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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
PETITION OF:

RONALD HOLTZ,

Petitioner.

NO. 43995-6-II

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed where the petitioner cannot show actual prejudice to a constitutional right?
2. Whether the issue raised in this petition is more appropriately considered in the consolidated direct appeal?
3. Whether the charging document, the Information, sufficiently notified the petitioner of all the elements of the crimes charged?

B. STATUS OF PETITIONER:

Petitioner, Ronald Holtz, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 11-1-03845-1. CP 158-171. He has filed a direct appeal of his conviction, #43995-6-II. This PRP has been consolidated with the appeal. Detailed facts

1 and procedure may be found in the briefs of the parties in the appeal. In brief, he was
2 convicted of felony violation of a no-contact order (NCO) and assault in the fourth degree.

3
4 C. ARGUMENT:

5 1. THE CHARGING DOCUMENT PROPERLY INCLUDED ALL
6 ESSENTIAL ELEMENTS OF THE CRIME CHARGED.

7 a. Raising the issues in the direct appeal.

8 The petitioner has an open direct appeal, #43995-6-II. In this PRP, he raises only
9 legal issues that can be argued within the record. *See State v. McFarland*, 127 Wn.2d 322,
10 335, 899 P.2d 1251 (1995). The petitioner could have argued these issues in his Statement
11 of Additional Grounds. However, the petitioner is free to use whatever form of redress he
12 feels appropriate.

13 b. The petitioner's burden of proof in a collateral attack.

14 In order to obtain collateral relief by means of a personal restraint petition, the
15 petitioner must demonstrate either an error of constitutional magnitude that gives rise to
16 actual prejudice or a nonconstitutional error that inherently results in a “complete
17 miscarriage of justice.” *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d
18 506 (1990). In a collateral attack, a petitioner has the burden and must meet a higher
19 standard than in a direct appeal. *See In re Personal Restraint of St. Pierre*, 118 Wn.2d
20 321, 328-329, 823 P. 2d 492 (1992). A personal restraint petition (PRP), or any other
21 collateral attack, is not a substitute for an appeal. *See In re Hagler*, 97 Wn.2d 818, 824,
22 650 P.2d 1103 (1982).
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1 c. Challenge to a charging document, raised for the first time
2 post-conviction.

3 A charging document must include all essential elements of a crime, statutory or
4 otherwise, in order to provide a defendant with sufficient notice of the nature and cause of
5 the accusation. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). A challenge to
6 the constitutional sufficiency of a charging document may be raised for the first time on
7 appeal. *Kjorsvik*, at 102. Where, as here, a defendant challenges the sufficiency of the
8 information for the first time post-conviction, as on appeal, the court construes the
9 document liberally in favor of validity. *Id.* To determine the adequacy of the charging
10 document, the Court engages in a two-part inquiry: (1) whether the essential elements
11 appear in any form, or can be found by any fair construction, in the information; and (2) if
12 the language is vague or inartful, whether the defendant was thereby prejudiced. *State v.*
13 *Brown*, 169 Wn.2d 195, 197–98, 234 P.3d 212 (2010). The petitioner has the burden of
14 raising and demonstrating actual prejudice. *See generally Kjorsvik*, at 106. He does not
15 demonstrate deficiency of the charging document, nor argue prejudice. His claim fails.

16
17 There is a difference between charging documents that are constitutionally deficient
18 because of the State's failure to allege each essential element of the crime charged and
19 charging documents that are factually vague. *See State v. Mason*, 170 Wn. App. 375, 285
20 P.3d 154 (2012). The State may correct a vague charging document with a bill of
21 particulars. *See State v. Leach*, 113 Wn.2d 679, 686–687, 782 P.2d 552 (1989).

22 The petitioner in the present case did not request a bill of particulars at trial. The
23 petitioner did file a motion to "disclose evidence." CP 14-15. In it, he requested "All of the
24 victims' names (first, middle, last) date of birth, ages, and respective races," among other
25 information. CP 14. He does not allege that the State failed to provide this information, nor

1 that the information provided by the State was inadequate. Because he failed to request a
2 bill of particulars, or even that discovery was inadequate, he waived his vagueness
3 challenge. *Leach*, at 687.

4 Liberal interpretation “balances the defendant's right to notice against the risk of ...
5 ‘sandbagging’—that is, that a defendant might keep quiet about defects in the information
6 only to challenge them after the State has rested and can no longer amend it.” *State v.*
7 *Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010) (citing *Kjorsvik*, 117 Wn.2d at 103).

8 The petitioner argues that an essential element(s) of the crime charged are missing
9 from the Information. Pet., at 6-8. However, the petition does not say which element or
10 elements are missing. Under *Kjorsvik*, he has the burden of proof in an appeal on the issue.
11 This burden is even greater in a collateral attack. See *PRP of St. Pierre*, 118 Wn.2d at 328.

12 RCW 26.50.110(5) provides:

13 A violation of a court order issued under this chapter, chapter 7.92, 7.90,
14 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid
15 foreign protection order as defined in RCW 26.52.020, is a class C felony if
16 the offender has at least two previous convictions for violating the
17 provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A,
18 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection
19 order as defined in RCW 26.52.020. The previous convictions may involve
20 the same victim or other victims specifically protected by the orders the
21 offender violated.

19 The language of the charging document is taken directly from this statute. No elements
20 have been omitted. The petitioner does not allege what element is missing. Of note, the
21 statute does not require the State to allege the date of birth of the victim.

22 The petition alleges that the violation NCO charges "fail to describe the conduct
23 that in fact violated the order, nor do they adequately state the required elements of the
24 crime." Pet., at 3. The petition alleges that the omission of victim Deborah Arlene Keal's
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1 date of birth from Lakewood Municipal Court complaint 9L1035 invalidates the current
2 felony charge. Pet., at 4.

3 The Information and amended Information both identify the illegally contacted
4 person, or victim, as Claire Jane Strain; and the Lakewood cause as 11 L000369. CP 1,
5 124. The Complaint for that case is attached to the Petition. Pet., at 14. Ms. Strain's date of
6 birth is listed in that document. The Declaration of Probable Cause in this felony cause
7 likewise names the same Ms. Strain as the victim, and refers to a no contact order in
8 Lakewood case 11 L000369. CP 3. Therefore, the factual allegations are quite clear in this
9 case.
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11 The petitioner cites no legal authority for the proposition that the victim's date of
12 birth must be alleged, as an element or otherwise, for a valid charge of violation of a no-
13 contact order. The identity of the victim is a factual issue. If the petitioner was unclear as
14 to which Claire Strain, or even Deborah Keal, he was alleged to have contacted, he was
15 required to file a bill of particulars in the trial court. He did not. He cannot raise the issue
16 for the first time on appeal or collateral attack. *See Leach, supra.*

17 Under both *Kjorsvik* and *PRP of Cook*, the petitioner must also demonstrate actual
18 prejudice. The petitioner fails to allege any effect, much less actual prejudice that the
19 supposed defects had on his case. He does not meet the required burden.
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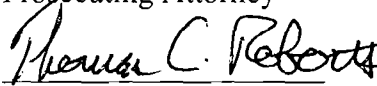
21 D. CONCLUSION:

22 The Information in this case met the constitutional requirements for a charging
23 document. The petitioner fails to demonstrate any legal or factual deficiencies because
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1 there are none. Even if there were factual deficiencies, he waived the issue to by failing to
2 object in the trial court. The State respectfully requests that the Petition be dismissed.

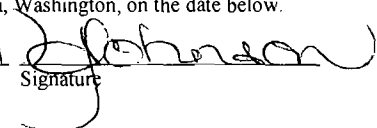
3 DATED: February 11, 2014.

4 MARK LINDQUIST
5 Pierce County
6 Prosecuting Attorney

7 
8 THOMAS C. ROBERTS
9 Deputy Prosecuting Attorney
10 WSB # 17442

11 Certificate of Service:

12 The undersigned certifies that on this day she delivered by U.S. mail or
13 ABC-LMI delivery to the petitioner true and correct copies of the document to
14 which this certificate is attached. This statement is certified to be true and
15 correct under penalty of perjury of the laws of the State of Washington. Signed
16 at Tacoma, Washington, on the date below.

17 
18 Date: 2/11/14 Signature

to Petitioner

PIERCE COUNTY PROSECUTOR

February 11, 2014 - 8:35 AM

Transmittal Letter

Document Uploaded: prp2-439956-Response.pdf

Case Name: In re the PRP of: Ronald Holtz

Court of Appeals Case Number: 43995-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

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