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Division II
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NO. 52092-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY KAZULIN,
Appellant.

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

Pierce County Cause No. 17-1-04489-1

The Honorable Philip K. Sorensen, Judge

BRIEF OF APPELLANT

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ISSUE AND ASSIGNMENTS OF ERROR

1. Mr. Kazulin's conviction for possession of a stolen motor vehicle violated his Sixth and Fourteenth Amendment right to an adequate charging document.
2. Mr. Kazulin's conviction for possession of a stolen motor vehicle violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.
3. The charging document failed to set forth the critical facts related to the charge against Mr. Kazulin.
4. The charging document failed to charge Mr. Kazulin with unlawful possession of "specifically described property."

ISSUE: An Information charging a theft offense must "clearly" charge the accused with a crime relating to "specifically described property" in order to provide the accused with constitutionally adequate notice of the charge against him/her. Was language charging Mr. Kazulin with possession of a stolen motor vehicle constitutionally deficient when it did not include any language describing the stolen vehicle he was alleged to have possessed?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Mr. Kazulin with possession of a stolen motor vehicle using the following language:

That JEFFREY JAY KAZULIN, in the State of Washington, on or about the 22nd day of November, 2017, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen and did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.
CP 1.

There was no language in the charging document describing the motor vehicle that Mr. Kazulin was alleged to have unlawfully possessed.
CP 1.

The case proceeded to trial, where the jury found Mr. Kazulin guilty of possession of a stolen motor vehicle. CP 35. This timely appeal follows. CP 54.

ARGUMENT

THE CHARGING LANGUAGE IN MR. KAZULIN'S CASE WAS CONSTITUTIONALLY DEFICIENT.

- A. The Information charging Mr. Kazulin failed to allege any “critical facts,” in violation of his Sixth Amendment right to notice of the “nature and cause” of the accusation against him.

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose

certain requirements on charging documents. U.S. Const. Amends. VI, XIV.¹ A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).

The charging language must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).² Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

¹ Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

² Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

In cases involving offenses related to theft, the Information must “clearly” charge the accused person with a crime relating to “specifically described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920); *See also United States v. Cruikshank*, 92 U.S. 542, 558, 23 L. Ed. 588 (1875).

In this case, the Information passes only the first of these three requirements: it charges the language of the statute, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

Here, the Information does not provide any allegations regarding the nature or character of the motor vehicle that Mr. Kazulin was alleged to have possessed. CP 1. Because of this, the allegation is “too vague and

indefinite upon which to deprive [Mr. Kazulin] of his liberty.” *Id.* The Information provides neither notice nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. The critical facts related to the charge against Mr. Kazulin cannot be found by any fair construction of the charging document. *Rivas*, 168 Wn. App. at 887.

The Information is constitutionally deficient. Mr. Kazulin’s conviction must be reversed and the charge dismissed without prejudice. *Russell*, 369 U.S. at 763-64; *Rivas*, 168 Wn. App. at 893.

B. Mr. Kazulin’s challenge to the violation of his constitutional right to notice of the charge against him can be raised for the first time on appeal.

Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). A constitutionally deficient charging document presents such an error. *Rivas*, 168 Wn. App. at 887.

The United States Supreme Court has long held that charging document which fails to advise the accused of any of the critical facts related to the allegations against him/her is inadequate under the Sixth Amendment. *See Cruikshank*, 92 U.S. at 558; *Hamling v. United States*, 418 U.S. 87, 117–18, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *Russell*, 369 U.S. 749.

The *Hamling* court made it clear that the constitution does not permit a person to be charged with a crime using only the language of the statute:

Undoubtedly the language of the statute may be used in the general description of an offence, *but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence*, coming under the general description, with which he is charged.

Hamling, 418 U.S. at 117–18 (quoting *United States v. Hess*, 124 U.S. 483, 487, 8 S.Ct. 571, 31 L.Ed. 516 (1888) (emphasis added)). The *Russell* court referred to this rule as a “basic principle of fundamental fairness.” *Russell*, 369 U.S. at 765.

Indeed, The Supreme Court has explicitly held that a document charging a theft offense is constitutionally deficient if it fails to “specify with some degree of certainty the articles stolen” because it does not advise the accused of the “particulars of the charge against him.” *Cruikshank*, 92 U.S. at 558.

Yet, somehow, Washington appellate courts have strayed from this basic constitutional principle by attempting to create a doctrine in which any deficiency in a charging document that fails to specify critical facts (rather than elements of an offense) of an offense is labelled as “vague,” rather than constitutionally insufficient. *See e.g. State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012); *State v. Laramie*, 141 Wn. App. 332,

340, 169 P.3d 859 (2007); *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005). Such cases hold that a “vague” charging document cannot be challenged for the first time on appeal, but that the accused is required to seek correction through a motion for a bill of particulars in the trial court. *Id.*

Decisions in cases such as *Mason*, *Laramie*, and *Winings* rely on *dicta* in the State Supreme Court’s decision in *State v. Leach* for their proposition that a charging document that fails to include specific facts is merely “vague,” rather than constitutionally infirm. *See Mason*, 170 Wn. App. at 385; *Laramie*, 141 Wn. App. at 340, *Winings*, 126 Wn. App. at 84 (*all citing State v. Leach*, 113 Wn.2d 679, 690–91, 782 P.2d 552 (1989)).

But the *Leach* court did not consider any issue relating to failure to allege “critical facts” in a charging document. *See Leach*, 113 Wn.2d 679. Rather, that *Leach* court simply made an offhand statement that the accused in that case could challenge the Information for the first time on appeal because it was constitutionally deficient, rather than “vague as to some other significant matter,” the issue could be raised for the first time on appeal under RAP 2.5(a)(3). *Id.* at 690-91.³

³ Notably, the *Leach* court also held that the constitutional requirements regarding charging language are more stringent in felony cases than in those charging only misdemeanors, such as those addressed by the Supreme Court in that case. *Leach*, 113 Wn.2d at 697.

Cases such as *Mason*, *Laramie*, and *Winings* misconstrue the *dicta* from *Leach* in a manner that directly contradicts the requirements of the Sixth Amendment, as laid out by the United States Supreme Court. This court should overrule or decline to follow those precedents because they violate the constitution and erode a “basic principle of fundamental fairness” enshrined in the Sixth Amendment. *Russell*, 369 U.S. at 765.

Mr. Kazulin may challenge in Information in his case for the first time on appeal because it is constitutionally. *Cruikshank*, 92 U.S. at 558; *Hamling*, 418 U.S. at 117–18; *Russell*, 369 U.S. 749; RAP 2.5(a)(3).

CONCLUSION

The Information in Mr. Kazulin’s case was constitutionally deficient because it failed to allege the “critical facts” necessary to permit him to plan his defense or to guard against subsequent prosecution in violation of the protection against double jeopardy. Mr. Kazulin’s conviction must be reversed.

Respectfully submitted on February 19, 2019,



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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I filed the Appellant's Opening 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 Seattle, Washington on February 19, 2019.



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