

FILED
COURT OF APPEALS
DIVISION II

87614-2

2012 JUL 11 AM 11:01
NO. 40401-0-II

STATE OF WASHINGTON
COURT OF APPEALS OF THE STATE OF WASHINGTON,
BY _____
DEPUTY
DIVISION II

FILED
JUL 18 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

STATE OF WASHINGTON,

Respondent,

vs.

BRENDA J. ZILLYETTE,

Petitioner.

PETITION FOR REVIEW

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(206) 423-3084

TABLE OF CONTENTS

	<i>Page</i>
Table of Authorities	3
A. Identity of Petitioner	4
B. Decision of the Court of Appeals	4
C. Issues Presented for Review	4
D. Statement of the Case	4
E. Argument Why Review Should Be Accepted	9
F. Conclusion	16
G. Appendix	
1. Washington Constitution, Article 1, § 3	17
2. United States Constitution, Fourteenth Amendment	17

TABLE OF AUTHORITIES

Page

State Cases

State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) 9, 14, 16
State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) 9, 10

Constitutional Provisions

United States Constitution, Fourteenth Amendment 10
Washington Constitution, Article 1, § 3 10

Statutes

RCW 69.50.204 11
RCW 69.50.206 11
RCW 69.50.208 11
RCW 69.50.210 11
RCW 69.50.212 11
RCW 69.50.401 11, 13
RCW 69.50.402 12
RCW 69.50.415 10-13

A. IDENTITY OF PETITIONER

Brenda J. Zillyette asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioner seeks review of each and every part of the decision of the Court of Appeals affirming the Grays Harbor County Superior Court judgment and sentence following this court's grant of the original Petition for Review and remand to the Court of Appeals to reconsider its original decision. A copy of the Court of Appeals' decision is attached.

C. ISSUES PRESENTED FOR REVIEW

Under a liberal interpretation, does an Information charging controlled substance homicide under RCW 69.50.409 include all of the essential elements of the offense if it fails to allege that the controlled substance delivered fell within Schedules I, II or III, given that the offense of controlled substance homicide does not apply when the controlled substance delivered is listed in Schedules IV or V?

D. STATEMENT OF THE CASE

Factual History

On the evening of April 1, 2009, Rich Green returned home from work to find his 18-year-old son Austin Burrows dead in his bedroom of a methadone overdose. RP 10-11, 67-81¹. Mr. Green had spoken to his son the

¹“RP 11/12/09 [page #] refers to the verbatim report of the hearing held on the date indicated. “RP [page #] refers to the verbatim report of the trial held on February 1, 2010.

previous evening at about 11:00 pm and he seemed fine. RP 9-10. A subsequent blood test revealed that Austin also had alprazolam and the metabolite of clonazepam in his blood. RP 67-81, 81-92. Methadone is an opiate used to treat pain. *Id.* It is also prescribed to heroin addicts to prevent the symptoms incident to withdrawal. *Id.* Alprazolam, commonly known as Xanax, is an anti-anxiety medication. *Id.* While Austin Burrows did not have a prescription for either methadone or alprazolam, the defendant Brenda Zillyette did. RP 52-67. In fact, she had refilled her prescriptions for both medications at 4:28 pm the previous day, receiving 45 five milligram methadone pills, and some 1 milligram alprazolam tablets. *Id.* The day after Austin's death, the defendant's boyfriend gave the pill bottles to the police. RP 50. There were a few methadone and alprazolam tablets in the bottles. RP 50, 92-95.

In fact, the defendant and Austin Burrows had become acquainted a few months before his death. RP 99-104. According to one of Austin's friends, about two months prior to Austin's death, he, the defendant, and Austin had "hung out" and ingested drugs together a couple of times. *Id.* Another friend had seen Austin and the defendant in a truck together about two weeks before Austin's death. RP 37-39. However, no person saw the defendant and Austin either together or in the vicinity of each other for two weeks prior to Austin's death. RP 8-163.

During the evening of March 31st, Austin sent a picture of his hand full of pills to a few friends over their cell phones. RP 24-25, 26-31, 31-37. Some of the pills were 5 milligram methadone tablets and 1 milligram alprazolam tablets. RP 57. According to the defendant's boyfriend, the defendant was home for about an hour on the evening of March 31st, sometime around 9:00 pm. She then left and returned at about midnight or 1:00 am. RP 45-46.

Procedural History

By information filed September 9, 2009, the Grays Harbor County Prosecutor charged the defendant Brenda J. Zillyette with one count of controlled substance homicide. CP 1-2. The information alleged as follows:

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime of CONTROLLED SUBSTANCE HOMICIDE, committed as follows:

THAT THE SAID DEFENDANT, Brenda J. Zillyette, in Grays Harbor County, Washington, on or about March 31,-April 1, 2009 did unlawfully deliver a controlled substance to Austin Burrows in violation of RCW 69.50.401, which controlled substance was subsequently used by Austin Burrows, resulting in his death;

CONTRARY TO RCW 69.50.415 and against the peace and dignity of the State of Washington.

CP 1 (capitals in original).

The case later came on for trial before the bench, defendant having waived her right to a jury trial. CP 77-80. The state called 15 witnesses, who

testified to the facts contained in the preceding factual history. *See* Factual History. Following the state's witnesses, the defense called a medical expert and a police officer. RP 137, 161. After the end of the defendant's case, the parties presented their closing arguments, and the court found the defendant guilty. RP 164-172. The court later sentenced the defendant to 55 months in prison, which was within the standard range. CP 91-99. The defendant then filed timely Notice of Appeal. CP 101-102.

On appeal, the defendant argued that substantial evidence did not support her conviction for controlled substance homicide because no evidence independent of her statements supported the conclusion that she or anyone else had delivered a controlled substance to the decedent. *See* Opening Brief of Appellant. In addition, she argued that the information was defective because it failed to allege that she had delivered a schedule 1, 2 or 3 drug to the decedent, which was an essential element of the crime charged. *Id.* By decision filed August 11, 2011, the Court of Appeals affirmed, holding that (1) there was evidence to support the conclusion that the decedent had died after ingesting the drugs that the defendant had obtained pursuant to prescription, thus meeting the *corpus delecti* rule, and (2) that the defendant was not entitled to dismissal without prejudice because she had failed to show prejudice from the fact that the state had failed to allege each and every element of the crime charged. *See* Published Opinion, filed August

11, 2011. The defendant thereafter sought review before this court.

By order entered February 16, 2012, this court granted defendant's Petition for Review in part and remanded this case to the Court of Appeals, holding that the Court of Appeals had failed to recognize that if an information fails to allege all of the essential elements of the offense, prejudice is conclusively presumed. This court held:

The Court of Appeals here did not first construe the information to determine whether the necessary facts appeared in or could be fairly construed from the face of the document. Rather, the court simply stated that Zillyette was unable to demonstrate actual prejudice and held that the information was thus sufficient. While the second Kjorsvik prong requires the defendant to show actual prejudice as a result of vague charging language, courts do not reach that part of the analysis unless the necessary elements can be fairly found on the face of the information. As we reiterated in *State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010), if the necessary elements are not found explicitly or by fair construction in the charging document, prejudice is presumed and reversal is required (without prejudice to refileing the charge).

We therefore reverse the Court of Appeals and remand to that court to apply the proper analysis, first considering whether the necessary elements appear in or may be fairly construed from the information. RAP 13.7(b).

State v. Zillyette, 173 Wn.2d 784, 270 P.3d 589 (2012)

The Court of Appeals has now reconsidered its original ruling pursuant to this order on remand and again affirmed the defendant's conviction in a published opinion filed June 26, 2012. The Court of Appeals held as follows on the defendant's essential elements argument:

The identity of a controlled substance is an element of the offense if

it aggravates the maximum sentence a court could impose. *State v. Goodman*, 150 Wn.2d 774, 786, 83 P.3d 410 (2004). Controlled substance homicide is a class B felony, regardless of which controlled substance was delivered. RCW 69.50.415(2). Because the identity of the controlled substance does not aggravate the maximum sentence for the crime, it is not an essential element of controlled substance homicide. Thus, a liberal reading of this information includes all essential elements.

State v. Zillyette, 2012 WL 2397444 (June 26, 2012).

As the following explains, this decision is in error because it misapplies the holding from *Goodman* through an error in logic, and fails to recognize that it does matter which controlled substance is delivered because only the delivery of certain controlled substances can create liability under the controlled substance homicide statute. The following addresses these points.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), the defendant was convicted of First Degree Robbery under an information that alleged that he “did unlawfully take personal property” *Kjorsvik*, 117 Wn.2d at 96. For the first time on appeal, the defendant argued that his conviction should be reversed because the information failed to allege the “essential” (court created) element of intent (*e.g.* that he “intentionally” took personal property as opposed to “unlawfully” taking personal property). In its opinion, the court specifically adopted the rule that an information is defective, and violates due process under Washington Constitution, Article 1, § 3, and

United States Constitution, Fourteenth Amendment, unless it alleges all of the “essential” elements of the crime, regardless whether the elements were statutorily or judicially created. The court then went on to note that in determining whether or not the essential elements are alleged, it will employ a liberal interpretation of the information if the issue is raised for the first time on appeal, and a strict interpretation of the information if the issue was raised pretrial. This court stated as follows on this issue:

In the present case, however, the information charged that the defendant unlawfully, with force, and against the shopkeeper’s will, took the money while armed with a deadly weapon. It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money. The case before us is thus clearly distinguishable from *Hicks*. Giving the information charging this defendant a liberal construction in favor of its validity, reading it as a whole and in a common sense manner, we conclude that it did inform the defendant of all the elements of robbery.

State v. Kjorsvik, 117 Wn.2d at 111.

In the case at bar, the state charged the defendant with controlled substance homicide under RCW 69.50.415. In determining what the elements are for this offense, it is first necessary to review RCW 69.50.401.

This statute states:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.50.401.

Under RCW 69.50.101(d), the term “controlled substance” is defined as “a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules.” Schedules I through V are defined in RCW 69.50.204, .206, .208, .210, and .220 respectively.

While RCW 69.50.401(1) makes it a crime to deliver any “controlled substance” to another person, section (2) of that statute sets out different penalties for the crime depending upon the type or class of the controlled substance delivered. With RCW 69.50.401 in mind, one can now turn to RCW 69.50.415 in order to determine what the elements are for the crime of controlled substance homicide. This statute provides as follows:

(1) A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(2) (a), (b), or (c) which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide.

RCW 69.50.415.

Under this statute, the crime of controlled substance homicide includes three elements: (1) the defendant delivered one of the “controlled substances” listed in RCW 69.50.401(2)(a), (b), or (c) to another person, (2) the person to whom the defendant delivered that listed “controlled substance” thereafter ingested it, and (3) the person who ingested that “controlled substance” then died from its effects. By contrast, if the “controlled substance” the defendant

delivered and the decedent ingested was one that falls within the categories listed in RCW 69.50.402(e)&(f), then the defendant has not committed the crime charged, because RCW 69.50.415 specifically limits its application to the delivery of those controlled substances listed in sections (a), (b), and (c). Herein lies the error in the information in the case at bar since it fails to allege the delivery of a controlled substance listed in sections (a), (b), or (c) of RCW 69.50.

In the case at bar, the information the state filed alleged the following:

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime of CONTROLLED SUBSTANCE HOMICIDE, committed as follows:

THAT THE SAID DEFENDANT, Brenda J. Zillyette, in Grays Harbor County, Washington, on or about March 31, -April 1, 2009 did unlawfully deliver a controlled substance to Austin Burrows in violation of RCW 69.50.401, which controlled substance was subsequently used by Austin Burrows, resulting in his death;

CONTRARY TO RCW 69.50.415 and against the peace and dignity of the State of Washington.

CP 1.

The deficiency in this information is glaringly apparent after reviewing the definition for the offense of controlled substance homicide in RCW 69.50.415, particularly after examining the five different categories of controlled substances found in RCW 69.50.401(2). By failing to allege that the "controlled substance" the defendant delivered was one of those

controlled substances listed in RCW 69.50.401(2)(a), (b), or (c), the state failed to allege a crime. Had the state at least included a claim that the “controlled substance” the defendant delivered was “methadone,” the state might be able to defend a post-conviction notice attack on the basis that “methadone” was one of the listed drugs, even though the information did not specifically allege this fact. However, the state did not even include this allegation.

An analogy can be drawn to an information that alleges that one delivered a “medication” to another person who took it and died, thereby violating RCW 69.50.401. While it is true that many, if not most, controlled substances listed in the five schedules defined by the legislature are “medications” which physicians in this state prescribe to patients, many “medications” are sold over the counter and are not listed or regulated under RCW 69.50. Thus, by alleging that a defendant delivered a “medication,” an information would not be alleging a crime, having failed to include the essential element that the “medication” was a controlled substance of that class of controlled substances included in the offense of controlled substance homicide.

Similarly, in the case at bar, the allegation that the defendant delivered a “controlled substance” to another person also fails to allege an essential element of the offense charged because it fails to alleged that the “controlled

substance” was one of the limited classes of such substances included in the crime. Thus, even with a liberal interpretation of the information, it still failed to allege a crime, and it left the defendant without notice of what conduct the state alleged constituted the crime charged. In spite of this fact, the Court of Appeals affirmed the defendant’s conviction by relying on a misstatement of the holding from *State v. Goodman, supra*. In *Goodman*, this court held as follows:

It is clear under *Apprendi* the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. Axiomatic in Washington law is the requirement that the charging document must “allege facts supporting every element of the offense” in order to be constitutionally sufficient. *State v. Leach*, 113 Wash.2d 679, 689, 782 P.2d 552 (1989).

State v. Goodman, 150 Wn.2d at 785-786 (footnote omitted).

The fact that “the identity” of a controlled substance would be an element of an offense if the type of controlled substance aggravated the maximum sentence applicable (the holding from *Goodman*) does not mean that “the identity” of a controlled substance is not an element of an offense if the type of controlled substance does not aggravate the maximum sentence.

What the court has done is to start with a valid argument such as this:

if A is included in B, and
if B is included in C,
then A must be included in C.

In this valid argument, “A” is “the identity of the controlled substance,”

“B” is “those facts which aggravate the maximum sentence a defendant is facing, and “C” is “the constitutional requirement that any information include all essential elements.” Thus, if A is included in B (those cases in which the “identity of the controlled substance” is “a fact which aggravates the maximum sentence,”) and if B is included in C (the requirement that all facts which aggravate the maximum sentence are part of the universe of essential elements), then A must be included in C (i.e. those cases in which the identity of a controlled substance is an essential element that must be included in the information). There is no error in this logic. However, what the Court of Appeals has done in this case is to set up the following invalid argument.

if A is not included in B, and
if B is included in C,
then A must not be included in C.

This argument is invalid because there are other facts which are included in the universe of essential elements to an offense which do not themselves aggravate the maximum penalty for an offense. Those are the facts which distinguish between what is an offense and what is not an offense. This is precisely what exists in the case at bar. If the controlled substance delivered causes the death of a person through ingestion, there is a crime if, and only if, the controlled substance was one of those listed in the first three schedules. If the controlled substance came from the last two schedules, there is no

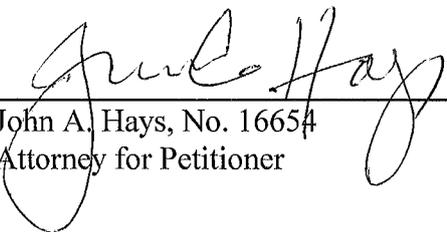
Appeals significantly alters and conflicts with the holdings from *Kjorsvik* and *Goodman*. The defendant respectfully requests that this court accept review because (1) this case presents important questions of constitutional law; and (2) the decision of the Court of Appeals conflicts with this court's decision in *State v. Kjorsvik, supra*.

F. CONCLUSION

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeals.

Dated this 6th day of July, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

G. APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

FILED
COURT OF APPEALS
DIVISION II

2012 JUN 26 PM 1:58

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON,

No. 40401-0-II

Respondent,

PUBLISHED OPINION

v.

BRENDA JEAN ZILLYETTE,

Appellant.

ARMSTRONG, J. — Brenda Jean Zillyette appealed her conviction for controlled substance homicide. In *State v. Zillyette*, 163 Wn. App. 124, 256 P.3d 1288 (2011), we affirmed her conviction, holding that the State presented sufficient evidence independent of Zillyette's statements to establish the corpus delicti of the crime. We also rejected Zillyette's claim that by failing to name the specific controlled substance she allegedly furnished, the information gave her inadequate notice of the charge; we reasoned that even if the information was deficient, Zillyette had not shown prejudice. The Supreme Court accepted review and remanded for us to more fully analyze Zillyette's challenge to the sufficiency of the information in *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012).

I. INFORMATION

Zillyette argues that the State failed to allege all of the elements of controlled substance homicide in the information. The information alleged:

That the said defendant, Brenda J. Zillyette, in Grays Harbor County, Washington, on or about March 31,–April 1, 2009 did unlawfully deliver a controlled substance to Austin Burrows in violation of RCW 69.50.401, which controlled substance was subsequently used by Austin Burrows, resulting in his death;

No. 40401-0-II

Contrary to RCW 69.50.415 and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 1.

RCW 69.50.415(1) provides, "A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(2)(a), (b), or (c) which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide." Zillyette contends that by failing to allege the specific controlled substances that were delivered to Burrows, the State failed to allege a crime.

A charging document must include all of the essential elements of the crime so that the defendant has notice of the nature of the charge. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Where, as here, the defendant challenges the information for the first time on appeal, we liberally construe it in favor of validity. *Kjorsvik*, 117 Wn.2d at 105. We first ask whether the necessary facts appear, or can be found by fair construction, in the information. If so, we then ask whether the defendant was nonetheless prejudiced by the unartful language in the information. *Kjorsvik*, 117 Wn.2d at 105-06. If we cannot explicitly or by implication find the necessary elements, we presume prejudice and must reverse. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

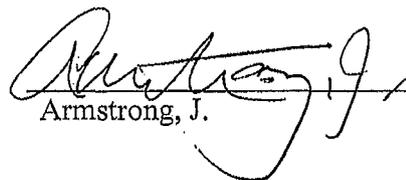
The identity of a controlled substance is an element of the offense if it aggravates the maximum sentence a court could impose. *State v. Goodman*, 150 Wn.2d 774, 786, 83 P.3d 410 (2004). Controlled substance homicide is a class B felony, regardless of which controlled substance was delivered. RCW 69.50.415(2). Because the identity of the controlled substance does not aggravate the maximum sentence for the crime, it is not an essential element of

No. 40401-0-II

controlled substance homicide. Thus, a liberal reading of this information includes all essential elements.

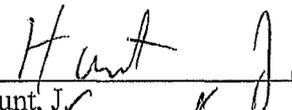
Moreover, when a defendant challenges the information for the first time on appeal, she must show that she was actually prejudiced by the vague language used in the information, meaning she did not receive actual notice of the charges that she had to defend against. *Goodman*, 150 Wn.2d at 789-90. Zillyette does not contend that she was actually misled by the information and expressed no confusion at trial about the specific identity of the controlled substance at issue. Accordingly, we hold that the information was sufficient.

We affirm.



Armstrong, J.

We concur:



Hunt, J.



Worswick, C.J.