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No. 68055-2-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, RESPONDENT,

v.

TIMOTHY LI-GEMINI FERGUSON, APPELLANT

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii-iii
I. ARGUMENT IN REPLY	1
A. A 15-hour delay to procure a search warrant under these circumstances was unreasonable, and therefore the search of Ferguson's car was unlawful.	1
B. The trial court erred by denying defendant's motion to suppress evidence from his cell phones because the warrant application was not recorded or otherwise preserved for review.	6
C. The trial court erred by allowing the State to amend the information to charge a different offense after the case had been submitted to the trier-of-fact.	8
D. The trial court erred by sentencing Mr. Ferguson for a crime with which he was never charged.	13
II. CONCLUSION	15

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

<i>Presidential Estates Apartment Assocs. v. Barrett</i> , 129 Wn.2d 320, 326, 917 P.2d 100 (1996)	13
<i>State v. Allyn</i> , 40 Wn. App. 27, 696 P.2d 45, <i>review denied</i> , 103 Wn.2d 1034 (1985);	8
<i>State v. Bergeron</i> , 105 Wn.2d 1, 18, 711 P.2d 1000 (1985).	12
<i>State v. Brisebois</i> , 39 Wn. App. 156, 692 P.2d 842 (1984), <i>review denied</i> , 103 Wn.2d 1023 (1985)	8
<i>State v. Debolt</i> , 61 Wn. App. 61-62, 808 P.2d 794 (1991)	9
<i>State v. Fischer</i> , 40 Wn. App. 506, 699 P.2d 249, <i>review denied</i> , 104 Wn.2d 1004 (1985)	8
<i>State v. Hockaday</i> , 144 Wn. App. 918, 184 P.3d 1273 (2008)	11
<i>State v. Hopper</i> , 118 Wn.2d 151, 822 P.2d 774 (1992)	9, 10
<i>State v. Huff</i> , 64 Wn. App. 641, 826 P.2d 698 (1992)	1, 3
<i>State v. Iniguez</i> , 167 Wn.2d 273, 217 P.3d 768 (2009)	11
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).	12

State v. Flores-Moreno,
72 Wn. App. 733, 866 P.2d 648,
review denied, 124 Wn.2d 1009 (1994) 3

State v. Markle,
118 Wn.2d 424, 823 P.2d 1101 (1992) 11

State v. McCarty,
140 Wn.2d 420, 425, 998 P.2d 296 (2000).

State v. Patton,
167 Wn.2d 379, 219 P.3d 651 (2009) 4

State v. Pelkey,
109 Wn.2d 484, 745 P.2d 854 (1987) 8

State v. Snapp,
174 Wn.2d 177, ___ P.3d ___ (2012) 3

State v. Tibbies,
169 Wn.2d 364, 236 P.3d 885 (2010) 4

State v. Vangerpen,
125 Wn.2d 782, 888 P.2d 1177 (1995) 8, 9, 10

Court Rules

CrR 2.3 4, 6, 7

CrR 3.2 4

CrR 7.8 13

Federal Cases

United States v. Burgard,
675 F.3d 1029 (7th Cir. 2012) 4

I. ARGUMENT IN REPLY

A. A 15-hour delay to procure a search warrant under these circumstances was unreasonable, and therefore the search of Ferguson's car was unlawful.

Ferguson argues that the 15-hour warrantless seizure of his vehicle to obtain a warrant was unreasonable because it deprived him of his vehicle and its contents overnight and because the State did not present any real reason to justify the delay. Brief of Appellant at 12-13. Ferguson cites *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992) for the proposition that an officer may only seize a vehicle for the time "reasonably needed" to obtain a search warrant. 64 Wn. App at 653.

Responding to Ferguson's argument that the 15-hour seizure of his vehicle was unreasonable, the State correctly points out that "from the facts in *Huff* it isn't clear how long the delay was." Brief of Respondent at 15. The fact that *State v. Huff* is silent on this critical issue demonstrates that the trial court erred by relying on *State v. Huff* to justify the warrantless seizure of Ferguson's vehicle for 15 hours, from Sunday night to Monday afternoon.

In holding that police may hold a car for an amount of time "reasonably needed" to obtain a warrant, 64 Wn. App. at 653, *State v. Huff* does seem to require an inquiry into the reasons for an officer's delay in attempting to procure a warrant to search a seized vehicle; 15 hours might

be reasonable under some circumstances, 1 hour may be unreasonable in others. To determine the question of “the time reasonably needed to obtain a warrant” the trial court must evaluate not only the length of the delay, but the reasons for the delay.

The record is clear that the officer in this case did not have a valid reason (other than his own convenience) for holding Ferguson’s vehicle over night. He could have easily obtained a telephonic warrant within the hour. The State apparently concedes that the officer could have obtained a warrant that night, and that there was no valid reason for him not to do so:

Here the WWU officer stopped the car for a traffic violation, with no reason to suspect at the time of the stop that the car might contain drugs. He seized the car in order to secure it until he could obtain a search warrant. He did not apply for a warrant that night because it was late on a Sunday night, and there was no urgent need to.

Brief of Respondent at 22. See also, RP 24-25 (“it being at that time . . . 11:30 at night on a Sunday night, I thought, um, that it would be better instead of making the calls to get a telephonic warrant to do it the next day”). “Because it was late on a Sunday night,” Brief of Respondent at 22, is not a reasonable basis for an overnight, 15-hour seizure of a vehicle and all of its contents, including the defendant’s wallet, keys and phone.

The State’s assertion that “[t]here were no extraordinary circumstances compelling the officer to obtain the search warrant that

night” Brief of Respondent at 22, completely ignores the holding of *State v. Huff*, which requires that a vehicle be seized only for the time reasonably needed to obtain a warrant. *State v. Huff, supra*, 64 Wn. App. at 653. Since the relevant inquiry is the “time reasonably needed to obtain a warrant,” in the absent of extraordinary circumstances, the warrant should be obtained as quickly as reasonably possible. Or, there should be some valid reason given for the delay. That did not occur in this case.

The state points out, and Mr. Ferguson concurs, that there are very few reported Washington cases on this issue. Brief of Respondent at 15. As mentioned above, *State v. Huff* is silent as to the length of time it took to obtain a warrant. The other Washington case cited by the State, *State v. Flores Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648, *rev. den.* 124 Wn.2d 1009 (1994), involved a 50-minute delay, obviously significantly shorter than the 15-hour delay at issue here. A 50-minute delay to make a phone call and get a warrant is reasonable; a 15-hour delay from Sunday night to Monday afternoon is not.

The Federal cases cited are not apposite because they involve the “automobile exception” to the warrant requirement. While the automobile exception is recognized for purposes of the Fourth Amendment, it is not recognized under article I, section 7. *State v. Snapp*, 174 Wn.2d 177, ___

P.3d ___ (2012), *citing*, *State v. Patton*, 167 Wn.2d 379, 386, n.4, 219 P.3d 651 (2009), *State v. Tibbies*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). Therefore, all of the federal Fourth-Amendment discussion about the “reasonableness” of warrantless vehicle searches is irrelevant to the issue in this case. The question of delay following a seizure and subsequent search under the “automobile exception” is not relevant here because in Washington we do not recognize this exception.

The State’s citation to *United States v. Burgard*, 675 F.3d 1029 (7th Cir. 2012) is not helpful because *Burgard* involves a search of a cell phone in an entirely different type of investigation. It is noteworthy however, for the analysis of whether a six-day delay in procuring a search warrant was reasonable. In finding that it was reasonable, the court evaluated the reasons for the delay which included conflicting shifts of several officers, an intervening robbery investigation, and difficulty communicating with the U.S. attorney’s office. In the instant case, by contrast, there were essentially no valid reasons offered for the delay in obtaining the warrant.

The State’s reference to court rules CrR 2.3(c) and CrR 3.2.1 do not shed much light on the question of whether a 15-hour delay in obtaining a warrant is reasonable. As the State points out, “The Washington Court rules do not dictate a time period within which a search warrant must be sought for seized property.” Brief of Respondent at 21.

Cases addressing warrantless detention of defendants base on probable cause are likewise irrelevant to the issue at hand, because here the officer did not arrest Ferguson and did not have probable cause to do so prior to execution of the search warrant.

The officer's arbitrary decision to seize Mr. Ferguson's vehicle and to wait 15 hours, from Sunday night to Monday afternoon, before even attempting to procure a search warrant was unreasonable. Ferguson's Fourth Amendment possessory interest in the vehicle, already strong, is even higher when one takes into account that in seizing Ferguson's vehicle, the office also seized his wallet, money, keys, and cell phone: an extreme and unreasonable inconvenience to a citizen who was presumed innocent at the time. Because the vehicle was seized for an unjustified and unreasonable amount of time, the evidence seized from the vehicle should have been suppressed.

B. The trial court erred by denying defendant's motion to suppress evidence from his cell phones because the warrant application was not recorded or otherwise preserved for review.

Ferguson argues that the court rules require a search warrant application to be recorded, transcribed or otherwise preserved for review, and that because the application in this case was not properly preserved for review, the evidence seized pursuant to the warrant should have been suppressed. CrR 2.3, Brief of Appellant at 14-16.

Although the state agrees that some portions of the tape of the recorded search warrant application are unintelligible, the State nonetheless argues that "it is clear from the tape and the signed warrant that the judge did find probable cause and did issue the warrant." Brief of Respondent at 26. This argument amounts to nothing more than a reiteration of the trial court's circular reasoning in denying defendant's motion on this issue: "if I thought there were not probable cause, I would not have signed the warrant." RP 11. The reasoning of both the State and the trial court is incorrect: the mere fact that the warrant was signed does not establish the basis for probable cause. The record must include the basis for probable cause to issue the warrant, not just the magistrate's conclusion that probable cause had been shown. Otherwise, appellate review of search warrants would be impossible.

CrR 2.3 says the recording of a search warrant application “shall be part of the court record” and that the recording “shall be transcribed if requested by the party if there is a challenge in court.” The rules do not say that the State may simply present the signed search warrant and thereby put an end to the inquiry. Such a holding would render meaningless the search warrant requirement of the Washington Constitution as well as the procedural rules for enforcing this requirement: CrR 2.3 and RCW 9A.72.085.

Because the recording of the search warrant application is partially unintelligible, the court should have granted Ferguson’s motion to suppress evidence seized from the cell phones. This court should reverse the trial court on this point and order suppression of the evidence obtained from Ferguson’s cell phones.

C. The trial court erred by allowing the State to amend the information to charge a different offense after the case had been submitted to the trier-of-fact.

Ferguson argues that allowing the State to amend an essential element of the Information after both sides had rested was per se prejudicial error that requires reversal and dismissal without prejudice. Brief of Appellant at 17-21, citing *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987) and *State v. Vangerpen*, 125 Wn.2d 782, 789-91, 888 P.2d 1177 (1995).

In an attempt to justify the improper and untimely amendment of the Information that occurred in this case, the State cites to several cases holding that an amendment to the date of the alleged crime is permissible even after the State has rested. However, cases upholding amendment to change the alleged date of the offense do not apply here. Amendment of the date is allowed because the date is not an element on the crime.

[T]he date is usually not a material element of the crime. Therefore, amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant. *State v. Allyn*, 40 Wn. App. 27, 35, 696 P.2d 45, review denied, 103 Wn.2d 1034 (1985); *State v. Fischer*, 40 Wn. App. 506, 510-12, 699 P.2d 249, review denied, 104 Wn.2d 1004 (1985); see also *State v. Brisebois*, 39 Wn. App. 156, 162-63, 692 P.2d 842 (1984), review denied, 103 Wn.2d 1023 (1985). Further, *Pelkey* refers to a "criminal charge" being amended. *Pelkey*, 109 Wn.2d at 491. Since the date here was not a material part of the "criminal charge", this case falls outside the ambit of *Pelkey*.

State v. Debolt, 61 Wn. App. 61-62, 808 P.2d 794 (1991). Ferguson does not challenge an amendment to the date of the alleged offense, but an amendment to the very nature of the offense charged.

The State's reliance on *State v. Vangerpen*, 125 Wn.2d 782, 787-88, 888 P.2d 1177 (1995) is misplaced. The *Vangerpen* court found the amendment on the information impermissible, and rejected the notion of a "scrivener's error":

The State argues that the omission of the element of "premeditation" was only a "scrivener's" error and relies on the cases which hold that technical defects can be remedied midtrial. Convictions based on charging documents which contain only technical defects (such as an error in the statutory citation number or the date of the crime or the specification of a different manner of committing the crime charged) usually need not be reversed. [*State v. Hopper* 118 Wn.2d 151, 822 P.2d 774 (1992)]. However, omission of an essential statutory element cannot be considered a mere technical error. Sometimes errors made in charging documents are oversights in omitting an element of the crime, but for sound policy reasons founded in our state and federal constitutions, this court has nonetheless consistently adhered to the essential elements rule.

While the *Vangerpen* court did make reference to "technical defects such as error in the statutory citation number" and cited *State v. Hopper* in a footnote, the amendment at issue in *Hopper* is very different from the amendment at issue in the instant case:

Hopper argues that the information here is insufficient for a second reason, in that it cites the wrong statute. The

information cites RCW 9A.36.021, which did not go into effect until July 1, 1988, rather than former RCW 9A.36.020, effective on the date of this crime, June 30, 1988.

Hopper, 118 Wn.2d at 159. The amendment at issue in *State v. Hopper* amounted to changing one digit of the statute because the change in numbering went into effect on the date the crime was committed.

In the instant case, it is not merely an amendment to a part of the statutory reference; transposing a “0” and “1” might be an acceptable “technical defect” or “scrivener’s error.” But here, there was an amendment to an essential element of a drug case: which substance the defendant was accused of possessing. The First Amended Information contained written references to “cocaine” and to “methamphetamine” and cited RCW sections prohibiting unlawful possession of methamphetamine, but used the written word “cocaine.” The erroneous substitution of the statutory reference to the entirely wrong crime is far more egregious than the error that occurred in *Hopper, supra*. The error here cannot be described as a mere “technical defect” or “scrivener’s error.” The charging document here, like the one that was found fatally flawed in *State v. Vangerpen, supra*, “was internally inconsistent and contradictory on its face.” *State v. Vangerpen, supra*, 125 Wn.2d at 792.

The State suggests that defense counsel “was careful to wait to

raise his argument until he was sure that all the evidence was in and the State had formally rested. Brief of Respondent at 30. There is nothing impermissible in this. A defendant can only defend the crime he is charged with. “A defendant has not duty to bring himself to trial; the State has that duty.” *State v. Iniguez*, 167 Wn.2d 273, 217 P.3d 768 (2009). If the State proceeds to trial on a defective Information, they do so at the risk of a dismissal without prejudice. That is the appropriate remedy here.

The State argues that “on appeal Ferguson has not pointed to any prejudice that he suffered from the amendment of the statutory citation.” Brief of Respondent at 31-32. This argument is misplaced because prejudice is presumed in this situation. An amendment of the charging document after the State has rested its case **necessarily prejudices** a defendant’s constitutional right to demand the nature and the cause of the accusation against him. “A trial court commits per se reversible error if it allows the State to amend the information after the State has rested its case.” *State v. Hockaday*, 144 Wn.2d 918, at 926, 184 P.3d 1273, citing *State v. Markle*, 118 Wn.2d 424, at 437, 823 P.2d 1101 (1992).

Furthermore, although the court granted the State’s motion to amend the Information at the close of the State’s case, the State **never filed a Second Amended Information** and Ferguson was never arraigned on a Second Amended Information. Even if we assume, *arguendo*, that

the court had authority to grant the motion to amend, the State failed to file an amended information after the motion to do so was granted or afterwards. Ferguson could not have been found guilty of a charge in an amended information that was never filed. Ferguson need not show prejudice in this circumstance. See *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

[A]n accused has a protected right, under our state and federal charters, to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial. *State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). Every material element of the charge, along with all essential supporting facts, must be put forth with clarity. CrR 2.1(a)(1); *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). It is a well-settled rule that a charging document satisfies these constitutional principles only if it states all the essential elements of the crime charged, both statutory and non-statutory. *Kjorsvik*, 117 Wn.2d at 97; *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Here, the charging document that Ferguson was tried on lacked essential elements (which substances he was alleged to be illegally possessing) and was therefore defective.

This court should reverse the per se error that occurred when the court allowed the State to amend the Information to change an essential element of the offense after the State had rested its case.

D. The trial court erred by sentencing Mr. Ferguson for a crime with which he was never charged.

In response to Ferguson's argument that the judgment is defective because it references the methamphetamine statute rather than the cocaine statute, the State once again argues that this is a "typographical error" that should be corrected pursuant to CrR 7.8(a). Brief of Respondent at 33. This argument should be rejected.

CrR 7.8(a) deals with "clerical mistakes . . . arising from oversight or omission." The reference to the wrong statute cannot be described as a "clerical mistake," especially where, as here, there was already an issue about the discrepancy between the charging document and the evidence that was presented during the State's case in chief.

"An error is clerical if the amended judgment corrects the language 'to reflect the court's intention.'" *State v. Snapp*, 119 Wn. App. 614, 627, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004). To determine whether an error is clerical or judicial, we look to "whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." *Snapp*, 119 Wn. App. at 627, (quoting *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)).

In the instant case, because of the defect in the Information, and the fact that it seemed to charge possession of either methamphetamine or

cocaine, the trial court's intention at sentencing is not clear. At the conclusion of the trial, the court stated: "Count two, we'll enter a finding of guilty." RP 79. The court did not state for the record what it was finding Mr. Ferguson guilty of. Considering that count two of the Information used the word "cocaine" but referenced the methamphetamine statute, the record does not embody the judge's intention at sentencing when he signed a judgment and sentence listing the offense of conviction as violating the methamphetamine (rather than the cocaine) statute.

II. CONCLUSION

The trial court erred by denying Ferguson's motion to suppress evidence seized from his vehicle following an unwarranted and unreasonable seizure of his vehicle. The trial court erred by refusing to suppress evidence seized from Ferguson's cell phones, despite the fact that the search warrant application was not preserved for review. The trial court erred by allowing the State to amend the Information after both sides had rested their cases. The trial court erred by entering a judgment for a crime that was not charged in the Information. For all of these reasons, Ferguson's conviction should be reversed, and the case should be remanded to Superior Court to be dismissed without prejudice.

Respectfully submitted this 11th day of September, 2012.



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PROOF OF SERVICE

I, Andrew Subin, attorney for Appellant, hereby declare, under penalty of perjury, that on September 11, 2012, I personally delivered a copy of the Reply Brief of Appellant to the following parties:

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I also mailed a copy of the brief (via US mail) to the following party:

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