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STATE OF WASHINGTON

Supreme Court No. \_\_\_\_\_  
(Court of Appeals 56924-4-1)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RONALD S. QUISMUNDO,

Petitioner.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2007 MAY 21 PM 4:53

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Petitioner, RONALD S. QUISMONDO, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4(b).

B. COURT OF APPEALS DECISION.

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division One, dated April 2, 2007, which affirmed his conviction for violating a no-contact order. (A copy of the opinion is attached hereto as Appendix A.)

C. ISSUES PRESENTED FOR REVIEW.

1. Where the information fails to allege an offense because it omits an essential element and Washington law bars amending the charge after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense, may the prosecution circumvent the constitutional rule by reopening its case for the sole purpose of filing a second amended information?

2. An information charging a crime must describe the acts constituting the offense in ordinary and concise language in such a manner as to enable persons of common understanding to know what is intended. The information here was redundant, repetitious and confusing because it alleged a multitude of inapplicable

statutory provisions. Does such a charging document comply with the standards established by this Court implating the provision of the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, §§ 3, 21 of the Washington Constitution?

3. Whether Mr. Quismundo violated a domestic violence court order as charged in the original information filed on June 3, 2005, in the absence of "contact" prohibited by previously issued orders?

4. Whether the State improperly amended the information during trial after statements to the jury involved "assault" in prior charging papers?

D. STATEMENT OF THE CASE.

Mr. Quismundo was charged with violating a no contact order contrary to RCW 26.50.110. CP 62-63. Mr. Quismundo testified at trial that he went to the apartment of his estranged wife, Kelly, after she telephoned him and indicated she was leaving their three children unattended. RP 109-11. He testified she was not at the apartment when he arrived and he had no contact with her, contrary to her allegations and relied on a defense of necessity. CP 55. Other relevant facts are detailed in the Court of Appeals opinion and are incorporated herein by reference. Slip op at 1-2.

D. ARGUMENT.

1. PERMITTING THE STATE TO AMEND THE INFORMATION AFTER IT HAD RESTED ITS CASE-IN-CHIEF WAS CONTRARY TO THE DECISION SOF THIS COURT AND INCONSISTENT WITH CONSTITUTIONAL STANDARDS FOR PROPER CHARGING

a. Charging documents must allege all the essential elements of the crime. Article 1 §§ 3 and 22 (amendment 10)<sup>1</sup> and the Sixth and Fourteenth Amendments<sup>2</sup> of the federal constitution provide defendants with the right under to be apprised with reasonable certainty of the nature of the accusations against him or her. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Russell v. United States, 369 U.S. 749, 770, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); United States v. Brown, 995 F.2d 1493 (10<sup>th</sup> Cir. 1993). These provisions bar trying an accused person for an offense that has not been charged. Auburn v. Brooke, 119 Wn.2d 623, 627, 836 P.2d 212 (1992); Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 21 L.Ed.2d 590 (1974).

This "essential elements" rule has been settled law in Washington since before statehood. Leonard v. Territory, 2

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<sup>1</sup> Const. Art. 1, § 3 provides that "No person shall be deprived of life, liberty, or property, without due process of law."

Const. Art. 1, § 22 provides that "in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him."

<sup>2</sup> U.S. Const. Amend. 6 provides in part: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation;..."

U.S. Const. Amend 14 provides in part: "No State shall ... deprive any

Wash.Terr. 381, 7 P. 872 (1885). A charging document is constitutionally adequate only if all essential elements of the crime, both statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992); State v. Leach, 113 Wn.2d 679, 687, 782 P.2d 552 (1989).

b. Permitting the state to reopen to file a second amended information was an abuse of discretion. After the prosecution presented its case-in-chief and rested, Mr. Quismundo moved through counsel to dismiss because the amended information failed to allege "Mr. Quismundo ever violated the order, or had contact with Kelly Quismundo." RP 83-84. The prosecutor and the Court of Appeals acknowledged the element of contact with a protected person was not alleged in the amended information. RP 84-88; Slip op at 3.

The trial court allowed the State to reopen its case-in-chief to file a second amended information adding the previously omitted element. RP 89-90, citing State v. Debolt, 61 Wn.App. 58, 808 P.2d 794 (1991). DeBolt however simply involved changing the charging date in the information, not the addition of a material

element of the crime. Therefore, the amendment of the date was a matter of form rather than substance.

Contrary to the trial judge's ruling here, however, CrR 2.1(d) permitting amendment of the information is limited by the application of WA Const. Art. 1, § 22 (amend. 10), requiring the defendant be adequately informed of a charge he is to meet at trial.

State v. Pelkey, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987).<sup>3</sup>

Pelkey articulated a bright-line rule: "A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." 109 Wn.2d at 491.

In this case, the second amended information did not seek to allege a lesser degree or included offense. Instead, the second amended information charged an offense where none was charged in the information upon which the trial had been conducted.

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<sup>3</sup> The Court explained the reason for this bright line rule:

The constitutionality of amending an information after trial has already begun presents a different question. All of the pretrial motions, voir dire of the jury, opening argument, questioning and cross examination of the witnesses are based on the precise nature of the charge alleged in the information. Where a jury has already been empanelled, the defendant is highly vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information.

c. Prejudice was inherent in the amendment after the prosecution rested and Quismundo's choice of potential future remedies should not preclude relief. An amendment of the information to something that is neither a lesser degree, nor a lesser included offense is reversible error per se. State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992). "Whether a defendant was prejudiced by a defective information is **only** to be considered if the information is challenged for the first time after a verdict." State v. Kjorsvik, 117 Wn.2d 93, 106, 812 P.2d 86 (1991) (emphasis added); State v. Hopper, 118 Wn.2d 151, 155-56, 822 P.2d 775 (1992).

This Court has clearly and repeatedly held that where the information fails to state an offense because it omits an essential element, a subsequent amendment to add the missing element does not fall within the rule delineated in Pelkey. State v. Vangerpen, 125 Wn.2d 782. The trial judge therefore abused his discretion in permitting amendment of the information rather than dismissal without prejudice to the State's ability to renew the prosecution.

The Court of Appeals seeks to sidestep this controlling caselaw by mischaracterizing his request for relief. The Court of Appeals asserts "the sole remedy sought by Quismundo was

dismissal with prejudice.” Slip op at 3. On the contrary, defense counsel began by requesting that, “at this point I’d move to dismiss the charge.” RP 84. Counsel then noted it would be improper to permit amendment after the State rested. RP 85. Defense counsel did subsequently state that “this charge should be dismissed with prejudice,” but this was never an exclusive or contingent remedy in the context of his request for the relief called for by the decisions of this Court. RP 86, 89.

The fact that the State may have been permitted to later recharge Mr. Quismundo was not a limitation on his right to dismissal of the prosecution at the time the motion was brought. Nothing in the motion for dismissal indicated his request for relief was contingent on the matter being dismissed with prejudice and if there was any question in that regard it was not ripe until the current prosecution was in fact dismissed and the prosecutor sought to recharge Mr. Quismundo.

Defense counsel did go on to argue why Mr. Quismundo was prejudiced by the trial court’s ruling permitted the State to reopen it case and file the amended information. RP 91-92. Discussion then turned to whether a continuance was necessary or desirable in light of the ruling permitted the filing of the second amended information and whether that in turn would require a

mistrial. RP 94-98. Although they chose to proceed with the trial, it was done so with the clear understanding that Mr. Quismundo preserved his objection to the amendment of the information and request for dismissal. RP 103-04.

In light of his motion for dismissal, which was governed by the definitive caselaw of this Court, he was entitled to that relief and the decision of the Court of Appeals to the contrary warrants review pursuant to RAP 13.4(b).

2. THIS COURT SHOULD GRANT REVIEW OF THE ISSUES PRESENTED IN PETITIONER'S STATEMENT OF ADDITIONAL GROUNDS INCLUDING FLAWS IN THE CHARGING DOCUMENT AND SUFFICIENCY OF THE EVIDENCE.

This Court has repeatedly noted that an information must present a concise statement of the offense, without repetition, so that a person of common understanding would know what was alleged. State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). As Mr. Quismundo noted in his Statement of Additional Grounds, the information was redundant, repetitious and confusing in that it alleged a multitude of eight or more different provisions that might have been violated. CP 48, 53, 62. The statutes cited, or ambiguously "half cite[d]" in the charging documents were confusing in that they cited numerous sections and subsections

failed to clearly and distinctly set forth in ordinary language the allegations such that a person of common understanding could discern the charges. State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989).

Mr. Quismundo also asks this Court to review of his claim that although the information charged him with "assault," not only did he not assault anyone, but also did not violate any no contact order then in place. SAG at 4, incorporated herein by reference, citing State v. Schaffer, 120 Wn.2d 616, 619-20, 845 P.2d 281 (1993).

Finally, Mr. Quismundo asks this Court to review his claim that the State improperly amended the information during trial after statements of "assault" were presented to the jury. SAG at 4-5. Such amendment was contrary to the Sixth Amendment guarantee of a "speedy and public trial, by an impartial jury." Mr. Quismundo contends the amendment of the information in the middle of trial prejudiced his right to fair trial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).





desire to see him. Quismundo testified that he went to the apartment because Kelly told a friend that she was going to leave their three children alone in the apartment while she went out. He stated that he knew he was not supposed to go to Kelly's home, and that the no-contact order barred him from talking to, seeing, or going near Kelly. But, according to Quismundo, Kelly was not at the apartment while he was there, so he believed that he did not violate the no-contact order.

Quismundo was charged with felony violation of a no-contact order, effectuated by assaulting Kelly. On the first day of trial, the State amended the information with Quismundo's assent. The amended information based the charge on the fact that Quismundo had at least two prior convictions for violating a no-contact order and deleted the assault element, but also deleted the allegation that Quismundo violated the no-contact order. After the State rested, defense counsel moved for a dismissal with prejudice based on the fact that the amended information failed to allege the essential element of violating the no-contact order. The trial court denied the motion. The trial court then granted the State's motions to reopen its case in chief and to amend the information to include the omitted element. The jury convicted Quismundo. He appeals.

#### DISCUSSION

Quismundo contends that the trial court abused its discretion by denying his motion to dismiss the charge with prejudice and by allowing the State to reopen and amend the information after it had initially rested its case. "A charging

document is constitutionally adequate only if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the defendant of the charges against him and to allow him to prepare his defense.”

State v. Simon, 120 Wn.2d 196, 198, 840 P.2d 172 (1992).

A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense [and a]nything else is a violation of the defendant’s article 1, section 22 right to demand the nature and cause of the accusation against him or her.

State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). But “[t]he State has a right to refile a proper information.” State v. Vangerpen, 125 Wn.2d 782, 793, 888 P.2d 1177 (1995). “The proper remedy for . . . a defective information is dismissal without prejudice to the State refiling the information.” Simon, 120 Wn.2d at 199. Accord Vangerpen, 125 Wn.2d at 792-93.

In this case, the State conceded that the amended information omitted an essential element of the crime. However, in response to the defect in the information, the sole remedy sought by Quismundo was dismissal with prejudice. This was not an available remedy. The trial court properly denied the motion.

The prosecutor then proposed the options of 1) reopening and allowing the State to amend the information; 2) declaring a mistrial; or 3) proceeding with trial. Defense counsel correctly responded that, after it rests, the State may amend an information only to charge a lesser crime, but again asserted that the proper remedy was dismissal with prejudice. The trial court indicated that it would entertain a motion for dismissal without prejudice, but Quismundo never chose to make such a motion. Instead, he chose to proceed with trial. Given

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Quismundo's decision not to move for dismissal without prejudice, the sole remedy properly available to him, the trial court did not abuse its discretion by granting the State's motions to reopen its case in chief and to amend the information to correct the defect.

Affirmed.

FOR THE COURT:

Denz, J.

Cox, J.

Schindler, ACJ