

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS M. CORREA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The generic charging document failed to allege facts to support every element of the offense and did not enable Mr. Correa to plead an acquittal or conviction in bar of future prosecutions for the same offense.

a. The information failed to allege facts supporting the elements of theft of a motor vehicle.

A charging document must “*allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The charging document must apprise the defendant of “the conduct of the defendant which is alleged to have constituted that crime.” State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 8688 (1991) (emphasis added). This is “[m]ore than merely listing the elements.” State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). Merely reciting the statutory elements of the crime charged may not be adequate unless the statute defines the offense with certainty. Kjorsvik, 117 Wn.2d at 98; Leach, 113 Wn.2d at 688. “Failure to provide the facts necessary to a plain, concise and definite statement of the offense renders the information deficient.” Id. (internal quotations omitted).

The State is correct that the primary purpose of essential element is to provide notice to the defendant of the nature of the offense. State v. Zillyette, 178 Wn.2d 153, 159, 307 P.3d 712 (2013). The State fails to

recognize, however, that the information in this case did not provide adequate notice of the nature of the offense. The charge for theft of motor vehicle is almost completely generic. CP 6. It is silent as to the “where,” “what,” and “who.” CP 6. It did not say where in the State of the Washington the offense occurred. CP 6. It did not state what type of motor vehicle was stolen. CP 6. And it did not state who had rightful control over the vehicle. CP 6. The only details are that the offense was committed “on or about July 11, 2014.” CP 6.

The State misunderstands the argument. The argument is not that a charging document must “describe in detail” how the offense was committed. Br. of Resp’t at 9. Rather the argument is that there must be sufficient detail to apprise the defendant of the nature of the offense.

The State cites State v. Noltie, 116 Wn.2d 831, 843, 809, P.2d 190 (1991) for the proposition that an information need not specify the “when, where, or how” of the charged offense. Br. of Resp’t at 9. An examination of the charging document in Noltie, however, shows that the charging document was sufficiently detailed. It read:

That the defendant Fredric Noltie, in King County, Washington, during a period of time intervening between November 29, 1983 and May 14, 1987, being over thirteen years of age, did engage in sexual intercourse with [M], a person less than eleven years old, to wit: five, six, seven, eight years of age;

Noltie, 116 Wn.2d at 841.

The State seeks to reframe Mr. Correa's argument as one of mere vagueness rather than constitutional insufficiency. Br. of Resp't at 11. But Leach and Kjorsvik set out constitutional rules. Kjorsvik, 117 Wn.2d at 97-98; Leach, 113 Wn.2d at 689-91. The cases that the State relies on, State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982) and State v. Holt, 104 Wn.2d 315, 704 P.2d 1189 (1985), predate this caselaw. Mr. Correa's argument is one constitutional due process and can be raised for the first time on appeal. Leach, 113 Wn.2d at 691.

Additionally, many of the State's citations do not involve the precise arguments that Mr. Correa is making. "An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." Cont'l Mut. Sav. Bank v. Elliott, 166 Wash. 283, 300, 6 P.2d 638 (1932). Hence, "[w]here the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive . . ." ETCO, Inc. v. Dep't of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992).

The Court should conclude that the charging document failed to allege sufficient facts to support the elements of theft of a motor vehicle.

b. The charging document did not permit Mr. Correa to plead the judgment as a bar to any subsequent prosecution for the same offense.

Another purpose of the essential elements rule is to bar any subsequent prosecution for the same offense. Zillyette, 178 Wn.2d at 159; Leach, 113 Wn.2d at 688. This rule that a charging document must be sufficiently precise so that the defendant can “avail himself of his acquittal or conviction for protection against a further prosecution for the same cause” is longstanding. State v. Carey, 4 Wash. 424, 433, 30 P. 729 (1892). This right is “zealously” guarded by Washington courts. State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). Federal law is in accord. United States v. Resendiz-Ponce, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007) (constitutional requirement for an indictment is that it must enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense).

Here, the information is insufficient to allow Mr. Correa to plead the judgment as a bar to any future prosecution for the same offense. The information only establishes that the charge of motor vehicle theft was “on or about July 11, 2014.” CP 6. This did not adequately inform Mr. Correa of the nature of the offense. As argued in the opening brief, Br. of App. at 14-15, this is similar to Carey. There, the court held the information was

insufficient to protect the double jeopardy rights of the defendant. Carey, 4 Wash. at 432-33.

In response to Mr. Correa’s argument that his case is analogous to Carey, the State seeks to distinguish the case on the basis that the trial record was stricken on review. This is immaterial. Despite the availability of trial records, courts have continued to apply the rule. See, e.g., Resendiz-Ponce, 549 U.S. at 108 (reasoning that the indictment, which specified the time and date of the offense, protected the defendant against multiple prosecutions for illegally entering into the United States). The State cites no authority for its novel exception to the rule.

Further, our Supreme Court did not take this approach in rejecting a challenge to an information in a subsequent case applying the rule from Carey. In State v. Hoyle, 114 Wash. 290, 194 P. 976 (1921), the court held an information was adequate because the “ingredients” of the offense “were set forth in the information and permitted the accused to “subsequently plead in bar” any future prosecution for the same offense:

Those are the elements of the crime with reference to children of tender years, as defined by statute, and all the necessary ingredients. Those ingredients were set forth in the information. To them the accused could plead his guilt or innocence, and, upon a judgment of conviction or of not guilty, could subsequently plead in bar of any prosecution for kidnapping, ‘on or about the 1st day of December, 1919, in Spokane county, Washington, the child under 16 years of age, to wit, Jane Doe Charest, of the age of two

weeks, with intent to conceal that child from her parents, or other persons having (then) lawful care and control over that child.’ The identity of the child, rather than the identity of the custodians, and the intent to conceal the child from any and all lawful custodians, with the time and place of taking and detaining unlawfully, identifies the crime. A verdict thereunder could certainly be shown by the face of the record to bar any subsequent prosecution for the same unlawful taking and detaining.

Hoyle, 114 Wash. at 293-94 (emphasis added). In making this ruling, the court quoted the rule from Carey and applied it. Id. at 291-92. The court did not distinguish Carey on the grounds urged by the State here.

The State also argues Carey is distinguishable because there are multiple ways to practice medicine without a license and only one way of stealing a motor vehicle. Br. of Resp’t at 15. This is not true. Theft is an alternative means crime. State v. Linehan, 147 Wn.2d 638, 647, 56 P.3d 542 (2002); RCW 9A.56.020(1). Here the State prosecuted Mr. Correa under the “exerts unauthorized control” means. RCW 9A.56.020(1)(a). Regardless, a person can steal multiple cars “on or about” the same day. Thus, the State fails to distinguish Carey.

This Court should conclude that the charging document was inadequate to permit Mr. Correa to plead the judgment as a bar to any future prosecution for the same offense.

c. No proof of prejudice is required before reversal.

The information did not apprise Mr. Correa with reasonable certainty of the nature of the accusation against him so that he could prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. The State suggests that Mr. Correa must prove prejudice to obtain reversal for this violation. Br. of Resp't at 12-13. To the contrary, once the information is established to be defective, the remedy is reversal and no prejudice need be established. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000); see Leach, 113 Wn.2d at 691 (affirming dismissal due to inadequate charging document without engaging in prejudice inquiry). Because the information was deficient, this Court should reverse.¹

2. The trial court erroneously found that Mr. Correa had the ability to pay legal financial obligations. This Court should order that no costs will be allowed on appeal.

The State does not disagree that the court found that Mr. Correa had an ability to pay legal financial obligations without conducting the necessary inquiry into ability to pay as required by State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Rather, the State contends this inquiry

¹ For the reasons stated in the Opening Brief, the conviction should also be reversed because Mr. Correa was deprived of his right to present a defense. Br. of App. at 16-22.

was unnecessary because the court only imposed non-discretionary legal financial obligations.

The court, however, entered a boilerplate finding that, “An award of costs on appeal against the defendant may be added to the total legal financial obligations.” CP 66. When read with the court’s finding on ability to pay, one might conclude that the court was finding that Mr. Correa has the ability to pay any costs that might be imposed on appeal. Absent a sufficient inquiry into ability to pay, this is erroneous. Appellate costs are discretionary, not mandatory. RAP 14.2; State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Regardless, if Mr. Correa does not substantially prevail in this appeal, this Court should exercise its discretion and decline any request by the State for costs, as permitted by the Rules of Appellate Procedure. A “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court has held that this rule allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of

the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

Nolan, 141 Wn.2d at 626 (emphasis added). This interpretation is consistent with the permissive language used by the statute authorizing the appellate courts to impose costs upon a defendant. RCW 10.73.160(1) (“The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.”) (emphasis added).

Here, an award of appellate costs becomes part of the judgment and sentence. RCW 10.73.160(3). Because the trial court failed to properly determine whether Mr. Correa has the present or future ability to pay discretionary legal financial obligations, it does not make sense for this Court to add significant legal financial obligations to the judgment and sentence. Thus, exercising its discretion, this Court should direct that no costs will be allowed. RAP 14.2.

Concerning witness costs, the State appears to be correct that witness costs were not imposed upon Mr. Correa.

Because there has not been an adequate inquiry into Mr. Correa’s ability to pay discretionary legal financial obligations, the Court should

overturn the finding stating that costs may be awarded on appeal and, exercising its discretion, order that no costs will be allowed.

B. CONCLUSION

The generic charging document was constitutionally inadequate to inform Mr. Correa of the nature of the offense. It did not allege facts to support the elements and did not permit him to plead the judgment as a bar to a later prosecution for the same offense. Thus, the conviction should be reversed. The conviction should also be reversed because Mr. Correa's right to present a complete defense was violated.

DATED this 11th day of January, 2016.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 47207-4-II
)	
DOUGLAS CORREA,)	
)	
Appellant.)	

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