

No. 34954-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

RUSTY JOE ABRAMS,

Appellant.

BRIEF OF RESPONDENT

**GARTH DANO
PROSECUTING ATTORNEY**

**Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney
Attorneys for Respondent**

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I. ISSUES PRESENTED

A. How should a court document the dismissal/vacation of a count based on double jeopardy?

B. Was there an error in attaching a supporting document to the judgment and sentence?

II. STATEMENT OF THE CASE

For the purposes of this motion appellant's statement of the case suffices.

III. ARGUMENT

A. Dismiss versus vacate

Dismissal: Termination of an action or claim without further hearing, esp. before trial of the issues involved. Black's Law Dictionary, 537 (9th ed. 2009).

Vacate: To nullify or cancel; make void; invalidate <the court vacated the judgment> Black's Law Dictionary, 1688 (9th ed. 2009).

The appellate courts have stated that courts may not reference a conviction when sentencing a defendant of multiple crimes for the same criminal conduct. *State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). By vacating a conviction the court necessarily acknowledges a conviction occurred, but nullifies it. By dismissing it, the court does not acknowledge the conviction; it never occurred. Using the term vacate necessarily references a conviction, using the term dismiss does not.

While the court can pretend the conviction never occurred, it cannot pretend the charge never occurred. It would create havoc with the State record keeping system if the court simply did not acknowledge that the charge was presented in the information. Once a charge is filed in an information it is listed in the court's database. There needs to be a disposition on the charge. It can be dismissed or it can be vacated, or the defendant can be found guilty or not guilty. It cannot simply disappear into thin air, or anyone looking at the records would be unable to determine what happened. Did the court just forget to deal with it?

The information is one of the documents a court looks at in determining the facial validity of a judgment and sentence. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 140, 267 P.3d 324 (2011). A judgment and sentence that does not dispose of all counts of an information in some way would not be valid on its face, as it does not complete the case. That is why the standard judgment and sentence form, on which Mr. Abrams' judgment and sentence form is based, has a line stating "The Court dismisses Counts _____ in the charging document."¹ If there was no need to document what happened to dismissed counts, there would be no need for the courts to include this line in the form.

¹ Washington Courts Forms page (Criminal)
<http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=18> (Last visited June 8th, 2017)

Thus there needs to be some sort of notation as to what happened with each charge in the information.

In any event Mr. Abrams does not explain how having a charge dismissed instead of vacated is prejudicial. If anything a dismissal is less prejudicial than a vacation, although it could be argued that there is no significant difference between the two terms in this setting, and indeed, Mr. Abrams has not identified any. If the court did err by using the term dismiss instead of vacate, the error was harmless.

B. Special interrogatory attachment

The attachment was attached to the original judgment and sentence. It was an oversight to not attach it to the amended judgment and sentence.

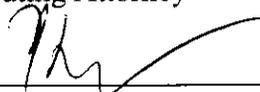
IV. CONCLUSION

Dismissal of the assault 3 count is appropriate as the term does not acknowledge the conviction but still maintains a record. The attachment is a de minimus scrivener's error that can be corrected if necessary.

Dated this 8th day of June, 2017.

Respectfully submitted,

GARTH DANO
Prosecuting Attorney

By: 
Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 34954-3-III
)	
v.)	
)	
RUSTY JOE ABRAMS,)	DECLARATION OF SERVICE
)	
Appellant.)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Lisa E. Tabbut
ltabbutlaw@gmail.com

Dated: June 9, 2017.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

June 09, 2017 - 10:29 AM

Transmittal Information

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