

FILED
Court of Appeals
Division III
State of Washington
3/6/2020 4:26 PM

NO. 37186-7-III

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

GERALD MOCCARDINE,

Appellant.

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

BRIEF OF APPELLANT

CHRISTOPHER PETRONI
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR
2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 4

 1. The information failed both to allege all essential
 elements and to adequately identify the crime charged. . 4

 a. The information omitted the essential element of
 knowledge of the protection order. 6

 b. The information failed to adequately identify the
 charged offense by omitting the statutory basis for the
 underlying protection orders. 9

 2. Remand is necessary to strike the interest erroneously
 imposed on Mr. Moccardine’s legal financial obligation. 13

F. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

In re Martin, 163 Wn.2d 501, 182 P.3d 951 (2008)..... 10

State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003)... 7, 11

State v. Courneya, 132 Wn. App. 347, 131 P.3d 343 (2006)
..... 8, 9

State v. Hugdahl, --- Wn.2d ---, No. 97148-0 (Feb. 27, 2020) 11

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991)... 4, 11, 12

State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000) 5

State v. Melland, 9 Wn. App. 2d 786, 452 P.3d 562 (2019) 7

State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005)..... 11

State v. Ortega, 177 Wn.2d 116, 297 P.3d 57 (2013) 10

State v. Pry, 194 Wn.2d 745, 452 P.3d 536 (2019)..... passim

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008)..... 5

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 13

State v. Snapp, 119 Wn. App. 614, 82 P.3d 252 (2004)..... 7

State v. Sommer, 193 Wn.2d 1013, 441 P.3d 1202 (2019) 13

State v. Sullivan, 196 Wn. App. 314, 382 P.3d 736 (2016) 6

State v. Sutherland, 104 Wn. App. 122, 15 P.3d 1051 (2001) ...
..... 7, 8, 9

Statutes

RCW 10.14.170 10

RCW 10.82.090	13
RCW 26.50.110	passim

A. INTRODUCTION

Notice of the crime charged is a basic constitutional guarantee and a cornerstone of our justice system. Gerald Moccardine was deprived of that notice here. The information charged Mr. Moccardine with two counts of violating a protection order, elevated to a felony based on two prior convictions for similar violations. Neither count alleged that Mr. Moccardine knew of the underlying order's existence, an essential element of the offense. Nor does either count allege the statute under which the present or past protection orders were issued, as necessary to show that the orders fell within the scope of the charged offense. These deficiencies left the information inadequate to apprise Mr. Moccardine of the nature of the charges against him.

B. ASSIGNMENTS OF ERROR

1. In violation of article I, section 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the U.S. Constitution, the information failed to provide Mr. Moccardine with adequate notice of the charges against him.

2. The trial court erred in imposing interest on Mr. Moccardine's legal financial obligation.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An information must set out each of the essential elements of the charged offense. Where neither count of the information alleged the essential element of knowledge of the underlying order, did the information fail to adequately allege the offense of felony violation of a protection order?

2. In addition to alleging the essential elements, an information must also adequately specify the offense charged. The statute under which Mr. Moccardine was charged does not criminalize violations of any and all protection orders, but only orders issued under certain statutes. Where neither count specified the statute under which the underlying protection order was issued, did the information fail to adequately identify the charged offense?

3. Interest may not be imposed on nonrestitution legal financial obligations. Did the trial court err in imposing interest on the sole, nonrestitution legal financial obligation?

D. STATEMENT OF THE CASE

Mr. Moccardine and Loretta Baggett were in a dating relationship. RP 154. On December 5 or 6, 2018, Ms. Baggett called Mr. Moccardine and asked him to pick her up at a casino. RP 155–56. Early in the morning on December 6, a trooper with the Washington State Patrol stopped a vehicle on I-90 containing both Mr. Moccardine and Ms. Baggett. RP 135–37, 142–43. Ms. Baggett called Mr. Moccardine again on January 24 or 25, 2019, and asked for a ride to a laundromat. RP 124, 155. In the early hours of January 25, an Ellensburg police officer encountered Mr. Moccardine and Ms. Baggett at a laundromat together. RP 126–27. Mr. Moccardine was arrested on both occasions for violating a protection order prohibiting contact with Ms. Baggett. RP 128–29, 143.

The State charged Mr. Moccardine with two counts of violating a protection order. CP 1–2. Both counts alleged that Mr. Moccardine had twice previously been convicted of a protection order violation, elevating the offense to a felony. *Id.* The information also alleged that both counts qualify as

domestic violence offenses. *Id.* Neither count alleged that Mr. Moccardine knew of the existence of the protection order when he allegedly violated it, or specified the statute under which any protection order was issued. *Id.*

A jury found Mr. Moccardine guilty. CP 27–30. As part of Mr. Moccardine’s sentence, the trial court imposed a victim penalty assessment of \$500 and ordered that interest accrue from the date of judgment forward. CP 36–37.

E. ARGUMENT

1. The information failed both to allege all essential elements and to adequately identify the crime charged.

“Accused persons have the constitutional right to know the charges against them.” *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019) (citing U.S. Const. amend. VI; Const. art. I, § 22). The charging document must “adequately identify[]” each offense charged and allege facts supporting each essential element. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (quoting *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). This “essential element rule” ensures that the defendant receives notice of what the State intends

to prove and permits the preparation of a defense. *Pry*, 194 Wn.2d at 752 (citing *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)). The remedy for a deficient information is dismissal without prejudice. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Where challenged for the first time on appeal, a reviewing court reads the information liberally—it will be found sufficient only if the requisite allegations either appear or “by fair construction may be found” on its face. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing *Kjorsvik*, 117 Wn.2d at 105). If so, the court moves on to consider whether the adequate-if-“inartful” language caused actual prejudice. *Pry*, 194 Wn.2d at 752–53 (citing *Kjorsvik*, 117 Wn.2d at 105–06). If not, the information is deficient and must be dismissed—even “the most liberal reading cannot cure it.” *McCarty*, 140 Wn.2d at 425 (quoting *State v. Moavensadeh*, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998)).

A court’s review of an information’s sufficiency, even where challenged for the first time on appeal, is limited to the

allegations on its face. *Pry*, 194 Wn.2d at 753. The court may not look to materials attached to the information or incorporated by reference. *Id.* at 761–62. The court may consider extrinsic materials only in evaluating prejudice, after finding the information facially adequate. *Id.* at 753. The information should be read “as a whole” and “according to common sense.” *State v. Sullivan*, 196 Wn. App. 314, 323, 382 P.3d 736 (2016) (quoting *Kjorsvik*, 117 Wn.2d at 109).

Here, both counts of the information omitted the essential element of knowledge of the protection order’s existence. Both counts also omitted the statute under which the protection order was issued, such that neither count adequately identifies the crime charged. Each omission independently requires reversal of Mr. Mocardine’s convictions and sentence and dismissal without prejudice.

a. The information omitted the essential element of knowledge of the protection order.

Under RCW 26.50.110, a person who violates a protection order of whose existence the person knows commits a gross misdemeanor. RCW 26.50.110(1)(a). The offense

becomes a felony if the person has twice previously been convicted of violating a protection order. RCW 26.50.110(5). The essential elements of a felony violation of a protection order therefore are that “(1) there is an order, (2) the person to be restrained knows of the order, and (3) the person violates the order,” *State v. Melland*, 9 Wn. App. 2d 786, 812–13, 452 P.3d 562 (2019); accord *State v. Snapp*, 119 Wn. App. 614, 625, 82 P.3d 252 (2004), as well as two prior convictions for violating a protection order, *State v. Carmen*, 118 Wn. App. 655, 662–63, 77 P.3d 368 (2003). Whether charged as a misdemeanor or a felony, then, knowledge of the protection order allegedly violated is an essential element of the offense.

Failure to allege a required mental element makes an information facially deficient, even where challenged for the first time on appeal. *See Pry*, 194 Wn.2d at 759–60 (rejecting information that “wholly omitted reference to the mental state required”). For example, in *State v. Sutherland*, 104 Wn. App. 122, 15 P.3d 1051 (2001), the State alleged a hit-and-run offense, which requires proof that the driver knew an

accident occurred. *Id.* at 130–31. The information, however, alleged only that the driver “fail[ed] to remain at the scene of the accident,” without alleging knowledge. *Id.* at 126. In effect, the information implied “that hit and run is a strict liability offense.” *Id.* at 132. The court held the information inadequate even under a “liberal interpretation.” *Id.* at 131–32. *Accord State v. Courneya*, 132 Wn. App. 347, 352–53, 355, 131 P.3d 343 (2006).

Here, the information charged as follows, in two counts identical except as to date:

He, the said, GERALD KEITH MOCCARDINE, in the State of Washington, on or about [DATE], violated the provision(s) of a valid protection order, to wit: Lower Kittitas District Court, 14701 KCS CN, and the defendant has two prior convictions for violating a protection order, to wit: 14701 KCS CN, date of violation: 06/07/2018 and 8Z0825289 WSP CN, date of violation: 08/24/2018; thereby committing the felony crime of VIOLATION OF A PROTECTION ORDER; contrary to Revised Code of Washington 26.50.110(5) and 10.99.020.

CP 1–2.

Neither count alleged Mr. Moccardine knew about the order when he allegedly violated it. A

common-sense reader would come away with the notion that Mr. Moccardine could be found guilty merely for violating the order, whether or not he knew it existed. Even read liberally, the information omits an essential element, rendering it deficient. *Pry*, 194 Wn.2d at 759–60; *Courneya*, 132 Wn. App. at 352–53, 355; *Sutherland*, 104 Wn. App. at 131–32. This Court therefore need not consider whether the deficiency caused actual prejudice. *Pry*, 194 Wn.2d at 753.

Mr. Moccardine received constitutionally inadequate notice of the charges against him. His convictions and sentence must be reversed and the information dismissed without prejudice.

b. The information failed to adequately identify the charged offense by omitting the statutory basis for the underlying protection orders.

RCW 26.50.110(5) does not criminalize the violation of any and all protection orders, but only orders “issued under this chapter [chapter 26.50], chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, *26.10, 26.26A, 26.26B, or 74.34

RCW.”¹ Likewise, the prior convictions must also be for violating orders issued under the listed statutes (excluding chapter 7.92). These specific lists express unambiguous legislative intent to exclude all but the listed statutes. *See State v. Ortega*, 177 Wn.2d 116, 124, 297 P.3d 57 (2013) (applying the principle that specifying one thing excludes others); *In re Martin*, 163 Wn.2d 501, 510–11, 182 P.3d 951 (2008) (same). Violation of an order issued under an unlisted statutory scheme—for example, an antiharassment order under RCW chapter 10.14²—cannot support a charge under RCW 26.50.110(5).

Because only violations of an order issued under a listed statute fall within RCW 26.50.110(5), an information that omits the statute under which the order was issued fails to “adequately identify[]” the charged offense. *Kjorsvik*, 117

¹ The statute also specifies certain out-of-state protection orders. RCW 26.50.110(5). The asterisk refers to a notice that chapter 26.10 has been repealed effective January 1, 2021. RCW 26.50.110 (reviser’s note).

² A violation of an antiharassment order under RCW chapter 10.14 is chargeable only as a misdemeanor. RCW 10.14.170.

Wn.2d at 98. The same is true of an information that fails to specify the statutory basis of the orders underlying the two prior convictions. Without the statutory authority for these orders, a common-sense reader of the information could mistakenly conclude that a violation of *any* protection order issued under *any* statute may give rise to a felony under RCW 26.50.110(5). *See State v. Hugdahl*, --- Wn.2d ---, No. 97148-0, slip op. at 8–9 (Feb. 27, 2020) (rejecting as “overinclusive” allegation that crime occurred near a “school bus route” rather than the statutorily required “school bus stop”).

It is no answer to point to decisions holding that the statutory basis of the protection order is not an essential element of the offense. It is true that issues bearing on the validity of a predicate order, including whether the order falls within RCW 26.50.110(5), are “[q]uestions of law . . . for the court, not the jury, to resolve.” *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005); *accord Carmen*, 118 Wn. App. at 663. But whether the order’s statutory basis is a factual element to be proved to the jury or a legal issue for the court, an

information that omits it fails to “adequately indentify[]” the offense defined in RCW 26.50.110(5). *Kjorsvik*, 117 Wn.2d at 98. Put another way, the statute under which the order was issued is “necessary to establish the very illegality” of the charged conduct, *Pry*, 194 Wn.2d at 752, regardless of whether the judge or the jury will ultimately decide it.

Here, each of the two counts in the information alleged that Mr. Moccardine violated a protection order and was convicted twice previously of violating a protection order. CP 1–2. The information nowhere specifies the statute under which any of the predicate protection orders were issued. *Id.* Accordingly, a common-sense reading of the counts would lead to the notion that Mr. Moccardine could be found guilty for violating any protection order, regardless of its statutory basis. The information therefore fails on its face to provide adequate notice of the crime charged, and prejudice is presumed. *Pry*, 194 Wn.2d at 753. Mr. Moccardine’s convictions and sentence must be reversed and the information dismissed without prejudice.

2. Remand is necessary to strike the interest erroneously imposed on Mr. Moccardine’s legal financial obligation.

Effective June 7, 2018, interest does not accrue on nonrestitution legal financial obligations. RCW 10.82.090(1); *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Here, the only financial obligation imposed was a penalty assessment of \$500 under RCW 7.68.035—no restitution was awarded. CP 36. Nonetheless, the judgment and sentence provides that the financial obligation imposed “shall bear interest.” CP 37. Accordingly, even if this Court affirms Mr. Moccardine’s convictions, it must remand with instructions to strike from Mr. Moccardine’s sentence the provision that interest will accrue on the penalty assessment. *See Ramirez*, 191 Wn.2d at 749–50 (remanding to strike “improperly imposed LFOs”); *State v. Sommer*, 193 Wn.2d 1013, 441 P.3d 1202 (2019) (remanding to strike improper interest provision).

F. CONCLUSION

Because the information is facially deficient, this Court should reverse Mr. Moccardine’s convictions and sentence and dismiss the information without prejudice. Alternatively,

even if the Court affirms the convictions, it should remand with instructions to strike the interest provision from Mr. Moccardine's sentence.

DATED this 6th day of March, 2020.

Respectfully submitted,



Christopher Petroni, WSBA #46966
Washington Appellate Project - 91052
Email: wapofficemail@washapp.org
chris@washapp.org

Attorney for Gerald Moccardine

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 37186-7-III
)	
GERALD MOCCARDINE,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF MARCH, 2020, I CAUSED THE ORIGINAL OPENING BRIEF OF APPELLANT TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|-------------------|--|
| <input checked="" type="checkbox"/> GREGORY ZEMPEL
[prosecutor@co.kittitas.wa.us]
[greg.zempel@co.kittitas.wa.us]
KITTITAS COUNTY PROSECUTOR'S OFFICE
205 W 5 TH AVE STE 213
ELLENSBURG, WA 98926 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> GERALD MOCCARDINE
(ADDRESS OF RECORD)
ON FILE WITH OUR OFFICE) | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF MARCH, 2020.

X _____ 

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

March 06, 2020 - 4:26 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37186-7
Appellate Court Case Title: State of Washington v. Gerald Keith Moccardine
Superior Court Case Number: 19-1-00019-7

The following documents have been uploaded:

- 371867_Briefs_20200306162546D3137611_1777.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.030620-04.pdf

A copy of the uploaded files will be sent to:

- Michelle@Hulllegal.com
- greg.zempel@co.kittitas.wa.us
- greg@washapp.org
- prosecutor@co.kittitas.wa.us
- tom@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Christopher Mark Petroni - Email: chris@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200306162546D3137611