

FILED

DEC 23 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 288153

COURT OF APPEALS,
DIVISION III OF THE STATE OF WASHINGTON

CITY OF SPOKANE.

Respondent.

v.

JOE TAYLOR, JR.,

Petitioner,

RESPONDENT'S BRIEF

MARY MURAMATSU
Spokane City Prosecutor

MARGARET K. HARRINGTON
WSBA No.20622
Assistant City Prosecutor
Attorneys for Respondent

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A. IDENTITY OF RESPONDENT: The City of Spokane (“City”) is the Respondent in this matter.

B. DECISION: On December 18, 2009, the Superior Court vacated defendant’s guilty plea finding the trial court abused its discretion by denying at arraignment the prosecution’s request to clarify the charge by way of CrRLJ 2.4(f), the procedural vehicle for amendment, and additionally committed error of law by accepting a plea to DWLS 3rd degree when there was no factual basis to support that charge.

C. ISSUES

To the extent clarification of the charge was necessary, did the trial court abuse its discretion in denying the prosecution’s request to clarify the correct charge – DWLS 1 – by way of CrRLJ 2.4(f) amendment at arraignment, the earliest stage of criminal prosecution, a time when amendments are liberally granted?

Did the trial court commit error of law when it accepted a guilty plea to a charge of DWLS 3rd, a crime separate and distinct from DWLS 1st, when DWLS 1st was the crime charged and there was no factual basis for the crime of DWLS 3rd?

D. STATEMENT OF THE CASE.

1. The contents of the charging document initiating criminal prosecution.

On February 25, 2009, Officer Devin Presta issued two citations to defendant Mr. Taylor, a criminal misdemeanor and a traffic infraction

citation. *See*, the Municipal Court Record (“MCR”)¹ – the RALJ record - for Municipal Court stamped “Filed Feb. 27, 2009” Misdemeanor Citation B 81007 (“Citation”) and Infraction Citation U 107071.²

The front side of the criminal citation issued to Mr. Taylor contained the following statutory numerical cite for DWLS first degree, “RCW 46.20.342.1A”,³ a court rule prescribed criminal citation content requirement. *See* CrRLJ 2.1(b)(3)(iii) and MCR for Citation B 81007.

Significantly, the bottom front side of the criminal citation issued to Mr. Taylor contains the officer’s **sworn certification incorporating by reference the probable cause statement on the back of the citation**, a

¹ The documents designated in the Clerks Papers (“CP”) are duplicative of some documents in the MCR, but omit other documents contained in the MCR. Petitioner City will cite to the MCR to the extent it relies upon documents not contained in Respondent’s CP designation.

² The traffic infraction citation cited defendant for expired vehicle license under RCW 46.16.010.3.0, and no liability insurance under RCW 46.30.020. *Id.*

³ In relevant part, RCW 46.20.342.1(a) states,

- (1) It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state.

* * *

(a) A person found to be a habitual offender under chapter 46.65 RCW, who violates this section while an order of revocation issued under chapter 46.65 RCW prohibiting such operation is in effect, is guilty of driving while license suspended or revoked in the first degree, a gross misdemeanor.

court rule prescribed criminal citation content requirement. CrRLJ

2.1(b)(4).⁴

The back side of the criminal citation, referenced in Officer Presta's certification on the front side, states the following in relevant part:

On 02-25-09 I was behind the listed vehicle at 2nd and Pine. I completed a DOL check and the vehicle expired as of 11-19-07.

* * *

I completed a DOL check and was advised his driver's license was suspended in the first degree. I then cited Taylor for . . . DWLS 1st.

Id. Beneath the RCW numerical cite for DWLS 1st on the front of the citation was the mislabeled shorthand acronymic reference to DWLS 3rd rather than DWLS 1st - an obvious scrivener's error.⁵ CP 38.

2. The Court accepts a plea to DWLS 3 and denies prosecution request to amend the scrivener's error reference to DWLS 3.

On March 6, 2009, pursuant to CrRLJ 4.1(a), seven days after the initiation of criminal proceedings on February 27, 2009 when the charging document was filed, defendant's arraignment was held.

⁴ Specifically, the certification signed by citing Officer Presta states, "I certify under penalty of perjury under the laws of the State of Washington that I have issued this on the date and at the location above, that I have probable cause to believe the above named person committed the above offense(s), and my report written on the back of this document is true and correct". See MCR for Citation B 81007.

⁵ Notably, the back of the traffic infraction citation (U107071) reiterated, "[a] DOL check revealed his drivers license to be suspended in the 1st Degree. I then cited him for DWLS 1st." *Id.*

At 1:38:50 during role call at the arraignment, the Court called Appellant/Defendant Joe Taylor. CP 38. Instead of receiving the Court's formal reading of the filed criminal citation and charges contained therein, otherwise required by CrRLJ 4.1(a)(2), Mr. Taylor's public defender immediately stood up in response to the court calling Joe Taylor and stated, "Present with counsel your honor.⁶ CP 38. We'd like to enter a plea of guilty to the charge of driving while license suspended third. The Vensel has been passed forward." CP 38. The prosecution immediately objected to the entry of the plea arguing the reference to DWLS 3 was scrivener's error for which an amended complaint was being offered to correct the error and clarify the charge - DWLS 1st, the charge otherwise already clearly stated on the charging document. CP 38-39.

Defense counsel responded that Mr. Taylor had an absolute right to plead guilty at arraignment under CrRLJ 4.2(a) and RCW 10.40.060 governing pleading at arraignment without affording the prosecution an ability to amend.⁷ CP 38-39.

⁶ Pursuant to CrRLJ 4.1(e) (6), the appearance by a lawyer authorized by this rule shall be construed as an arraignment under the other provisions of these rules. Also, defendant's appearance through his lawyer constituted a waiver of any defect in the citation and notice pursuant to CrRLJ 4.1(e) (3).

⁷ RCW 10.40.060 states, "[i]n answer to the arraignment, the defendant may move to set aside the indictment or information, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it."

The court took the issue under advisement, continued with role call, CP 39-40, and returned to the bench accepting the guilty plea to DWLS 3rd as voluntary, made upon the advise of counsel and finding that Mr. Taylor “[does] have an absolute right to plead guilty to the charge at arraignment, that [he] had entered a guilty plea prior to the amendment from prosecution and that to accept the amendment after that plea does prejudice [him].” CP 40. Additional arguments regarding the prosecution’s right to amend and defendant’s right to plead guilty at arraignment were advanced, CP 41 -42, and the court decided to postpone final acceptance of the plea and continue arraignment pending additional research by the parties until March 27. CP 42.

On March 27, 2009, the court resumed the March 6th arraignment and guilty plea hearing. CP 43. At that hearing the court accepted Mr. Taylor’s guilty plea to DWLS 3rd. CP 44. The court offered several bases for that decision, CP 44-46, which were ultimately recorded in Findings of Fact and Conclusions of Law (“FFCLs”). CP 90-92, discussed *infra* herein.

3. Sentencing and the defense argument that DOL was holding Mr. Taylor’s license based on infractions alone.

On that same date, after the court accepted the guilty plea to DWLS 3, the court proceeded to sentencing. CP 47. Thereafter,

Prosecutor Papini read Mr. Taylor's criminal and driving infraction history to the court, which included looking at Mr. Taylor's Department of Licensing (DOL) status. CP 47 - 48. That history included 12/20/2003 charges for driving with license suspended second degree and hit and run attended for which Mr. Taylor was found guilty. CP 47. Mr. Taylor's DOL status indicated he was suspended in the first degree for a judgment from an accident. CP 48.

The Court then asked, "Mr. Taylor, is there anything you'd like to add?" CP 49. Mr. Taylor responded that on July 15, 2008, he went to the state Department of Motor Vehicles (DMV) to find out what it would take to get his license reinstated. CP 49. Defense counsel continued, "Your honor according to [DOL] readout on July 15, 2008, upon Mr. Taylor's inquiry as to what he would take to get his license reinstated he was given three infractions, one from Pasco Municipal Court, one from Benton County District and one from Pasco Municipal Court." CP 49.

Notably, the readout offered no information about Mr. Taylor's driving status seven months later on February 25, 2009, the date he was charged with DWLS 1st herein. Nevertheless, at sentencing, the court considered Mr. Taylor's testimony in this regard stating, "I'm actually heartened by the information that you provided to the court with reference

to the inquiry you made and the fact that you were not placed on notice by the [DOL] of what was really holding your license, . . .” CP 50.⁸

4. Prosecution’s Motion to Reconsider and Vacate Guilty Plea.

On April 15, 2009, the court heard the City’s “Motion to Reconsider and Vacate Judgment Pursuant to CrRLJ 7.8(b)” (“Reconsideration Motion”) filed on April 7, 2009. CP 54-63. Attached to that Motion as an Exhibit was the DOL certified copy of Mr. Taylor’s driving record (“CCDR”) indicating that Mr. Taylor’s driving status on February 25, 2009, the date Officer Presta cited him for DWLS 1, was “revoked in the first degree”, and that on April 19, 2004 notice of the Order of Revocation dated April 16, 2004 was sent from DOL via certified mail to Mr. Taylor’s last known address on file with DOL⁹ - a Kennewick, Washington address. *See*, MCR for the April 6, 2009 CCDR from DOL, a five page long exhibit attached to the City’s April 15, 2009 “Memorandum

⁸Ultimately, Mr. Taylor was sentenced to 15 days electronic monitoring 75 days suspended, no fine and probation for 12 months. CP 50. In issuing the sentence, the court again noted, “the fact that [Mr. Taylor] actually asked the [DOL] about the status of [his] license and [was] told only about the infractions. That’s a failure of notice of the State not to provide you full and adequate notice which seems to have plagued this case from the beginning.” CP 50-51.

⁹ In Washington, drivers are required to notify DOL of any address change within 10 days thereafter. RCW 46.20.205(1).

in Support of Motion to Reconsider and Vacate Judgment Pursuant to CrRLJ 7.7(b)” (“Reconsideration Memorandum”).¹⁰

The Court denied the motion. Among the findings made at that hearing, the court indicated the factual basis for the plea was the DOL letter previously brought to the court’s attention by defense counsel during the March 27 sentencing and referred to as a “DOL readout”, and the fact that an uninsured motorist accident judgment would not have placed Mr. Taylor in DWLS 1 status. CP 62-63.

5. RALJ Appeal.

On October 30, 2009, Superior Court Judge Michael Price issued his decision on Mr. Taylor’s RALJ appeal finding: the charging document is the citation in its entirety, a review of the entire citation indicates the crime charged was DWLS 1st, the DWLS 3rd reference was scrivener’s error, there was not a factual basis for the defendant’s plea to the crime of DWLS 3rd and the trial court abused its discretion in denying prosecution’s request to amend given the absence of prejudice at that time. *See* Superior Court Findings of Fact and Conclusions of Law, CP 90-92.

¹⁰ The five page April 6, 2009 CCDR exhibit includes the 04/06/09 certified DOL letter and four attachments which include: a 04/16/04 Notice of personal driver’s license (“PDL”) revocation; the “Habitual Traffic Offender Hearing Request” form; the 04/19/04 signed certified mail receipt; and the U.S. Postal Service 1st class mail 04/21/04 DOL copy stamped received return envelope for certified mail receipt. The CCDR exhibit is attached to the Harrington Declaration which is attached to the Reconsideration Memorandum.

E. ARGUMENT.

Mr. Taylor argues Superior Court erred when it vacated his DWLS 3rd guilty plea because the crime he was entitled to plead to at arraignment was merely driving with a suspended license regardless of the reason for suspension. Implicitly, defendant argues any reference to degree in the charging document is superfluous because degree is not an element of the crime. For this reason, he argues his plea to DWLS 3rd was supported by a factual basis. Mr. Taylor relies on RCW 10.04.070, *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980) and *State v. Smith*, 155 Wn.2d 496, 120 P.3d 559 (2005), in support of his argument. Defendant's reliance on these authorities, however, is misplaced given mere driving with license suspended is not the legislatively designated crime. Rather, DWLS 1st and DWLS 3rd are independent crimes and the reason for the suspension status on the date the crime was charged is an element of the crimes.

- 1. There is no arraignment right to plead guilty to mere driving with license suspended regardless of status because that is not the legislatively designated crime.**

The three suspended driving crimes are independent crimes. *State v. Jasper*, ___ Wn.App. ___, 240 P.3d 174 (Sept. 20, 2010). The reason for the suspension/driving status is an element of each of the crimes. *Id.*

In *Jasper*, the court reversed the defendant's DWLS 3rd guilty verdict. *Id.* In so ruling, the court held the reason (the "why") for the

suspension on the date of the crime was an element of the crime DWLS 3rd. *Id.* The only evidence of the reason for suspension on the dates the crime was charged was the DOL affidavit of driver's status (indicating 3rd degree). *Id.* But earlier in its opinion, the court held that under the constitutional confrontation clause the trial court erred when it admitted into evidence at trial the affidavit absent a live witness. *Id.* Given no other untainted evidence was offered at trial to prove the defendant's driving status on the date in question, the court held the error failed the constitutional harmless error test and reversed the DWLS 3rd conviction. *Id.* The plain language of the suspended driving crimes statute is consistent with the *Jasper* court's interpretation as well as *State v. Smith*, 155 Wn.2d 496, 120 P.3d 559 (2005) a case upon which defendant heavily relies.

Driving with license suspended is not the crime articulated by the Legislature. Rather the Legislature prescribed three separate DWLS offenses requiring proof of separate elements. As the court in *State v. Smith* stated,

[u]nder the plain terms of the [DWLS] statute, the criminal act is DWLS in the first degree as a result of being found to be a habitual traffic offender under RCW 46.65. RCW 46.20.342(1)(a).

* * *

[T]he DWLS statute describes no “degrees” of revocations. Under the statute’s plain terms the crime is driving with a license that has been suspended or revoked, the degree of which depends on the reason for the revocation. See RCW 46.20.342(1)(a)-(c).

* * *

First degree DWLS lies where an individual drives while his license is suspended or revoked due to a finding that he is an habitual offender under chapter 46.65 RCW 46.20.342(1)(a).

Second degree DWLS lies where an individual (1) drives while his license is suspended or revoked for any of the numerous reasons specified in the subsection and (2) is not eligible to have his license reinstated. RCW 46.20.342(1)(b).

Third degree DWLS lies where an individual (1) drives while his license is suspended or revoked for any of the reasons specified in the subsection or (2) drives while his license is suspended but was eligible for reinstatement. RCW 46.20.342(1)(c).

State v. Smith at 503-504 and n.7.

The plain language of the statutory definitions for DWLS 1st and 3rd degree outlined *supra* herein at 27 clearly designate the two offenses as separate requiring proof of the reason for suspension. In other words, one who is driving with a suspended license is either one status, or the other of

two, based on their DOL record. One is guilty of DWLS 3rd degree “solely” if their license suspension arises out of one of the specifically enumerated reasons set forth in the statute. In contrast, one is guilty of DWLS 1st degree if the reason for their license suspension is a DOL finding, under RCW 46.65, that they are a habitual offender. It would not make sense for the prosecution to charge DWLS 3rd degree when DOL records show the driver to be a habitual offender because they’ve committed three or more convictions for one of the crimes listed in the Habitual Offender Statute, RCW 46.65.020.¹¹ The Washington Pattern Jury Instructions (“WPIC”) further reinforce the separateness of the DWLS offenses.¹²

Because one of the elements of DWLS 1st and 3rd degree is the reason for suspension status at the time charged, the crimes are independent from each other. Restated, one cannot be one status at the same time as another. Whether Mr. Taylor had an arraignment right to

¹¹ Indeed, when the legislature intends to designate one driver’s license related offense as a lesser included offense of another driver’s license related offense, it knows how to do it. *See* RCW 46.20.005.

¹² *See* WPIC 93.02 Driving While License Revoked—First Degree—Elements, and WPIC 93.07 Driving while License Suspended or Revoked—Third Degree—All Subsections of RCW 46.20.342(1)(c) Except (VI)—Elements.

plead guilty to DWLS 3rd therefore depends on whether that crime was charged.

2. The crime charged was DWLS 1st therefore there was no arraignment right to plead guilty to DWLS 3rd.

The city does not dispute that a criminal defendant in Washington has an arraignment right to plead guilty under RCW 10.40.060¹³ and *State v. Martin*, 94 Wn.2d 1, 3, 614 P.2d 164 (1980).¹⁴ Yet it is also evident from the language of the relevant statute and the *Martin* case that the scope of the arraignment right to plead guilty rule is **not limitless**. The plea must be to **the crime charged** in the charging document, not to just any crime the defendant selects. *See Martin* at 1 (wherein the charge was unequivocally first degree murder); *see also, State v. James*, 108 Wn.2d 483, 739 P.2d 699 (1987). In sum, a right to plead guilty at arraignment to the crime charged does not include the right to plead to scrivener's error, or a patently unclear charge.

In this case, a comprehensive reading of the charging document in its entirety indicates the charge was DWLS 1st not 3rd degree.

¹³ The statute states, “[i]n answer to the arraignment, the defendant may move to set aside the indictment or information, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it.” *Id.*

¹⁴ In *Martin*, the court held that that the death penalty statute did not prevent a defendant from exercising his right to plead guilty to the charged crime, first degree murder, before the state made a decision regarding whether to seek the death penalty *See also, State v. James*, 108 Wn.2d 483, 739 P.2d 699 (1987) (clarifying the distinction between the unconditional nature of the right to plead guilty to the crime charged at arraignment, and the conditional right to withdraw a not guilty plea after one is entered at arraignment).

Alternatively, at a minimum, the DWLS 3rd acronymic reference rendered the charging document ambiguous and in need of clarification which liberally should have been granted at arraignment the earliest possible stage of criminal prosecution.

At the March 6, 2009 arraignment in this case, the court found the citation to charge one crime - DWLS 3.CP 39. The court reiterated that interpretation in its April 15, 2009 ruling on the prosecution's motion to reconsider. Specifically, the court stated,

Mr. Taylor certainly received a ticket. And this court system responded not by looking at the numeric string and so the vagueness on the face of that allows him under any ruling this court makes the ability to plea under, and actually it's 10.04.070 which is that the defendant may plead guilty to any offense charged. He was charged by virtue of that ticket which we have all colloquially began to adopt as the complaint in this case. He was charged with driving with suspended license in the third degree. Prosecution has raised not once, not twice but perhaps three times throughout all of these hearings that the back of the ticket said something else. Mr. Taylor never received the back of the ticket.

CP 61.

For purposes of identifying what crime is charged, the court rules and case law clearly direct one's attention to the contents of the charging document, not the labeling a court clerk might select. *See* CrRLJ2.1(a)(2)

“The complaint shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.”); *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991); see also, *State v. Irizarry*, 111 Wn.2d 591, 763 P.2d 432 (1988).

The citations in their entirety were filed with the Court thereby initiating criminal prosecution of the offense charged. CrRLJ 2.1(b)(5).¹⁵ A comprehensive reading of the charging document in its entirety would have resolved that the DWLS 3 reference was mere scrivener’s error and that the correct charge was DWLS 1. The Court should not sanction an unreasonable artificially limited reading of only the face of the citation given to Mr. Taylor when the correct charge was discernible by a simple review of the full document readily available to defense counsel and the court from the file before and at arraignment.¹⁶ The court’s artificially limited reading of the charges by exclusive reference only to the front of the charging citation is an error of law and patently unreasonable in the

¹⁵ It is the information contained in the charging document, not the court clerk’s office labeling, that is relevant to determining what the charge is. The CrRLJs permit charging of criminal offenses in courts of limited jurisdiction by three methods: 1.) filing of a complaint, CrRLJ 2.1(a); 2.) by citizen complaint, CrRLJ 2.1(c); and 3.) the filing in court of the citation and notice. CrRLJ 2.1(b) (5) (the filed citation and notice “shall be deemed a lawful complaint for the purpose of initiating prosecution of the offense charged therein”).

¹⁶ See, *State v. Malone*, 72 Wn.App. 429, 864 P.2d 990 (1994) (wherein the court held that, as part of protecting a client’s speedy trial rights, defense counsel had an affirmative duty to investigate those easily ascertainable facts that are relevant to setting the trial date within the speedy trial period).

context of the filed charging document that initiates the criminal prosecution.

The criminal citation contained both the statutory citation for DWLS 1 and the acronymic reference to DWLS 3. The bottom of the citation alerted the recipient to Officer Presta's report on the back and expressly incorporated by reference the back of the citation. The abbreviated shorthand reference to DWLS 1st contained in the officer's narrative statement on the back of the citation coupled with his statement, "[a] DOL check revealed his driver's license to be suspended in the first 1st Degree" and the numerical reference to RCW 46.20.3421A on the face of the citation, should have sufficiently apprised Mr. Taylor, his attorney and, more importantly, the Court during guilty plea consideration discussed *infra* herein, of the necessary elements of the correct offense charged: 1.) driving; 2.) with a suspended license; and 3.) that the defendant's driving status on the date in question was first degree, not third.

Alternatively, at a minimum, a comprehensive reading of even simply the front of the citation alerted all to a possible lack of clarity in the charging document. For this reason, the prosecution out of an abundance of caution sought to clarify by amendment that the reference to "DWLS 3" was scrivener's error, and the charge of DWLS 1 contained in the balance

of the charging document was the correct charge. That request was made at the earliest stages of criminal prosecution – arraignment. Notably, though not required by law, notice of the error was also conveyed prior to arraignment to defense counsel who was assigned prior to arraignment.¹⁷

3. Amendment is liberally granted because prejudice is not an issue at arraignment.

If a defect in the charging document is identified, whether arising out of surplusage, scrivener’s error, or otherwise, CrRLJ 2.4 (f) – the amendment rule – provides the prosecution with the opportunity to correct and clarify. The rule provides, “[t]he court may permit a complaint, a citation and notice, or a bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” (emphasis supplied).

The type of prejudice contemplated by the amendment rule is that prejudice which occurs when a defendant cannot adequately prepare a

¹⁷ Mr. Taylor had been assigned public counsel as of the citation filing date. CP 87 (“Second Declaration of Donna L. August” dated March 25, 2009 which states, “Mr. Taylor made a counter appearance within 24 hours of his arrest for DWLS 3 on 2/26/09. . . On that same date, Mr. Taylor applied for an attorney and was appointed. Our office opened a file for Mr. Taylor on that same date.”) The appointment of a public defender to defendant’s case was recorded in defendant’s CDK on February 27, 2009. *See*, MCR for CDK attached as exhibit to “Declaration of Rebecca L. Stewart” (“Stewart Declaration”) which is attached to the City’s March 24, 2009 “Briefing in Support of Accepting Amended Complaint”. From that day forward, including the date of arraignment on March 6, 2009, the full charging document initiating the criminal action was readily available to Mr. Taylor’s counsel for review and therefore to Mr. Taylor as well.

defense to the charges against him. “[A]mendments to an information are liberally allowed before trial with continuances granted to a defendant if necessary to prepare to meet the altered charge, . . . “ *State v. Kjorsvik*, 117 Wn.2d 93, 103 n.18, 812 P.2d 86 (1991) quoting *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987) (emphasis supplied); see also, *City of Auburn v. Brooke*, 119 Wn.2d 623, 634, 836 P.2d 212 (1992) (“even though an officer in the field may not know (or have access to) a listing of elements of an offense for which a citation is issued, under the court rules (CrRLJ 2.4(f)], a citation may be amended if the defendant is not prejudiced thereby. The amendment rule is a liberal one and should ordinarily permit any necessary amendments.” *Id.* (citations omitted).

Liberal application of the amendment rule is consistent with the purpose of the essential elements rule regarding notice. “The primary goal of the “essential elements” rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against. As the Court in *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991) noted, the purpose of the essential elements notice requirement is to ensure defendants are “fully informed of the nature of the accusations against them so that they can prepare an adequate defense.” *Kjorsvik*, 117 Wn.2d at 101 (internal citations omitted and emphasis supplied).

There simply is no prejudice to the ability to mount a defense at the arraignment stage of criminal proceedings. *State v. Ford*, 125 Wn.2d 919, 927, 891 P.2d 712 (1995). In *Ford*, the court specifically permitted amendment of the complaint from first degree murder to aggravated murder, after continuing an arraignment wherein it did not accept the defendant's *Martin* offer to plead guilty to first degree murder, the charge unequivocally plead. Considering the stage in the criminal process was arraignment, the court in permitting the filing of an amendment and denying acceptance of the guilty plea found "[n]o substantial rights of the Defendant were prejudiced, the amendment of the information was properly allowed." *Id.* Indeed, other cases in which courts have considered denying amendment occur at significantly later stages of the criminal proceedings - wherein the parties are in or near trial, not at arraignment, the earliest stages of the criminal process.¹⁸

¹⁸ See *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987) (an information may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense); *State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992) (mid-trial amendment of charges from crime of statutory rape to indecent liberties after the State rested its case was per se reversible error because new charge was not lesser included offense); *State v. Hopper*, 118 Wn.2d at 160, 882 P.2d 775; *State v. DeBolt*, 61 Wn.App. 58, 61-62, 808 P.2d 794 (1991); *Pelkey*, 109 Wn.2d at 490-91, 745 P.2d 854 ("scrivener's" error and technical defects can be remedied midtrial and convictions based on charging documents which contain only technical defects such as an error in the statutory citation number or the date of the crime or the specification of a different manner of committing the crime charged usually need not be reversed); *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995) (after resting its case, state may not amend charge to include element of premeditation in support of attempted first degree even though it inadvertently omitted because defendant suffers prejudice).

When amendment was requested, it was incumbent upon the Court liberally to grant the amendment, or identify how granting the same would have prejudiced Mr. Taylor's ability to prepare a defense to the amendment – the only prejudice consideration contemplated by the amendment rule. Yet, rather than liberally permitting amendment, the court permitted defense counsel selectively to read the numerical cite for DWLS 1 out of the citation and plead to the incorrect charge of DWLS 3, an independent offense from DWLS 1 for which punishment is less severe.¹⁹ Indeed it is especially difficult to envision any prejudice associated with seeking amendment in this case given pre-arraignment

¹⁹ In relevant part, the same section of the statute sets forth the penalties applicable to a defendant convicted of DWLS 1. Upon the first such conviction, the person shall be punished by imprisonment for not less than ten days. RCW 46.20.342(1)(a). The statute also requires the DOL to extend the driver's license suspension for an additional year if a defendant is convicted of DWLS 1 under the statute. Specifically, the statute states,

- (2) Upon receiving a record of conviction of any person or upon receiving an order by any juvenile court or any duly authorized court officer of the conviction of any juvenile under this section, the department shall:
 - (a) For a conviction of driving while suspended or revoked in the first degree, as provided by subsection (1)(a) of this section, extend the period of administrative revocation imposed under chapter 46.65 RCW for an additional period of one year from and after the date the person would otherwise have been entitled to apply for a new license or have his or her driving privilege restored;

RCW 46.20.342(2).

communications between the prosecutor and defendant's court-appointed counsel provided notice of the forthcoming amendment though not required to do so.

On March 2, 2009, after a public defender was appointed for Mr. Taylor, Assistant City Prosecutor Rebecca Stewart emailed Assistant City Public Defender Christopher Edwards a list of cases set for arraignment identifying the status of any early case resolution offers on each one. *See*, MCR for March 4, 2009 two-page email attached as an exhibit to the City's March 24, 2009 "Briefing in Support of Accepting Amended Complaint".²⁰

Among the cases identified therein is the Joe Taylor Jr. case. The offer status for that matter states, "[n]o offer – should be DWLS 1. Will be providing the court with an Amended Complaint charging the Defendant with DWLS 1 at Arraignment." The email indicates it was read by the recipients. *Id.*

The right to plead guilty to the crime charged at arraignment the denial of which was identified as the perceived prejudice by the court in this case simply does not include a right to plead to an incorrect charge. Any reasonable interpretation of the charging document, even if limited to a reading of only the face sheet, indicated that there was an error. And,

²⁰ The email is attached to the Stewart Declaration exhibit attached to the March 24, 2009 "Briefing in Support of Accepting Amended Complaint".

there is no legal authority supporting a finding of prejudice arising out of a prosecutor not amending sooner than arraignment because the only temporal limitation on the freedom to amend under the rule is “any time before verdict”. Simply put, the findings are not relevant. And the court’s decision denying amendment based thereon is an abuse of the discretion afforded the court under the amendment rule – the result obtained in the Superior Court’s review of the decision.

The end result of the municipal court’s decision is to sanction a race to the courthouse between the prosecution and defense whenever the prosecution seeks to clean up surplusage, scrivener’s error or just plain error at arraignment. Such a race makes a charade out of the criminal process, a result not endorsed by the court in *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980); *see also*, *State v. James*, 108 Wn.2d 483, 739 P.2d 699 (1987) (wherein the court warned against sanctioning races to the courthouse between pleading guilty and amending the criminal complaint albeit not at arraignment).²¹

²¹ In *James*, the prosecution sought to amend the original charge of second degree murder to first degree at the same hearing in which the defendant sought to withdraw his not guilty plea to second degree and instead plead guilty. *James*, 108 Wn.2d at 484-85. While the plea issue in *James* did not occur at arraignment as is the case here, the court stated, “[h]ere, both *James* and the State came to the omnibus hearing prepared to make their respective motions. Certainly, first in time should not have decided the issue. We did not contemplate sanctioning such a race to the courthouse in *Martin*, and refuse to do so here.” *State v. James*, 108 Wn.2d 483, 490, 739 P.2d 699 (1987).

4. There are no facts in the record supporting the commission of DWLS 3rd for which the trial court accepted a guilty plea.

In this case, the trial court accepted a guilty plea in violation of its duties under CrRLJ 4.2(d). CrRLJ 4.2(d) states,

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.

The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrRLJ 4.2(d)(emphasis supplied). The significance of the court's duty to find a factual basis was considered in *State v. Ford*, 125 Wn.2d 919, 891 P.2d 712 (1995) (The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea).

In *Ford*, the defendant was charged by information with three counts of first degree murder. At Mr. Ford's arraignment, he proffered a plea of guilty. The prosecutor immediately moved for a continuance of the arraignment stating he possessed potentially exculpatory material which he needed to disclose to Mr. Ford prior to any plea. The court continued the arraignment proceeding for a week and did not accept the proffered guilty plea. During the following week, potentially inculpatory evidence was discovered and the State moved to amend the charges to aggravated first degree murder, which the trial court granted. On appeal, Mr. Ford

argued that under *Martin*, once his guilty plea was proffered, the trial court was compelled to determine immediately its voluntariness and to accept the guilty plea without granting a continuance if it was made knowingly, intelligently and voluntarily. In response to this argument, the Supreme Court stated the court "is not a potted-palm functionary" and recognized the obligations imposed upon the court by CrR 4.2(d) as part of the plea of guilty proceeding. *Ford*, 125 Wn.2d at 923-24, 891 P.2d 712 (1995).

Specifically, the court stated,

By its terms, the rule creates an obligation on the part of the trial court to be independently satisfied of the voluntariness **and factual basis for the plea**. The court is part of the proceeding and is not a potted-palm functionary, with only the attorneys having a defined purpose.

Id. at 925 (emphasis supplied). Considering any apparent inconsistency with *Martin*, the *Ford* court stated, "nothing in *Martin* compels automatic and immediate acceptance of a proffered guilty plea. To the contrary, *Martin* makes the trial court's acceptance of the guilty plea explicitly contingent on the trial court's independent evaluation of voluntariness . . ."

Ford at 924.²²

²² Our State's Supreme Court reiterated the importance of a judge's duties during the guilty plea acceptance process in other contexts as well. *See, In re Disciplinary Proceeding Against Michels*, 150 Wn.2d 159, 169, 75 P.3d 950 (2003) and *In re Disciplinary Proceeding Against Hammermaster*, 139 Wn. 2d 211, 985 P.2d 924 (1999).

A factual basis exists if there is sufficient evidence from which a jury can conclude that the defendant is guilty. *State v. Zumwalt*, 79 Wn.App. 124, 130, 901 P.2d 319 (1995). In determining the factual basis, the court may consider any reliable source of information in the record at the time of the plea. *State v. Saas*, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). A factual basis requires factual statements rather than legal conclusions. *State v. Zumwalt*, 79 Wn.App. 124, 1331, 901 P.2d 319 (1995).

The Court in this case accepted the plea of guilty for the crime of DWLS 3rd rather than DWLS 1st. In relevant part, the statute defining DWLS 1st states, (a) A person found to be an habitual offender under chapter 46.65 RCW, who violates this section while an order of revocation issued under chapter 46.65 RCW prohibiting such operation is in effect, is guilty of driving while license suspended or revoked in the first degree, a gross misdemeanor. RCW 46.20.342(1)(a). In contrast, the statute defining DWLS 3rd in relevant part states,

(c) A person who violates this section when his or her driver's license or driving privilege is, at the time of the violation, suspended or revoked **solely** because (I) the person must furnish proof of satisfactory progress in a required alcoholism or drug treatment program, (ii) the person must furnish proof of financial responsibility for

the future as provided by chapter 46.29 RCW, (iii) the person has failed to comply with the provisions of chapter 46.29 RCW relating to uninsured accidents, (iv) the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289, (v) the person has committed an offense in another state that, if committed in this state, would not be grounds for the suspension or revocation of the person's driver's license, (vi) the person has been suspended or revoked by reason of one or more of the items listed in (b) of this subsection, but was eligible to reinstate his or her driver's license or driving privilege at the time of the violation, or (vii) the person has received traffic citations or notices of traffic infraction that have resulted in a suspension under RCW 46.20.267 relating to intermediate drivers' licenses, or any combination of (I) through (vii), is guilty of driving while license suspended or revoked in the third degree, a misdemeanor.

RCW 46.20.342.1(c) (emphasis supplied). Before it accepted Mr.

Taylor's plea to DWLS 3 on March 27, the Court did not make any finding that the sole reason for Mr. Taylor's license suspension fell within any of the enumerated reasons set forth in the DWLS 3rd statute. Frankly, it was factually impossible to do so. There simply is no evidence of that crime. In fact, the only reliable source of information in the record at the time the plea was accepted was the reverse side of the criminal and traffic

infractions that contained Officer Presta's certified statement indicating he conducted a DOL check that revealed DWLS 1, not 3. In fact, at all times relevant to the municipal court's acceptance of the DWLS 3rd guilty plea, all evidence explaining the basis for license suspension pointed to first degree, not third.

Nevertheless, in its ruling on the prosecution's motion for reconsideration on April 15, 2009, the court indicated that it found a factual basis for the plea to DWLS 3 based on the readout Mr. Taylor received from DOL that identified only infractions as the basis for his license suspension. CP 62-63 wherein the court states,

[s]o, when prosecution indicated that I had made my decision based upon perhaps some whimsical determination that [Mr. Taylor] was suspended in the third degree, it was on the factual basis that perhaps he had been provided an erroneous letter from the [DOL] indicating that it was three infractions that had suspended him. And, in addition to the fact that the uninsured motorist accident judgment would not have placed him in the first degree.

Id.

But the July 15, 2008 readout offers no factual basis for Mr. Taylor's driving status on February 25, 2009, an element of each of the DWLS crimes, including DWLS 3rd. Further, the court's statement

revises the history of the March 27 guilty plea acceptance/arraignment hearing.²³ Contrary to the court's April 15 ruling, it was not until after accepting the guilty plea and during sentencing that the referenced letter from DOL was brought to the attention of the court by Mr. Taylor and his defense counsel. CP 49. After the plea was accepted on April 15 and the court heard the prosecution's reading of Mr. Taylor's criminal background, the court asked Mr. Taylor if he had anything to add. CP 49. Mr. Taylor responded, "Yes. On the 7th month of 2008, on the 15th of 2008, I went to DMV to get a printout of my license, I mean to establish what it would take to get my license and I have just." CP 49. Defense counsel continued, "Your honor according to [DOL] readout on July 15, 2008, upon Mr. Taylor's inquiry as to what he would take to get his license reinstated he was given three infractions, . . ." *Id.* Hence, the information was not considered by the court before accepting the plea.

And, if the court was reconsidering the factual basis for the plea, to identify Mr. Taylor's DOL readout as a factual basis for the plea at the April 15 hearing on prosecution's "Motion to Reconsider and Vacate", then it should also have considered two other reliable sources of information in the record at that time, namely the DOL CCDR cited *supra*

²³ The court did acknowledge that it was going by its memory of the proceedings given a hearing transcript of the March 27 hearing was not available at the April 15 hearing. CP 59.

herein at pg. 9, and the abstract of Mr. Taylor's driving record obtained from DISCIS, both attached as exhibits to the prosecution's Reconsideration Memorandum. *See* MCR for abstract driving record ("DR abstract") attached as first page to Harrington Declaration, attached as exhibit to City's April 15, 2009 Reconsideration Memorandum cited *supra* herein at pages 9 and 10, n.10.

The CCDR clearly contains the DOL certified letter sent to Mr. Taylor's last known address on file with DOL notifying Mr. Taylor of his suspension as a habitual traffic offender, under RCW 46.65.070, and his right to a hearing. *See*, MCR for CCDR cited *supra* herein at 9 and 10, n. 10. Habitual traffic offender is an element of DWLS 1, not 3. The DR abstract also references the habitual offender designation, and identifies a September 2003 DUI, a November 2003 breath and blood test refusal and a January 2004 hit and run (occupied). *See* MCR for DR abstract cited above. The court rejected consideration of this information characterizing it as requiring independent investigation of the case by the court.

Specifically, the court stated,

It is not this court's duty to investigate these cases and that is another argument prosecution has proffered to this Court that I should have independently reviewed his ADR. If we extrapolate that to every single case then that means that prosecution is indicating that the Court should go out and

independently investigate every fact that it may have a question about that prosecution presents to it. That is clearly not the role of the court and by any ruling that I make today I am not persuaded one way or another based upon who is presenting me this information, but that the information is presented. But it is not my role to go out and independently investigate, ever, ever. If I were to do that, then I would be taking on the role either as defense counsel or as prosecution which would clearly violate more rules than I care to discuss.

CP 61. The harsh criticism is misplaced given the court's duty to find a factual basis for the plea as discussed *supra* herein. The court simply could not have based its acceptance of Mr. Taylor's plea on March 27 on information not offered until sentencing. And, when the court decided to declare that information as the basis for the plea at the April 15 reconsideration hearing (despite the absence of any information regarding driving status on February 25, 2009), it should have considered all information in the record at that time. Contrary to the court's characterization, consideration of the same would not have involved an independent investigation of the case by the court. It was brought to the court's attention by the prosecution.

F. Conclusion.

For the aforementioned reasons, this Court should uphold the Superior Court's decision vacating the plea to DWLS 3rd and remanding this case for trial on the charge of DWLS 1st.

Respectfully submitted this 23rd day of December 2010.

CITY OF SPOKANE

MARY MURAMATSU, City Prosecutor

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Certificate of Service

I, Margaret K. Harrington, certify and declare under penalty of perjury under the laws of the State of Washington that via U.S. Mail postage prepaid I served a copy of the attached, "RESPONDENT'S BRIEF", on each of the following counsel in *Joe Taylor, Jr. v. City of Spokane.*, Case No. 288153:

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