 906 P.2d 325 (1995). At Mr. Sharples’s trial, the court convened an in-chambers conference to discuss the court’s general questions during *voir dire*, the logistics of jury selection, potential witnesses, the exclusion of witnesses, and the number of alternate jurors. RP 91-92.

The right to a public trial attaches when “experience and logic” dictate that the core values protected by the right are implicated during a proceeding. *State v. Sublett*, 176 Wn.2d 58, 72-78, 292 P.3d 715 (2012).

Under the “experience” prong, discussions of the logistics of *voir dire*—including the questions the court will ask of the venire and the time allotted to each party—traditionally occur in an open courtroom. *See e.g. State v. Bowen*, 157 Wn. App. 821, 826, 239 P.3d 1114 (2010); *State v. Yates*, 161 Wn.2d 714, 748, 168 P.3d 359 (2007); *State v. Brady*, 116 Wn. App. 143, 145-46, 64 P.3d 1258 (2003). Without citing to authority, Respondent simply asserts that “these sorts of logistical discussions” are

historically conducted in chambers. Brief of Respondent, p. 14. But the questions that the court would pose to the venire are not a mere “logistical” issue. The inquiry is fact-specific and sometimes contentious. Experience shows that these discussions take place in open court.

The logic prong of the test also suggests that the proceeding should have been held in open court. The court’s questioning of the venire is an important part of jury selection, which is itself subject to the public trial right. *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). Basic fairness, the appearance of fairness, and confidence in the criminal justice system are all enhanced when such discussions are conducted in public. *Sublett*, 176 Wn.2d at 75. Nonetheless, the state argues that the proceeding was not subject to the public trial rule because there were “no witnesses, no testimony, and no perjury risk.” Brief of Respondent, pp. 14-15.

But the public trial right is not limited to circumstances where witnesses provide testimony under penalty of perjury. The public trial right attaches to the *voir dire* process because it plays such a central role in the criminal justice system. *Strode*, 167 Wn.2d at 217.

The public trial right can attach to a purely ministerial proceeding if it passes the “experience and logic” test. *Sublett*, 176 Wn.2d at 72. Respondent argues that Mr. Sharples misstates the holding of *Sublett*.

Brief of Respondent, pp. 12-13. But the lead opinion of that case explicitly states that the court: “decline[s] to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other.” *Sublett*, 176 Wn.2d at 72. The state erroneously claims that *Sublett* left intact the line between ministerial and adversarial issues. Brief of Respondent, p. 12. The court’s plan language indicates that it intended to supplant all such artificial distinctions with the experience and logic test. *Sublett*, 176 Wn.2d at 72.

Experience and logic dictate that the rights to an open and public trial attached to the in-chambers conference in Mr. Sharples’s case. The court violated Mr. Sharples’s and the public’s right to an open and public trial. The court should have addressed the *Bone-Club* factors before discussing important matters in chambers. *Strode*, 167 Wn.2d at 228. Mr. Sharples’s conviction must be reversed. *Id.*

II. THE INFORMATION VIOLATED MR. SHARPLES’S RIGHT TO ADEQUATE NOTICE BECAUSE IT OMITTED ESSENTIAL ELEMENTS OF THE SENTENCING ENHANCEMENT.

The state must plead and prove the essential elements of any sentencing enhancement. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). The rule applies when the enhancement raises

the mandatory minimum sentence for a conviction. *Alleyne v. United States*, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013).

The Information charging Mr. Sharples was deficient because it left out two essential elements of the sentencing enhancement for refusal to submit to a breath test. It did not specify the nature of the test he allegedly refused, and it did not indicate that he had been arrested based on reasonable grounds to believe he had committed DUI. CP 2; RCW 46.20.308(1).

The *Apprendi* rule applies to state charging documents as well as federal indictments. *Apprendi*, 530 U.S. at 476; *Recuenco*, 163 Wn.2d at 434. Respondent erroneously claims that *Alleyne* is only applicable to federal indictments. Brief of Respondent, pp. 17-18. This is incorrect.

Alleyne simply holds that facts increasing the sentencing “floor” are elements of the underlying offense. *Alleyne*, 133 S.Ct. at 2158. The state and federal constitutions require that the charging document allege all such elements. *Apprendi*, 530 U.S. at 476; *Recuenco*, 163 Wn.2d at 434. *Apprendi* explicitly states that the Fourteenth Amendment requires constitutionally sufficient charging documents in both state and federal court. *Id.* The state constitutional right to notices of charges compels the same result. *Recuenco*, 163 Wn.2d at 434. Respondent does not explain

why *Alleyne*'s holding concerning the sentencing "floor" should be treated any differently from *Apprendi*'s holding concerning the "ceiling." Brief of Respondent, pp. 17-18.

Due process and the right to adequate notice required the state to apprise Mr. Sharples of all of the essential elements of refusal to submit to a breath test. *Apprendi*, 530 U.S. at 476; *Recuenco*, 163 Wn.2d at 434.

A. The charging document was deficient because it did not allege the type of test that Mr. Sharples had allegedly refused.

Essential elements include both statutory and non-statutory facts that the state must prove beyond a reasonable doubt. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The "mere recitation of a numerical code section" in the charging document does not satisfy the essential elements rule. *Id.* at 162.

The Information did not charge Mr. Sharples with refusing a breath test. CP 2. Instead, it alleged only that he: "refuse[d] to take a test pursuant to RCW 46.20.308; contrary to the Revised Code of Washington 46.61.5055." CP 2. This "mere recitation" of the statutory number was inadequate to apprise Mr. Sharples of the type of test he was alleged to have refused. *Zillyette*, 178 Wn.2d at 158. Still, Respondent argues that "the essential element of the test refusal does appear" in the Information.

Brief of Respondent, pp. 19-20. But Mr. Sharples does not argue that the Information failed to charge him with “refusal.” Rather, it did not indicate what test, exactly, he had refused to take. CP 2.

Next, the state argues that the Information in this case was adequate because the “mere recitation” was of a statutory citation contained “*within* the statute.” Brief of Respondent, p. 20 (emphasis in original). Respondent does not explain why simple repetition of a “numerical code section” that has been incorporated into another statute provides Mr. Sharples with any more notice than one that has not.

The Information did not adequately apprise Mr. Sharples of all of the elements of the charges against him. *Zillyette*, 178 Wn.2d at 158. Mr. Sharples’s case must be remanded for resentencing. *Id.*

B. The charging document was inadequate because it did not allege that Mr. Sharples refused a breath test after being arrested based on reasonable grounds to believe that he had committed DUI.

A lawful arrest based on reasonable grounds to believe that a person has committed DUI is an “indispensable element” of refusal to submit to a breath test. *Clement v. State Dep't of Licensing*, 109 Wn. App. 371, 375, 35 P.3d 1171 (2001).

Even a fair and liberal construction of a charging document does not permit an appellate court to read language into the Information that is

simply not there. *State v. Rivas*, 168 Wn. App. 882, 888, 278 P.3d 686, 690 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013).

Still, the state argues that the Information charging Mr. Sharples sufficiently apprised him of the element that he had been arrested based on reasonable grounds to believe that he had committed DUI, because it also charged him with DUI. Brief of Respondent, p. 21. But the DUI charging language did not include anything about the arrest. CP 2. Even under a fair and liberal construction of the charging document, the state did not apprise Mr. Sharples of the essential element that he had been arrested based on reasonable ground to believe that he had committed DUI.

If the necessary elements do not appear in the Information in any form, the accused does not need to show prejudice. *Zillyette*, 178 Wn.2d at 161. Despite this, Respondent argues that Mr. Sharples cannot show that he was prejudiced by the deficient charging document. Brief of Respondent, p. 20. Because no reasonable construction could glean all of the essential elements from the Information, no separate prejudice showing is required. *Zillyette*, 178 Wn.2d at 161.

The Information did not give Mr. Sharples notice of all of the elements of the refusal to submit to a breath test. *Zillyette*, 178 Wn.2d at 158. Mr. Sharples's case must be remanded for resentencing without the mandatory minimum. *Id.*

III. THE COURT VIOLATED MR. SHARPLES’S RIGHTS TO DUE PROCESS AND TO A JURY TRIAL BY INSTRUCTING THE JURY IN A MANNER THAT DID NOT INCLUDE ALL OF THE ESSENTIAL ELEMENTS OF REFUSAL TO SUBMIT TO A BREATH TEST.

Due process and the right to a jury trial require the jury to be instructed on all factors that increase the mandatory minimum sentence. *Alleyne*, 133 S.Ct. at 2158.

Here, the court did not instruct the jury on the state’s burden to prove a lawful arrest based on reasonable ground to believe that DUI had been committed. That failure violated Mr. Sharples’s right to have the jury instructed regarding each element of the sentencing enhancement for failure to submit to a breath test. RCW 46.20.308(1); *Clement*, 109 Wn. App. at 375.¹

The DUI sentencing statute explicitly incorporates the implied consent statute at RCW 46.20.308. RCW 46.61.5055(1) (referring repeatedly to “refusal to take *a test offered pursuant to RCW 46.20.308*”) (emphasis added). Despite this, Respondent argues that a lawful arrest is only an element of refusal to submit to a breath test in administrative proceedings. Brief of Respondent, pp. 24-27. Respondent points out that

¹ The state argues that the invited error doctrine precludes review of this issue on appeal. Brief of Respondent, pp. 21-23. As argued in Mr. Sharples’s Supplemental Brief, his attorney provided ineffective assistance of counsel by proposing the same instructions as those the court erroneously gave. Appellant’s Supplemental Brief.

the statute criminalizing DUI does not list the element of lawful arrest.

Brief of Respondent, p. 24 (RCW 46.61.5055(1)).

Respondent is incorrect. By incorporating the implied consent statute, the DUI statute incorporates the requirements of that statute, which criminalizes refusal to submit to a breath test only after a person is arrested based on reasonable grounds to believe that s/he has committed DUI. RCW 46.20.308(1). Indeed, refusal to submit to a breath test is not illegal unless one has been properly arrested for DUI. RCW 46.20.308(1); *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

Additionally, the state does not explain why the required showing would be higher in an administrative license revocation proceeding than in a criminal trial. Brief of Respondent, pp. 24-26.

A finding that a person has committed DUI is not the same as a finding that s/he was lawfully arrested for DUI. Nonetheless, the state argues that the jury necessarily found all of the elements of refusal because it found Mr. Sharples guilty of DUI. Brief of Respondent, p. 27. But Mr. Sharples could have been arrested for some other reason, or arrested unlawfully. Under either circumstance, the jury might still have found him guilty of DUI. The jury's finding that Mr. Sharples committed DUI did not relieve the state of its burden to prove an arrest based on

reasonable grounds to believe he had committed DUI. Nor did it relieve the court of its responsibility to ensure that the jury was instructed regarding all essential elements of refusal to submit to a breath test.

Because the jury was not instructed on all of the elements of refusal to submit to a breath test, Mr. Sharples should not have been subjected to the mandatory minimum. *State v. Williams-Walker*, 167 Wn.2d 889, 897, 225 P.3d 913 (2010); *Alleyne*, 133 S.Ct. at 2158. His sentence must be vacated, and the case remanded for a new sentencing hearing. *Id*

CONCLUSION

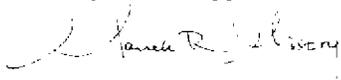
Mr. Sharples's conviction must be reversed and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for resentencing

Respectfully submitted on February 27, 2014,

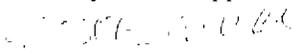
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

James Sharples
643 Cispus Rd
Randle, WA 98610

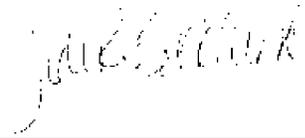
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Skamania County Prosecuting Attorney
kick@co.skamania.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 27, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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