

78970-3
NO. 55583-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARK EATON,

Appellant.

FILED
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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANTHONY WARTNIK
THE HONORABLE CHERYL CAREY
THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES

1. A defendant suffers prejudice from an improper arraignment when he is not informed of the essential elements of the crime. Criminal rules provide that following a mistrial, the defendant need not be re-arraigned. Here, at his first trial, the defendant was charged with possession of cocaine and a jury was unable to reach a unanimous verdict. Following the mistrial, the defendant was erroneously arraigned on the charge of possession of amphetamine, not cocaine. The matter proceeded to re-trial where the evidence proved that the controlled substance was cocaine, and a jury found him guilty as charged. Did Eaton suffer prejudice from the unnecessary arraignment following the mistrial?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The defendant, Mark Eaton, was charged by original information with possession of amphetamine. CP 1-3. On May 3, 2004, the case was sent to trial before the Honorable Carol Schapira, King County Superior Court. 1RP¹ 3. On that date, the

¹ The verbatim report of proceedings is contained in seven volumes designated as follows: 1RP (May 3, 2004); 2RP (July 27, 2004); 3RP (November 18, 2004); 4RP (November 24, 2004); 5RP (November 29, 2004); 6RP (November 30, 2004); 7RP (January 7, 2005).

State orally amended the information to accurately charge Eaton with possession of cocaine and a second count of disorderly conduct. 1RP 5. The first trial resulted in a hung jury. CP 19-20.

On May 18, 2004, following the mistrial, Eaton was mistakenly re-arraigned on the original information charging him with possession of amphetamine. 6RP 4-5. However, the information to support this arraignment following the mistrial is not documented in the court file. A motion to dismiss was set by Eaton's attorney before criminal motions. 2RP 3-4.

On July 27, 2004, the Honorable Cheryl Carey heard Eaton's motion to dismiss. 2RP 3-20. Defense counsel argued that the case should be dismissed because Eaton was re-arraigned on an incorrect information. 2RP 3-10. Judge Carey denied Eaton's motion to dismiss, finding that although the State had made a mistake in the re-arraignment, Eaton was not prejudiced by this mistake. 2RP 13-14. The State could only re-try Eaton on the charges from the first trial, and Eaton was clearly prepared for that trial having gone through it once before. 2RP 13-14. Judge Carey gave Eaton the opportunity to request a continuance, and Eaton declined. 2RP 13.

On November 18, 2004, the case was sent to trial before the Honorable Anthony Wartnik. 4RP 2. The State presented evidence proving that Eaton possessed cocaine. At the close of the State's case, defense counsel moved to dismiss based upon the State's failure to prove that the defendant possessed amphetamine, as charged in the original information. 5RP 192-197. However, in three separate pleadings submitted by defense counsel to the court, counsel acknowledged that Eaton was charged with possession of cocaine. CP 27-30, 31-35, 56-58. In denying Eaton's motion to dismiss, Judge Wartnik ruled:

When the mistrial occurred, the only charge in play was violation of the Uniform Controlled Substances Act, possession of cocaine.

When the arraignment took place following the mistrial, there's no indication that there was any motion before the Court to amend the information back to Violation of the Uniform Controlled Substances Act, possession of amphetamine.

Under the law of the case, when mistrial occurs and the case is presented for retrial, following the rule which says the speedy trial date starts to run immediately from the date of mistrial, I can only assume that the State gave notice to the defense that it intended to retry the case.

Mr. Eaton knew the case was being tried, and that the case had been tried as a possession of cocaine case.

New arraignment isn't required. The fact that it took place certainly could have been misleading, but that was corrected by Judge Carey on July 27 when she informed the defense that in fact [the] charge was possession of cocaine, not possession of amphetamine. For those reasons, the motion is denied.

6RP 14-15.

The jury found Eaton guilty as charged of possession of cocaine. CP 41. He was sentenced to 4 months in custody, a standard range sentence. CP 59-65. Eaton filed this timely appeal. CP 66-73.

2. SUBSTANTIVE FACTS

On December 5, 2002, Lake Forest Police Sergeant Claves was in his patrol car in the parking lot of the police department. 4RP 90. He was approached by a civilian who informed Claves that Eaton was acting oddly. 4RP 92. Claves watched as Eaton picked up a rock and threw it into oncoming traffic and Eaton then proceeded to block traffic in both directions. 4RP 103-04. Another officer described Eaton as jumping in and out of traffic. 5RP 21. Claves called for back-up. When officers approached Eaton to arrest him for disorderly conduct, Eaton began screaming profanities, yelling, fighting and physically resisting arrest. 4RP

109. Clayes testified that Eaton appeared extremely intoxicated.
4RP 120.

Eaton was ultimately transported to the jail by Officer Gross.
5RP 44-46. Eaton was placed in a holding cell where Gross
watched him closely. 5RP 46-48. While in the holding cell Eaton
continued to curse at Gross and other officers, and he urinated on
the floor of the cell. 5RP 49. Eaton then attempted to use his foot
to shove a plastic sandwich bag containing crack cocaine inside the
drain of the cell floor. 5RP 51-53. Officers stopped Eaton and
recovered the bag.

Mark Strongman, a forensic scientist with the Washington
State Patrol Crime Lab, tested the contents found in Eaton's plastic
bag and concluded that it was cocaine weighing approximately
twenty grams. 5RP 152.

C. ARGUMENT

1. EATON WAS NOT PREJUDICED BY THE
UNNECESSARY ARRAIGNMENT OCCURRING
AFTER THE MISTRIAL.

Eaton argues that he was prejudiced by the State's
unnecessary arraignment following a mistrial. Criminal rules do not
require that the defendant be re-arraigned following a mistrial. The
re-arraignment following mistrial erroneously charged Eaton with

possession of amphetamine, instead of cocaine. Eaton cannot show prejudice from this unnecessary arraignment following the mistrial, thus this Court should reject his argument.

Both the Federal and Washington State constitutions require that in criminal prosecutions the accused must be informed of the criminal charge he is to meet at trial. U.S. const. amend 6; Washington Const. Art. 1, Sec. 22 (amend 10). Washington courts have held that the charging document must contain the essential elements of the crime in order to inform the defendant of the charges against him and to allow the defendant to prepare a defense. State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). The crime of possession of a controlled substance requires that the State prove beyond a reasonable doubt that the defendant possessed a controlled substance. RCW 69.50.401(d).

CrR 3.3(c)(iii) sets forth the procedure to establish a new trial date following a mistrial,

New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

The rule does not require that a defendant must be re-arraigned following a mistrial.

Washington courts have held that a minor discrepancy between the information and the crime of which the defendant is convicted, which does not prejudice the defendant, can be harmless error that does not require reversal. State v. Leach, 113 Wn.2d 679, 696, 782 P.2d 552 (1989). An error in the citation of a statute does not invalidate an information unless the error prejudices or affects the defendant's substantial rights. State v. Weiding, 60 Wn. App. 184, 186, 803 P.2d 17 (1991). Washington courts have consistently upheld convictions based upon charging documents that contained "technical defects," such as citation to the wrong statute. State v. Hopper, 118 Wn.2d 151, 160-61, 822 P.2d 775 (1992).

The unnecessary and erroneous arraignment that occurred after Eaton's mistrial did not prejudice Eaton, and is analogous to cases addressing a technical error in the charging document. This court addressed the issue of a technical error in the information in State v. Garcia, 65 Wn. App. 681, 829 P.2d 241 (1992). The Garcia court held that an error in the amended information that was filed on the day of trial and that misidentified the person to whom the defendant delivered cocaine was technical and harmless. In Garcia, the information was amended on the day of trial, and

charged incorrectly that the defendant had delivered cocaine to a police officer instead of to the co-defendant. Id. at 684. At trial the testimony only consisted of the defendant's delivery of cocaine to the co-defendant. Id. at 688. The "to convict" instruction on the delivery charge did not require the State to prove the individual to whom the defendant delivered the cocaine, but only required that the State prove that the cocaine was delivered. Id. at 685. The court also found that neither party appeared to have noticed the error in the amended information. Id. at 687. The Garcia court held that the error in the amended information was harmless because the defendant did not rely upon the error in the charging document, and the certification for determination of probable cause correctly informed the defendant of the crime charged. Id. at 686-87.

Eaton cannot show that he was prejudiced by the unnecessary arraignment that charged him with possession of amphetamine. Eaton was present during the first trial in which he was charged with possession of cocaine. Following the mistrial, he was mistakenly re-arraigned on the amphetamine charge, but no amended charging document was ever filed with the court. That arraignment was unnecessary under CrR 3.3. Following the unnecessary arraignment, Judge Carey confirmed that Eaton was

charged with possession of cocaine. Judge Carey gave defense counsel the opportunity to request a continuance, and defense counsel declined to request a continuance. At the time of trial in front of Judge Wartnik, three separate pleadings submitted by Eaton's attorney reflect that Eaton was charged with possession of cocaine. CP 27-30, 31-35, 56-58. For these reasons, Eaton cannot show that he was prejudiced by the unnecessary arraignment.

Eaton cites as authority a case in which the charging document failed to set forth the essential elements of the crime charged. In State v. Vangerpen, supra, the defendant was charged with attempted first-degree murder. The charging document omitted the element of premeditation. After the State had rested its case, the State amended the information to include the element of premeditation. On appeal, the court found that it was prejudicial error for the State not to have included premeditation in the charging document. The court concluded that the appropriate remedy was reversal and dismissal of charges, without prejudice to the State to re-file.

Vangerpen does not apply here. Eaton was charged with possession of cocaine at the first trial in front of Judge Schapira. At

issue in Vangerpen was the State's failure to include an essential element in the information, but here the information included the essential elements of possession of a controlled substance. In Vangerpen, the State failed to include the essential element of premeditation until after resting its case, and the defendant could show prejudice from the late amendment. In contrast, here, the defendant was properly charged by oral amendment of the information at the first trial with possession of a controlled substance, cocaine. Consequently, Vangerpen should not control this court's decision.

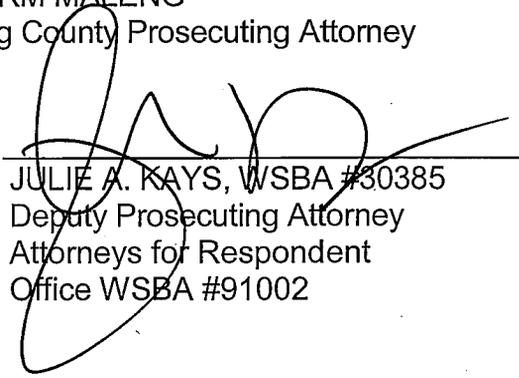
D. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reject Eaton's arguments and affirm his conviction.

DATED this 11 day of January, 2006.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

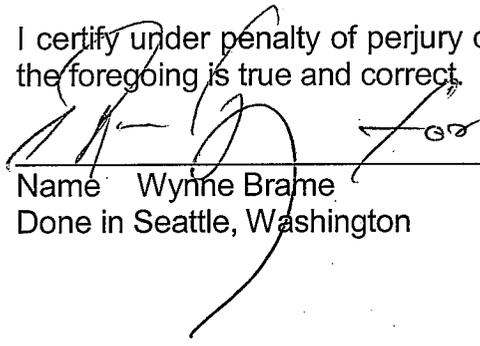
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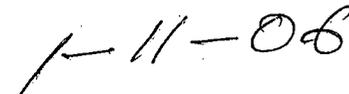
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Magda Baker, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MARK EATON, Cause No. 55583-9-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Wynne Brame
Done in Seattle, Washington



Date Jan. 11, 2006

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