

Case # 327221

**Statement of Additional Grounds
for Review**

State of Washington

v.

Alexander Joseph Como, Jr.

COPY



II. ARGUMENT

Additional Ground 1

Did the State err and abuse its discretion when it established charging information that was "vague as to some of the particulars," such as the date of the offense, when pursuant to CrR 2.1, charging information "shall be a plain, concise and definitive written statement of the essential facts constituting the offense charged"?

When the State established charging information that was "vague as to some of the particulars," it violated CrR 2.1, which states that charging information "shall be a plain, concise and definitive written statement of the essential facts constituting the offense charged", thereby violating the due process rights of the Appellant.

Due process is satisfied when the defendant receives sufficient notice from the State to prepare a defense. State v. Powell, 167 Wn.2d 672, 682, 223 P.3d 493 (2009).

The Appellant did not receive proper due process of law, due to the fact that in the charging document, it states that the Appellant did commit said offense "between October 31, 2013, and December 15, 2013". This particular information is vague as to any particular date when the alleged offense occurred, and time becomes a material element. This shows that the crime was not properly alleged.

[N]o one can be legally convicted of an offense not properly alleged. State v. Ackles, 8 Wash. 462, 464, 36 P. 597 (1894).

Defendants have a right to be apprised with reasonable certainty of the nature of the accusations against them so they may prepare an adequate defense. State v. Grant, 89 Wn.2d 678, 686, 575 P.2d 210 (1978). Without a reasonable certainty of a particular date when the alleged offense occurred, the Appellant could not establish an adequate defense.

Where the information is "vague as to particulars", then the defendant is entitled to a bill of particulars. State v. Maurer, 34 Wn.App. 573, 577-78, 663 P.2d 152 (1983). The function of a bill of particulars is to allow the defense to prepare for trial by providing it with sufficient details about the charge and eliminating surprise. State v. Noltie, 116 Wn.2d 831,845, 809 P.2d 190 (1991).

The test in passing on a bill of particulars should be whether it is necessary that the defendant have the particulars sought in order to prepare the defense and in order that prejudicial surprise will be avoided. A defendant should be given enough information about the offense charged so that he or she may, by the use of diligence, prepare adequately for trial. If the needed information is in the indictment or information, then no bill of particulars is required. State v. Allen, 116 Wn.App. 454, 460, 66 P.3d 653 (2003).

The Appellant could not prepare adequately for trial as no definitive date was provided, impeding the gathering of exonerating evidence or witness testimony, necessary to his defense.

Under the essential elements rule, which was developed to ensure that the constitutional notice guarantee is fulfilled as to the underlying crime, the omission of any element in the charging document is a constitutional defect which may result in the dismissal of the... charge. State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985).

Additional Ground 2

Was the Appellant's Sixth Amendment right to conflict-free representation violated when Richard G. Wernette was assigned to represent him and Richard G. Wernette had presided as judge over a matter in municipal court and found against the Appellant, and when said assigned counsel refused to note the Appellant's objection to his representation

in the record or to remove himself from the case, and when the trial court erred by not initiating an inquiry into conflict of interest when it reasonably should have known that such a conflict existed?

The Sixth Amendment right to counsel includes the right to conflict-free counsel. State v. Davis, 141 Wash.2d 798, 860, 10 P.3d 977 (2000)(citing Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d. 220 (1981)).

When the trial judge appointed Richard G. Wernette (WSBA #15911) as defense attorney for the Appellant, the Appellant's right to conflict-free representation under the Sixth Amendment was violated.

In order to establish any violation of the Sixth Amendment based on a conflict of interest, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

The appointed counsel had, in 2007, presided as judge over a matter in municipal court in which the Appellant and the Appellant's father were both defendants, and while serving in such a capacity, said counsel ruled against the Appellant and his father, resulting in a deferred judgement and sentence for the Appellant. (See Appendix A, B). Said counsel refused to note the Appellant's concerns of conflict of interest or his objection to said counsel's representation within the record, or to remove himself from the case.

The Appellant's right to due process was violated when the requirement of the appearance of fairness called for said counsel to disqualify himself due to the established bias against the Appellant resulting from said counsel's prior judgement against the Appellant.

This bias against the Appellant is evident in the actions taken by said counsel that were prejudicial to both the interests of the Appellant and the administration of justice. Said counsel's conduct in continuing to represent the Appellant even after the issue of conflict of interest was raised is conduct that is prejudicial to the administration of justice and involves misrepresentation, violating RPC 8.4 (c)(d).

The conduct of said counsel resulted in prejudice that had a substantial likelihood of affecting the verdict. The Appellant could not afford to retain his own counsel, and said appointed counsel clearly should have recused himself from the case due to an existing conflict of interest.

When the trial court appointed said counsel, it should have reasonably known that a possibility of conflict of interest existed, resulting from said counsel having served as a municipal court judge. Therefore, the trial court should have initiated an inquiry into such conflict of interest.

To protect a defendant's right to conflict-free counsel, a trial court must initiate an inquiry when it knows or reasonably should know of the possibility of a conflict of interest. Wood v. Georgia, supra, at 272, and n.18, 101 S.Ct., at 1104 and n.18; see also Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988); Cuyler v. Sullivan, 446 U.S. 335, 347, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980).

By the trial court failing to initiate such an inquiry, it failed to protect the Appellant's Sixth Amendment right to conflict-free counsel.

Additional Ground 3

Was the Appellant's right to compulsory process under the Sixth Amendment and Washington State Constitutional Article 1 § 22 violated when assigned counsel refused to interview witnesses necessary to the defense of the Appellant prior to trial or to make note of such witnesses within the record?

A defendant in a criminal matter has the right to compulsory process under the Sixth Amendment and Washington State Constitutional Article 1 § 22. This right to compulsory process includes the right to interview witnesses who are necessary to his defense prior to trial. State v. Burri, 87 Wash.2d 175, 550

P.2d 507 (1976). When this right is violated, it prejudices the defendant and causes him to be unable to properly defend himself at trial.

The assigned counsel for the Appellant was given the names of several witnesses prior to trial who the Appellant wished to have interviewed and subpoenaed to testify at trial. Said witnesses could provide exculpatory testimony and impeach the testimony of the State's witnesses. The assigned counsel refused to interview these witnesses. When two of the said witnesses arrived at the office of the assigned counsel to provide their testimonies, they were turned away and not given the opportunity to give their statements.

In refusing to interview said witnesses, both at the request of the Appellant and upon their attempts to provide their statements directly to said counsel, the appointed counsel for trial violated the Appellant's right under both Sixth Amendment and Washington State Constitutional Article 1 § 22. By violating this right, the Appellant was prejudiced by being denied the opportunity to call forth witnesses who could provide exculpatory testimony and impeach the testimony of the State's witnesses on the behalf of the Appellant, while the State had witnesses called to testify on its behalf, creating a situation of an appearance of unfairness.

In a letter responding to allegations made by the Appellant about such conduct to the Washington State Bar Association, said counsel stated that "the witnesses and evidence that Mr. Como refers to can only attest to his beliefs of the sexual misconduct of the other adult male." This statement was made despite the said counsel not having interviewed any witnesses or examining any evidence that the Appellant requested he interview and examine.

The actions of the Appellant's appointed counsel can, in no way, be construed as valid trial strategy, as the Appellant's Federal and State constitutional rights were violated, and the actions of said counsel served only to prejudice the Appellant. Any time there is a prejudice against a defendant, it does not serve the interests of justice. The conduct of said counsel violated RPC 8.4 (c)(d), and was both improper and prejudicial to the Appellant. The Appellant's claim of prejudice should be reviewed on the merits.

III. CONCLUSION

The issues presented are of a constitutional magnitude, as the Appellant's Federal and State constitutional rights to due process of law and compulsory process were violated, and the crime was not properly alleged.

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5 (a)(3). The Appellant must show actual prejudice in order to establish that the error is "manifest". State v. Munguia, 107 Wash.App. 328, 340, 26 P.3d 1017 (2001) (citing State v. McFarland, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995)), *review denied*, 145 Wash.2d 1023, 41 P.3d 483 (2002).

The Appellant has established that these errors are manifest and affected his constitutional rights, due to the conduct of said appointed counsel and the State that violated his constitutional rights.

The Appellant now moves the Court to do the following:

- 1) Reverse the judgement and dismiss the charges with prejudice, and immediately mandate the release of the Appellant; or
- 2) Reverse the judgement and remand the case for a new trial, with new counsel form outside the Walla Walla Public Defenders Office, to prevent bias and/or prejudice, and order a bill of particulars be established.

Date: 5/27/15

Signature: _____



Appendix A



WALLA WALLA DISTRICT COURT

317 WEST ROSE
WALLA WALLA, WASHINGTON 99362

Judges
Kristian E. Hedine
John O. Knowlton

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Records Prepared by:
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Court Records Coordinator
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May 4, 2015

Record held within Walla Walla District Court
Transferred from College Place Municipal

Defendant: True Name: COMO, ALEXANDER JOSEPH JR
AKA's: COMO, ALEX J.

DOB: 09 03 1987

64302 CPP CN CPM 08/20/07 MARIHUANA POSS LESS/EQUAL 40 Dismissed/Closed
08/20/07 USE/DELIVER DRUG PARAPHERNALI Dismissed/Closed

Please see attached court docket.

I hereby certify that this is a true and correct
copy of the original on file at Walla Walla District Court.

Date 5/4/15 
Clerk

* only docket info available
due to age of case.

DD7020SX KCC
05/04/2015 2:35 PM

COLLEGE PLACE MUNICIPAL COURT
D O C K E T

CASE: 64302 CPP
Criminal Non-Traffic
Agency No.

DEFENDANT
COMO, ALEX J.

AKA true name COMO, ALEXANDER JOSEPH JR

OFFICER
00404 CPP MAIDMENT, ROGER

CHARGES

Violation Date:		DV Plea	Finding
1 69.50.4014	MARIHUANA POSS LESS/EQUAL N		Dismissed
2 69.50.412	USE/DELIVER DRUG PARAPHER N		Dismissed

TEXT

S 08/21/2007 Case Filed on 08/21/2007 ALS
DEF 1 COMO, ALEX J. Added as Participant
OFF 1 MAIDMENT, ROGER Added as Participant
ARR Set for 09/13/2007 04:30 PM
in Room 1 with Judge RGW
08/24/2007 PCN added to case
09/04/2007 Notice Issued for ARR on 09/13/2007 04:30 PM
09/13/2007 ATY 1 BARRETT, JAMES EDWARD Added as Participant
ARR Set for 09/27/2007 04:30 PM
in Room 1 with Judge RGW
ARR: Held
09/18/2007 Notice Issued for ARR on 09/27/2007 04:30 PM
U 09/20/2007 NOTICE OF APPEARANCE AND PLEA OF NOT GUILTY FILED BY
MR. BARRETT
S NJT Set for 10/11/2007 06:00 PM
in Room 1 with Judge RGW
ARR on 09/27/2007 04:30 PM
in Room 1 with Judge RGW Canceled
10/02/2007 Notice Issued for NJT on 10/11/2007 06:00 PM
10/15/2007 NJT Set for 11/08/2007 06:00 PM LKL
in Room 1 with Judge RGW
10/31/2007 Notice Issued for NJT on 11/08/2007 06:00 PM
11/08/2007 NJT: Held
11/13/2007 NJT Set for 11/29/2007 06:00 PM
in Room 1 with Judge RGW
11/14/2007 ATY 2 SLACK, C DALE Added as Participant
ATY 1 BARRETT, JAMES EDWARD Removed
11/19/2007 Notice Issued for NJT on 11/29/2007 06:00 PM
11/28/2007 NJT Rescheduled to 12/13/2007 06:00 PM
in Room 1 with Judge RGW
12/05/2007 Notice Issued for NJT on 12/13/2007 06:00 PM
12/17/2007 NJT Set for 01/24/2008 06:00 PM
in Room 1 with Judge RGW
12/20/2007 ATY 2 SLACK, C DALE Removed
ATY 3 METRO, JOHN GARY Added as Participant
01/02/2008 Notice Issued for NJT on 01/24/2008 06:00 PM
S 01/24/2008 NJT on 01/24/2008 06:00 PM LKL
in Room 1 with Judge RGW Canceled
PTR Set for 02/28/2008 05:45 PM
in Room 1 with Judge RGW
JTR Set for 03/05/2008 09:00 AM

in Room 1 with Judge RGW
 02/20/2008 Notice Issued for PTR on 02/28/2008 05:45 PM
 Notice Issued for JTR on 03/05/2008 09:00 AM
 02/28/2008 PTR: Held
 03/03/2008 JTR on 03/05/2008 09:00 AM
 in Room 1 with Judge RGW Canceled
 NJT Set for 03/13/2008 06:00 PM
 in Room 1 with Judge RGW
 03/04/2008 Notice Issued for NJT on 03/13/2008 06:00 PM
 03/13/2008 Charge 1 Other Deferral : Other Pros Rsn
 Case Heard Before Judge WERNETTE, RICHARD G
 Judge Commissioner WERNETTE, RICHARD G Imposed Sentence
 Total Imposed on Charge 1: 0.00
 with 0.00 Suspended
 And 150.00 Other Amount Ordered
 No Criminal Violations : 23 M
 NCR Review Set for 02/28/2010
 Pay Fine : 23 M
 No Alcohol/Drug Related Vios : 23 M
 NDV Review Set for 02/28/2010
 03/17/2008 Accounts Receivable Created 150.00
 REV NN Set for 10/09/2008 03:30 PM
 in Room 1 with Judge RGW
 Case Scheduled on Time Pay Agreement 1 for: 150.00
 03/27/2008 8087100122 Time Payment Received 25.00 LRN
 04/29/2008 8119100056 Time Payment Received 100.00 SRD
 8119100058 Time Payment Received 25.00
 Case Paid in Full and Removed from Time Pay
 10/06/2008 REV NN Rescheduled to 06/25/2009 03:30 PM LKL
 in Room 1 with Judge RGW
 06/22/2009 REV NN Rescheduled to 11/05/2009 03:30 PM
 in Room 1 with Judge RGW
 10/27/2009 REV NN Rescheduled to 02/25/2010 03:30 PM
 in Room 1 with Judge RGW
 02/25/2010 REV NN: Held
 03/09/2010 Charge 1 Dismissed : Oth Defrl Compl
 Defendant Complied with No Criminal Violations
 Defendant Complied with Pay Fine
 Defendant Complied with No Alcohol/Drug Related Vios
 Charge 2 Dismissed : Oth Defrl Compl
 Case Heard Before Judge WERNETTE, RICHARD G
 Case Disposition of CL Entered

U

ACCOUNTING SUMMARY

	Total Due	Paid	Credit	Balance
Timepay: N	150.00	150.00		

ADDITIONAL CASE DATA

Case Disposition
 Disposition: Closed Date: 03/09/2010

Parties
 Attorney METRO, JOHN GARY

Hearing Summary

Held	ARRAIGNMENTS	ON 09/13/2007 AT 04:30 PM IN ROOM 1	WITH RGW
Schedule	BENCH TRIALS	ON 10/11/2007 AT 06:00 PM IN ROOM 1	WITH RGW
Held	BENCH TRIALS	ON 11/08/2007 AT 06:00 PM IN ROOM 1	WITH RGW
Schedule	BENCH TRIALS	ON 12/13/2007 AT 06:00 PM IN ROOM 1	WITH RGW
Held	PRE-TRIAL HEARING	ON 02/28/2008 AT 05:45 PM IN ROOM 1	WITH RGW
Schedule	BENCH TRIALS	ON 03/13/2008 AT 06:00 PM IN ROOM 1	WITH RGW
Held	DEFERRED CASE REVIEW	ON 02/25/2010 AT 03:30 PM IN ROOM 1	WITH RGW

End of docket report for this case

Appendix B

GENERAL AFFIDAVIT

STATE OF WASHINGTON)
)
COUNTY OF FRANKLIN) ss.

Before the undersigned, an officer duly commissioned by the laws of the State of Washington, on this 18 day of February, 2015, personally appeared

(Print name) Alexander J. Como Jr. who having been duly sworn depose and say:

1. My attorney, in case no. 13-1-00217-2 was Richard G. Wernette, of McAdams, Ponti, Wernette & Van Dorn, P.S.
2. In the City of College Place, WA, during 2007, Mr. Wernette presided over a case of Possession of Paraphernalia and Possession of Marijuana under 40 grams, in which I was the Defendant, and in which he decided against me.
3. In case no. 13-1-00217-2, Mr. Wernette did not make any issue of this, raised no objections, nor asked to be removed from the case as my appointed defense counsel, despite my having an issue of his representation of me.

Alex J. Como Jr. 2-18-15
Signature Date

Sworn and subscribed to before me this 18th day of FEBRUARY, 2015.



Mike Zwicky
Notary Public for the state of Washington
Residing in Connell, WA
Commission expires April 30 2018

