

No. 49104-4-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

CYRUS PLUSH, Appellant.

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Appeal from the Superior Court of Grays Harbor County  
The Honorable F. Mark McCauley  
No. 16-1-00096-0

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**BRIEF OF APPELLANT  
CYRUS PLUSH**

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## **I. ASSIGNMENTS OF ERROR**

1. The Order Allowing the State to File an Amended Information, Was Error.
2. The State's Closing Argument, Which Misstated the Facts and Law, Was Error.
3. The Findings Regarding Mr. Plush's Prior Convictions and Offender Score, Without Sufficient Evidence, Was Error.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Should the State be allowed to file an amended information the days prior to trial, changing the dates alleged in the charging document on a failure to register case, where the State has been on notice for at least a month that the defendant was incarcerated and unable to register on the dates originally charged?
2. Is a defendant prejudiced when his entire defense strategy and witnesses revolved around him being incarcerated on the dates he is alleged to have failed to register, when the State is allowed to file an amended information ten days before trial, placing the defendant in a position to choose between his right to a speedy trial or his right to be adequately prepared for trial.

3. Does the State commit flagrant and ill-intentioned misconduct when it argues that a jury can convict the defendant for failing to register after his release from jail and before being arrested when there is no evidence in the record for a jury to find that the defendant was out of custody for more than three business days?
4. Does a trial court error when it relies on the State's representation of the defendant's criminal history and offender score when the State does not present judgments and sentences or other evidence of the defendant's prior convictions?

### **III. STATEMENT OF THE CASE**

Mr. Plush represented himself, pro se, with the assistance of standby counsel. He was convicted, after a jury trial, of one count of failure to register as a sex offender. He appeals his conviction.

#### **1. Amended Information.**

Mr. Plush was originally charged with one count of failure to register as a sex offender between November 5, 2015 and November 12, 2015. (CP 1-2). Mr. Plush decided to represent himself. (CP 12-13, RP 4-13-16 at 2).

While representing himself, Mr. Plush filed numerous pro se

motions. On March 17, 2016, Mr. Plush filed a motion to dismiss, arguing that he was in custody during the dates alleged; and, therefore, was not required to register. (CP 14-15). On April 4, 2016, Mr. Plush filed a motion to hear argument on his motions. (CP 34-39).

On April 18, 2016, Mr. Plush waived his right to a CrR 3.5 hearing and stipulated to the admissibility of this statement to police after his arrest. (CP 54, RP 4-18-16 at 7-8). On the same date, the State asked to file an amended information. (RP 4-18-17=6 at 8). The hearing was set over one week for Mr. Plush to respond to the motion. (RP 4-18-16 at 8-9).

On April 25, 2016, the State filed a motion to amend the information, changing the dates, after learning that Mr. Plush was in custody on the dates originally charged.<sup>1</sup> (CP 59-61). Mr. Plush objected to the amended information, arguing he had filed a motion to dismiss because he was incarcerated during the dates alleged in the original information and the state waited over a month to file an amended information, he was prejudiced because he had prepared to defend against the dates charged, that the new dates would require different witnesses and a different defense, and that he could not prepare to defend against the amended information when there were only ten days before trial. (RP 4-

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<sup>1</sup> The motion was dated April 17, 2016.

25-17 at 2-4).

The court allowed the State to file an amended information, stating that the dates in the amended information were covered in the affidavit for probable cause. (RP 4-25-16 at 4, CP 62). The amended information alleged that Mr. Plush failed to register between January 18, 2016 and February 25, 2016. (CP 63).

On May 10, 2016, Mr. Plush filed a motion to re-hear, or reconsider, allowing the amended information. (CP 134). Mr. Plush argued that he was given only ten days to prepare for trial on the amended information, with different dates, creating a Hobson's choice of waiving his right to a speedy trial or being prepared to adequately defend the charge against him, arguing that the case should be dismissed. (CP 134-35). On May 16, 2016, the court heard Mr. Plush's motions; the court denied all of Mr. Plush's motions. (RP 5-16-17 at 3-8).

## 2. Facts.

Mr. Plush was convicted of a class A felony sex offense in 1992. (Exh 5 at CP 65, RP 5-5-16 at 27, 89).

Mr. Plush was registered at 209 ½ East, Apartment 218, in Aberdeen, Washington. (RP 5-5-16 at 26). The apartment manager testified that Mr. Plush was a tenant there from May 20, 2015 until November, 2015. (RP 5-5-16 at 48). The apartment manager started a

procedure to evict Mr. Plush, but did not complete that process. (RP 5-5-16 at 49, 51). The apartment was rented to another tenant in December of 2015. (RP 5-5-16 at 50). In January of 2016, Mr. Plush sent a letter to the apartment manager, stating that he was withholding rent due to health issues, including roaches and the heater not working. (RP 5-5-16 at 49, 55-56).

On January 24, 2016, an officer was asked to verify Mr. Plush's address. (RP 5-5-16 at 42). The officer went to Mr. Plush's registered address and spoke to someone in the apartment who said he was not Mr. Plush, didn't know him, and had been living there since December. (RP 5-5-16 at 42).

A detective was assigned to follow up. (RP 5-5-16 at 66). On February 3, 2016, the detective called Mr. Plush. (RP 5-5-16 at 68). The officer told Mr. Plush that he was supposed to register a change of address within 72 hours and told Mr. Plush to go in and register. (RP 5-5-16 at 69). The detective checked on February 9<sup>th</sup> and February 12<sup>th</sup> and Mr. Plush had not registered a new address. (RP 5-5-16 at 70). Believing that Mr. Plush did not go in to register as instructed, the officer filed a report and referred the case for charging on failure to register as a sex offender. (RP 5-5-16 at 70). However, Mr. Plush did report the following day, but was arrested on an unrelated matter before he could register. (RP 5-5-16

at 80). The detective did not check to see if Mr. Plush was in jail before referring the case for charging. (RP 5-5-16 at 73).

Mr. Plush was ultimately arrested for failing to register on February 25, 2016. (RP 5-5-16 at 71). After Mr. Plush had been arrested, he was interviewed by a detective. (RP 5-5-16 at 77). Mr. Plush told the detective that he had been in and out of jail on department of correction (DOC) violations, that his landlord was trying to evict him, but he believed he still lived there and received mail there. (RP 5-5-16 at 77-78).

Jail records show that Mr. Plush was in custody on the following dates: January 6, 2015 – January 15, 2016, February 4, 2016 to February 22, 2016, and February 25, 2016 to the date of trial. (RP 5-5-16 at 93-96).

Mr. Plush's cross-examination of the State's witnesses revolved around whether he was incarcerated at the times alleged and whether he had a duty to register while incarcerated. (RP 33, 45, 73, 86-87).

### 3. Closing Arguments.

The State, in its closing arguments, argued that there were two periods of time when Mr. Plush was guilty of failure to register, arguing, in part, that from February 22 to February 25, 2016, he was out of custody for 72 hours without updating his address. (RP 5-5-16 at 112-13, 126).

## I. ARGUMENT

### 1. The Trial Court Erred by Allowing the State to File an Amended Information.

“Under article 1, section 22 of the Washington Constitution, ‘the accused shall have the right ... to demand the nature and cause of the accusation against him.’” *State v. Schaffer*, 120 Wash. 2d 616, 619, 845 P.2d 281, 283 (1993), quoting WASH. CONST. art. I § 22.

“[W]e have tailored our jurisprudence toward the precise evil that article 1, section 22 was designed to prevent—charging documents which prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice.” *Schaffer*, 120 Wash 2d at 620, quoting *State v. Leach*, 113 Wash.2d 679, 695–96, 782 P.2d 552 (1989).

The court may only allow an amendment of the information if the court finds that “substantial rights of the defendant are not prejudiced.” CrR 2.1(d). “An amendment to an information at trial may prejudice a defendant by leaving him without adequate time to prepare a defense to a new charge.” *State v. Purdom*, 106 Wash. 2d 745, 749, 725 P.2d 622, 624 (1986), quoting *State v. Jones*, 26 Wash.App. 1, 6, 612 P.2d 404 (1980). Denying a defendant’s request for a continuance under those circumstances is reversible error. *Jones*, 26 Wash.App. at 6.

A defendant is also prejudiced if he is placed in a position where he must choose between waiving his right to a speedy trial or requesting more time to adequately prepare to defend against an amended information. *See State v. Ralph Vernon G.*, 90 Wash. App. 16, 21, 950 P.2d 971, 973 (1998). “[T]he State may not, without excuse, compel defendants to choose between their right to assistance by an attorney who has had an opportunity to adequately prepare for trial, and their right to a speedy trial.” *Id.*, citing *State v. Price*, 94 Wash.2d 810, 814, 620 P.2d 994 (1980). It is unfair for the State to wait until days before trial to file an amended information based on information that the State has been aware of. *State v. Michielli*, 132 Wash.2d 229, 246, 937 P.2d 587 (1997).

a. *Mr. Plush was Prejudiced Because He Was Forced to Choose Between His Right to a Speedy Trial or Being Adequately Prepared for Trial.*

In this case, Mr. Plush was charged with one count of failure to register as a sex offender on February 29, 2016. (CP 1-5, 192). Conditions of release were set on the same day, but it appears Mr. Plush was not arraigned until March 7, 2016. (CP 192). If he was arraigned on March 7, 2016, then his time for trial would have expired on or around May 6, 2016, as Mr. Plush was being held on this charge. CrR 3.3.

On April 13, 2016, the court stated:

I want you to be assured that no one is going to ask you to waive your right to a speedy trial. You have a trial date right now of April 26th, I think, and I can't promise you that your case will go to trial on that day, but your speedy trial period expires, I think, May fourth or something like that, within a week of April 26th. And your case will go to trial some time before your speedy trial, between April 26th and the following week on May third or fourth.

(RP 4-13-16 at 3).

On April 18, 2016, the court notified Mr. Plush that his trial could not go forward on April 26, 2016, due to court congestion. (RP 4-18-16 at 9). The parties agreed to reset the trial to May 5, 2016. (RP 4-18-16 at 9). Therefore, there was no remaining time within speedy trial. On that same date, the State filed a motion to amend the information. (RP 4-18-16 at 8). That motion was continued one week; on April 25, 2016, the court granted the motion to amend. It is clear from Mr. Plush's pre-trial motions, his cross-examination of the State's witnesses, and the witness he called, that the entire focus of his defense was on him being in custody at the time of the allegations.

If Mr. Plush had requested a continuance to adequately prepare to defend against the amended information, he would have been forced to waive his right to a speedy trial. Thus, he was forced to decide between his right to a speedy trial and his right to be adequately prepared to defend against the charge against him.

b. *The State Failed to Act With Due Diligence By Failing to File an Amended Information Until the Eve of Trial.*

The State filed charges against Mr. Plush on February 29, 2016, alleging that he failed to register as a sex offender between November 5, 2015 and November 12, 2015. On February 26, 2016, Mr. Plush told police that he had been in custody. (RP 5-5-16 at 77-78). On March 17, 2015, Mr. Plush filed a motion to dismiss, arguing that he was in custody during the dates alleged. (CP 14-15). However, the State waited until April 18, 2016, over a month after Mr. Plush filed his motion and 8 days prior to the original trial date, to address filing an amended information. The trial date was extended and the court ultimately allowed the State to file the amended information on April 25, 2016, ten days before the new trial date. Mr. Plush was prejudiced by the State's failure to timely file an amended information.

c. *The Remedy for Allowing an Amended Information When the Defendant Was Prejudiced by Being Forced to Choose Between Being Prepared and His Right to a Speedy Trial Should be Dismissal.*

When a defendant is forced to request a continuance to prepare to address an untimely amended information, the court looks at the time for trial without any exception for the time of the continuance, and if the time for trial has expired, the remedy is dismissal. *Ralph Vernon G.*, 90 Wash. App. 22. In other circumstances, the remedy for the court improperly

allowing an amended information is dismissal. *See State v. Dallas*, 126 Wash. 2d 324, 331–32, 892 P.2d 1082, 1085–86 (1995). Our Supreme Court discussed why dismissal was the appropriate remedy:

According to the State's analysis, the critical factor in allowing retrial is the fact the defendant was actually convicted of the amended charge at the first trial. However, were we to adhere to this analysis, the remedy for an improper attempt to amend an information would depend upon when the impropriety was recognized. If the trial court correctly refused the State's motion to amend and the evidence did not support the original charge, dismissal would result . . . . If, on the other hand, the trial court incorrectly allowed the amendment and proceeded to convict on the amended charge, the appellate court would dismiss without prejudice to refile. This difference in remedy is substantial enough to encourage courts to overlook improper amendments and proceed to verdict, thereby wasting the resources of the trial courts and encouraging needless appeals.

The State's final argument is that an improper amendment violates a defendant's right to notice, and retrial is the way to correct a notice problem. However, when prosecutorial negligence results in a mistrial, the public interest in judicial efficiency is not well served, and the defendant is potentially subjected to another trial and more delay. These policy interests must also be considered when looking at the appropriate remedy.

*Id.* at 331–32 (internal citations omitted).

In this case, if Mr. Plush had requested a continuance to prepare, it would have necessarily resulted in a continuance past the time for trial. And, as stated above, the denial of such a motion, when necessary to prepare his defense and avoid prejudice, would have been in error. Thus,

the result would have been dismissal. In the alternative, if the court would have denied the motion, as it should have, the State would have been forced to dismiss or go forward on the dates originally charged, when Mr. Plush was in custody, and the State would have had insufficient evidence to convict Mr. Plush as a matter of law. For those reasons, this court should reverse and remand for dismissal.

2. The State Committed Prosecutorial Misconduct by Arguing Facts Not in Evidence and Misstating the Law.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced his defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied*, 100 Wn.2d 1008 (1983). A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005).

“Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial.” *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012); *State v. Davenport*, 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

A defendant’s constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury’s verdict. *Jungers*, 125 Wn.App. 895.

Generally, improper prosecution argument, even when indirectly touching upon a constitutional right, is tested by whether the prosecution argument is so flagrant and ill-intentioned as to create incurable prejudice . . . . However, if the alleged misconduct is found to directly violate a constitutional right . . . then "it is subject to the stricter standard of constitutional harmless error."

*State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (internal citations omitted).

It is improper for the State to argue facts that are not in evidence. *State v. Jones*, 144 Wash. App. 284, 294, 183 P.3d 307, 313 (2008). And, when the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wash. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious

irregularity having the grave potential to mislead the jury. *Davenport*, 100 Wash.2d at 764.

In this case, Mr. Plush was charged with failure to register as a sex offender. RCW 9A.44.132. He is required to register within “three business days” of his release from custody. RCW 9A.44.130(4)(a)(i). However, the State argued repeatedly, in closing argument, that the jury could convict Mr. Plush of failing to register after his release from custody on February 22, 2016, when he was arrested on February 25, 2016, because he did not register for three days. However, there was no evidence presented regarding what time he was released or what time he was arrested. Therefore, it is impossible to determine if he did in fact fail to register for three business days and it was improper to argue to the jury that it could convict Mr. Plush of failure to register after his release from jail on February 22, 2016. Mr. Plush was prejudiced because there is no way to determine if any jurors convicted him based on the dates improperly argued by the State.

3. There Was Insufficient Evidence of Mr. Plush’s Prior Convictions.

The State bears the burden to prove Mr. Plush’s criminal history, and must present certified copies of the judgment and sentence for his prior offenses or explain why it is unable to do so, and provide some other

documentation to prove the prior convictions. *State v. Rivers*, 130 Wash. App. 689, 705, 128 P.3d 608, 616 (2005). In this case, the State provided no evidence of Mr. Plush's prior convictions.

The State argued that the standard range for Mr. Plush was 43-57 months. (RP 6-3-16 at 17-18). The State filed an Amended Statement of Prosecuting Attorney, which included the State's recitation of Mr. Plush's criminal history, offender score, and the State's sentencing recommendation. (CP 150-157). The court relied on the State's sentencing memorandum to find that Mr. Plush had two prior convictions for failure to register and had fourteen points. (RP 6-3-16 at 21). Mr. Plush did not stipulate to his prior convictions and refused to sign the judgment and sentence. (RP 6-3-16 at 22). The State did not file copies of the judgement and sentence, or any other documents, regarding Mr. Plush's prior convictions. (RP 6-3-16 at 15-25). Therefore, there was insufficient evidence to establish any of Mr. Plush's prior convictions. If this court does not remand for dismissal, as argued above, this court should reverse Mr. Plush's sentence and remand for re-sentencing.

4. This Court Should Not Impose Appellate Costs Because Mr. Plush is Indigent and Unable to Pay.

This court has discretion to waive appellate costs for indigent defendants. The amended RAP 14.2 states that costs will be awarded

unless this court directs otherwise in its decision, or the commissioner or clerk finds that “an adult offender does not have the current or likely future ability to pay such costs.” RAP 14.2. Furthermore, a trial court’s “finding of indigency remains in effect . . . unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.” RAP 14.2.

This Court should direct that costs not be imposed in this case.

As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

*State v. Sinclair*, 192 Wash. App. 380, 391-92, 367 P.3d 612, 616 (2016, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider “important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Blazina*, 182 Wn.2d at 838. In

addition, if a person is considered indigent, “courts should seriously question that person's ability to pay . . . .” *Id.*

In this case, Mr. Plush was found indigent and counsel was appointed for his trial<sup>2</sup>, as well as this appeal. (CP 8, 189-90). The trial court found Mr. Plush unable to pay and waived all non-mandatory court costs and fines. (RP 6-3-16 at 15, CP 173). In addition, Mr. Plush was sentenced to 50 months at the department of corrections (DOC). (RP 6-3-16 at 18, CP 170, 176). It is unlikely that Mr. Plush will be able to pay appellate costs after his release from prison. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Plush does not substantially prevail.

## **I. CONCLUSION**

In conclusion, the trial court erred by allowing the State to file an amended information without sufficient time for Mr. Plush to prepare for trial, the State committed prosecutorial misconduct by misstating the law and facts in closing argument, and there was insufficient evidence of Mr. Plush’s prior convictions. Therefore, this court should reverse and remand for dismissal. Or, in the alternative, reversed the sentence and remand for re-sentencing.

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<sup>2</sup> Counsel was originally appointed, and after Mr. Plush decided to go pro se, standby counsel was appointed.

Dated this 30<sup>th</sup> day of March, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 49104-4-II
vs.	)	
	)	CERTIFICATE OF SERVICE
CYRUS PLUSH, II,	)	
	)	
Appellant.	)	
	)	

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically via the Court of Appeals web portal to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

Cyrus Plush, II, DOC# 720626 (Appellant)  
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Callam Bay, WA 98326

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.



Signed March 30, 2017 at Tacoma, Washington.

CERTIFICATE OF SERVICE

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