

No. 68055-2-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, RESPONDENT,

v.

TIMOTHY LI-GEMINI FERGUSON, APPELLANT

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BRIEF OF APPELLANT

Andrew Subin
WSBA No. 21436
Attorney for Appellant
114 W. Magnolia St., No. 409
Bellingham, WA 98225
(360) 734-6677

TABLE OF CONTENTS

Table of Contents	i, ii
Table of Authorities	iii, iv
I. ASSIGNMENTS OF ERROR	1
No. 1	1
No. 2	1
No. 3	1
No. 4	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
No. 1	1
No. 2	1
No. 3	2
No. 4	2
No. 5	2
II. STATEMENT OF THE CASE	2
III. ARGUMENT	9
A. The trial court erred by denying Ferguson’s motion to suppress evidence seized by police following the unlawful seizure of Ferguson’s vehicle.	9
B. The trial court erred by denying defendant’s motion to suppress evidence obtained from his cell phones, because the warrant application was not	

properly recorded or otherwise preserved for review.	14
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.	17
D. The trial court erred by sentencing Mr. Ferguson for a crime with which he was never charged.	22
IV. CONCLUSION	24

TABLE OF AUTHORITIES

Table of Cases

<i>In re Pers. Restraint of Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011)	23
<i>In re Pers. Restraint of Thompson</i> , 141 Wn.2d 712, 10 P.3d 380 (2000)	23
<i>In re Pers. Restraint of Stoudmire</i> , 141 Wn.2d 342, 5 P.3d 1240 (2000)	23
<i>State v. Singleton</i> , 9 Wn. App. 327, 511 P.2d 1396 (1973)	9
<i>State v. Barajas</i> , 57 Wn. App. 556, 789 P.2d 321 (1990)	10
<i>State v. Greenway</i> , 15 Wn. App. 216, 547 P.2d 1231 (1976)	10
<i>State v. Hardman</i> , 17 Wn. App. 910, 567 P.2d 238 (1977)	10
<i>State v. Roberts</i> , 158 Wn. App. 174, 240 P.3d 1198 (2010)	10
<i>State v. Huff</i> , 64 Wn. App. 641, 826 P.2d 698 (1992)	11, 12
<i>State v. Hockaday</i> , 144 Wn. App. 918, 184 P.3d 1273 (2008)	18-19, 21
<i>State v. Haner</i> , 95 Wn.2d 858, 631 P.2d 381 (1981)	18
<i>State v. Carr</i> , 97 Wn.2d 436, 645 P.2d 1098 (1982)	18

<i>State v. Lutman</i> , 26 Wn. App. 766, 614 P.2d 224 (1980)	18
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	19
<i>State v. Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992)	19
<i>State v. Pelkey</i> , 109 Wn.2d 484, 745 P.2d 854 (1987)	18,19, 21

Constitutional Provisions

Washington Constitution, Article I, section 22	18
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Statutes

RCW 46.55.113	9-12
RCW 69.50.401	7-9, 17, 22
RCW 69.50.402	7-9, 17, 22
RCW 9A.72.085	15

Regulations and Rules

CrR 2.1	18
CrR 2.3	2, 14, 15, 16
CrR 3.6	16

I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying defendant's motion to suppress evidence obtained from defendant's vehicle after the vehicle was unlawfully seized and impounded.

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

3. The trial court erred by allowing the state to amend the information after both sides had rested their case.

4. The trial court erred by sentencing the defendant on a count with which he was neither charged nor convicted.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where defendant is arrested and released, do police have authority to seize and impound the defendant's vehicle for over 15 hours in order to obtain a search warrant? (Assignment of Error No. 1)

2. When the recording of a search warrant application is unintelligible, does the trial court err by finding that because the warrant had been issued, the magistrate must have found probable cause, and therefore the warrant is valid? (Assignment of Error No. 2)

3. When the state and the Superior Court fail to properly preserve the record of a search warrant application, in violation of CrR 2.3 (c), must the evidence obtained pursuant to that warrant be suppressed? (Assignment of Error No. 2)

4. Did the trial court err by allowing the state to amend the Information to change the statute the defendant is alleged to have violated, and allege violation of a different statute, after both sides had rested and the case had been submitted to the trier of fact? (Assignment of Error No. 3)

5. Did the trial court err by entering a judgment of guilt and imposing a sentence for a crime that was not charged in the Information? (Assignment of Error No. 4)

II. STATEMENT OF THE CASE

On November 28 2010, at approximately 10:18 pm, Officer Lipson of the Western Washington University Police Department stopped a white Mitsubishi Eclipse because of equipment violations: the officer could not see a front license plate, and the vehicle appeared to have a modified exhaust system. Verbatim Report of Proceedings (hereafter “RP”) 14-16.¹

¹ In fact, the vehicle did have a front license plate, which may have been properly attached and displayed. RP 29-30. The state did not introduce any evidence showing that the exhaust system on Mr. Ferguson’s vehicle had actually been modified. Officer

Officer Lipson approached and contacted the car's only occupant: the driver, subsequently identified as Appellant, Tim Ferguson. RP 18.

Through Ferguson's open window, Officer Lipson could smell "the odor of un-burnt marijuana" coming from within the car. RP 18.

Ferguson denied having any marijuana in the car. RP 21.

Based solely on the alleged odor of un-burnt marijuana coming from the car, Officer Lipson placed Ferguson under arrest for possession of marijuana. Officer Lipson placed Ferguson in handcuffs, and seated him in the back of a patrol car. RP 20, 35. Ferguson invoked his *Miranda* rights, and denied consent to search the car. RP 36.

Officer Lipson requested assistance from a K-9 unit trained in the detection of illegal narcotics. RP 21. Although he has no training or experience as a K-9 drug detection dog handler, RP 21, Officer Lipson was permitted (over objection) to testify that the dog's behavior indicated the presence of marijuana inside the vehicle. RP 23.

When the dog's alleged "alert" indicated the presence of drugs within the vehicle, Officer Lipson decided to issue Mr. Ferguson a notice of infraction for the obscured front license plate and to release him pending further investigation. RP 23-24. Officer Lipson seized and

Lipson testified that he could tell from the sound of the car driving by that the exhaust had been improperly modified. RP 31.

and had it towed to the Western Washington University Police Department impound lot. RP 24.

Office Lipson explained his decision to release Mr. Ferguson, but to nonetheless seize Mr. Ferguson's vehicle, as follows:

Well, my reasoning was that there were no exigent circumstances that I knew of and it being at that time at, ah, 11 to 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 that night to do it the next day.

RP 24-25. On cross-examination, Officer Lipson was asked to elaborate:

Q. Why did you release him?

A. Not knowing what the car contained, I wasn't sure what to charge him with had I booked him into jail so I released him pending further investigation.

...

Q. Is there some reason why you chose not to book Mr. Ferguson into jail?

A. I decided to continue the investigation and then book him at a later time.

RP 38-39.

The next day, November 29, 2010, at approximately 3:41 pm, over 15 hours after seizing the car, Officer Lipson applied for a warrant to search the vehicle. In support of his request for a warrant, Officer Lipson reported the following to Commissioner Anthony Parise of Whatcom District Court:

- He had stopped a White Mitsubishi for “equipment violations.”
- When he contacted the driver, he smelled the odor of un-burnt marijuana.
- He arrested the driver, Mr. Ferguson, based on this odor.
- Ferguson did not make any statements and did not consent to a search of the car.
- The K-9 unit arrived and “alerted” to the car.
- Officer Lipson was trained and experienced in identifying the odor of marijuana.
- Officer Lipson could not offer any information about the K-9’s training or experience.

Clerk’s Papers (hereafter “CP”) at 64-67. The warrant was issued at 3:20 pm on November 29, 2011 and executed shortly thereafter. RP 25.

Officer Lipson searched the car pursuant to the warrant. During his search of the vehicle, Officer Lipson discovered what appeared to be marijuana and a white powder that appeared to be either cocaine or methamphetamine. RP 26, 45-46. He also discovered two cell phones.

Officer Lipson applied for an additional warrant to search the cell phones. RP 26. Officer Lipson prepared a written search warrant application, including a written affidavit in support of search warrant.

However, the affidavit was missing the second page and was therefore undated, unsigned, and invalid. RP 4.

Because the written search warrant affidavit was defective, the state elected to rely on an audio-cassette tape recording of the warrant application to establish a factual record for how and why the warrant to search the cell phones was issued. RP 4. However, although the application for the warrant to search the cell phones warrant was tape-recorded, critical portions of the recording were unintelligible, including the magistrate's (Judge Uhrig's) ultimate determination that probable cause had been established. RP 9.

Despite the unintelligible portions of the tape, the trial court refused to suppress the evidence obtained from Ferguson's cell phones. In denying the motion to suppress, the court stated

I could probably provide a precise answer as to what was said if I had the original, but I don't think it's significant. The inflection in my voice, it seemed to be a declarative statement, not a question. My voice was not intoned as a question. Even if it were, ah, I signed the warrant and I think that's the issue. . . . If I had additional questions, if I thought there were not probable cause, I would not have signed the warrant. If I had a question that was unanswered, ah, then I would not have signed the warrant.

RP 11.

Mr. Ferguson moved to suppress the evidence seized during execution of the search warrant to search the car, arguing that the vehicle

had been unlawfully seized or impounded on the night of November 28, 2011, following Mr. Ferguson's release, and that the affidavit in support of the search warrant failed to establish probable cause. See generally, CP 53-67.

Mr. Ferguson also moved to suppress evidence obtained from the cell phones because the warrant application was not properly recorded. See generally, CP 47-52. Both motions to suppress were denied, CP 27-31, and the case proceeded to trial. The trial court entered Findings of Fact and Conclusions of Law reflecting these rulings. CP 27-31.

Mr. Ferguson waived jury, and both parties agreed to a trial on stipulated facts. CP 38-39. After submitting the case on stipulated facts, both sides rested. RP 72.

Mr. Ferguson argued for a verdict of acquittal on Count II because although the language in the First Amended Information includes the word "cocaine," the RCW section referenced in the First Amended Information refers to the section prohibiting possession of methamphetamine.²

² Count II of the First Amended Information read as follows:

UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, TO-WIT COCAINE, COUNT II
That on or about the 28th day of November, 2011, the said defendant, TIMOTHY LI-GEMINI FERGUSON, then and there being in said county and state, did possess said substance, to wit: cocaine, in violation of RCW 69.50.401(2)(b), which violation is a Drug Class B Felony

Ferguson also pointed out that Count III explicitly referenced “methamphetamine.” RP 79-80.

Despite the fact that both sides had already rested, the state moved to amend Count II of the First Amended Information so that it would cite to the cocaine statute: RCW 69.50.402(a), rather than the methamphetamine statute. RP 76. Ferguson objected, arguing that the amendment was untimely because both sides had rested and the State had already presented its closing argument. RP 77-78. Allowing the amendment of the information, that court ruled

The First Amended Information did contain what appeared to be a scrivener’s error; the wrong statutory citation or the heading of count two was indeed amended. It is appropriate; it is within the rules to allow amendment at this time. There is no prejudice to the presentation of the defense such as scrivener’s error.

RP 79. After the Information was amended, the court found Mr. Ferguson guilty of count II, in violation of RCW 69.50.402(a). CP 35.³

The case proceeded to sentencing on November 29, 2011. Despite the amendment of the Information at trial to charge a violation of RCW

CP 72. The information used the word “cocaine” but the statutory reference, RCW 69.50.401(2)(b), was to the statute prohibiting possession of methamphetamine.

³ Count I of the First Amended Information charged Mr. Ferguson with possession of marijuana with intent to deliver. CP 72. The trial court found him not guilty of this charge. RP 79. Count III of the Information also explicitly alleged a methamphetamine charge. CP 72. The State withdrew this charge at the close of the case. CP 35, RP 80. Counts I and III are therefore not part of this appeal.

69.50.402(a), RP 79, the court entered a judgment of guilty which contained the same ambiguities as the First Amended Information: the Judgment and Sentence purports to be a conviction for unlawful possession of “cocaine,” but refers to the unlawful possession of methamphetamine statute: RCW 60.50.401(2)(b). CP 17.

The court imposed a sentence of 20 months, the top of the standard sentencing range for unlawful possession of cocaine. CP 17-26. This appeal timely follows. CP 4-16.

III. ARGUMENT

A. The trial court erred by denying Ferguson’s motion to suppress evidence seized by police following the unlawful seizure of Ferguson’s vehicle.

Officer Lipson arrested Mr. Ferguson for possession of marijuana, but then released Ferguson before impounding and searching his vehicle. Because Mr. Ferguson was not taken into custody, impounding his vehicle was unauthorized by statute. Because the vehicle was held for over 15 hours before the police attempted to procure a search warrant, the seizure was unreasonable. All evidence seized following the unlawful seizure and impound should be suppressed.

An impoundment is lawful if authorized by statute or ordinance. *State v. Singleton*, 9 Wn. App. 327, 331, 511 P.2d 1396 (1973). Under RCW 46.55.113(1) a vehicle is subject to impoundment

whenever a driver is arrested for driving with a suspended license. RCW 46.55.113(2)(d) also authorizes the police to impound a vehicle whenever the driver of a vehicle is arrested and taken into custody. An impoundment must be reasonable in order to satisfy constitutional requirements. *State v. Barajas*, 57 Wn. App. 556, 561, 789 P.2d 321 (1990). Whether a particular impoundment is reasonable is determined based on the facts of each case. *State v. Greenway*, 15 Wn. App. 216, 219, 547 P.2d 1231 (1976). If available, the police must also consider reasonable alternatives to impoundment. *State v. Hardman*, 17 Wn. App. 910, 912, 567 P.2d 238 (1977).

State v. Roberts, 158 Wn. App. 174, 184, 240 P.3d 1198 (2010).

RCW 46.55.113(2) sets forth the situations where a police officer is entitled to impound a driver's car. The statute authorizes impoundment in 9 situations, none of which are applicable to the present case except subsection (2)(d), which reads as follows:

(2) In addition, a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances . . .

(d) Whenever the driver of a vehicle is arrested **and taken into custody**.

RCW 46.55.113(2)(d)(emphasis added).

In the instant case, the driver (Mr. Ferguson) was briefly arrested, but he was never taken into custody. Rather, he was released prior to the impoundment of vehicle. Because Mr. Ferguson was not taken into custody, RCW 46.55.113(2)(d) did not authorize Officer Lipson to impound Mr. Ferguson's vehicle. Nor did any of the other subsections of the statute

authorize Officer Lipson to impound Mr. Ferguson's vehicle. The impoundment of Mr. Ferguson's vehicle lacked statutory or other authorization and was, therefore, unlawful.

The trial court ruled that the impoundment statute, RCW 46.55.113, was irrelevant, and that the seizure of Ferguson's vehicle was "reasonable" and authorized by *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698(1992). Denying the motion to suppress, the court ruled

Clearly under the authority of *State versus Huff*, this was an appropriate seizure. . . . Getting back to the quote of *Huff* that I started earlier, and it is page 653 of Washington Appeals, if an officer has probable cause to believe that a car contains contraband or evidence of a crime, he or she may seize and hold the car for the time reasonably needed to obtain the search warrant and conduct the subsequent search. That is what happened in this case.

RP 60. This ruling was memorialized in a written conclusion of law. CP 30. The trial court's reliance on *State v. Huff* is misplaced. *Huff* is distinguishable from the instant case in two significant ways.

First, in *Huff*, the defendant was arrested and taken into custody and his vehicle was impounded. *Huff*, 64 Wn. App. at 644. This scenario is explicitly authorized by the impound statute discussed above, RCW 46.55.113, which specifically allows an officer to impound a vehicle after the driver is arrested and taken into custody. See RCW 46.55.113(2)(d). In the instant case, by contrast, Mr. Ferguson was

briefly arrested and then released. He was not taken into custody. After he was released, his car was impounded. Impounding a driver's vehicle, without taking him into custody, is not authorized by RCW 46.55.113, or any other statute.

Second, *Huff* is distinguishable because of the length of the seizure / impound of the vehicle. Although the *Huff* decision did not specifically state how long the driver's car in that case was impounded before a warrant was obtained, it is clear that the seizure and impound of the vehicle was brief, and lasted no longer than necessary for the police to obtain a warrant: "At this point [the officer] decided to obtain a search warrant for the car. Thus, he impounded it and had it towed to the police station, where it was held pending preparation of the documents needed for a search warrant." In *Huff*, the Court went on to find that

when an officer has probable cause to believe that a car contains contraband or evidence of crime, he or she may seize and hold the car for the time reasonably needed to obtain a search warrant and conduct the subsequent search. . . . Cox's seizure of the Lincoln was valid because he had probable cause to search it, and **because he seized it only for the time reasonably needed to obtain a warrant and then search.**

Huff, 64 Wn. App. at 653.

In the instant case, as opposed to *Huff*, Mr. Ferguson's vehicle was seized for an unreasonably long period of time. The trial court found that Officer Lipson seized the vehicle at approximately 11:00 pm on

November 28, 2011. CP 28. He did not apply for a search warrant until 3:20 pm on November 29, 2011. CP 28-29. This delay of over 15 hours was longer than necessary to obtain a search warrant and was therefore unreasonable. The officer was not able to offer a valid explanation for the delay:

Q. And, um, what was your reasoning in not seeking to obtain a warrant right then when the vehicle was on Consolidation Street?

A. Well, my reasoning was that there were no exigent circumstances that I knew of and it being at that time at about, ah, 11 to 11:30 on a Sunday night, I thought, it would be better instead of making the call to get a telephonic search warrant that night to do it the next day.

RP 24-25. Clearly, the officer knew that he could have obtained a warrant within minutes of seizing the vehicle, simply by making a phone call. The State offers no explanation for Officer Lipson's decision to hold the vehicle for 15 hours before applying for a search warrant.

The 15-hour delay between the seizure of the defendant's vehicle and the initial attempt to obtain a warrant renders this seizure unreasonable and distinguishes this case from *State v. Huff*, supra. The trial court's reliance on *Huff* to justify the warrantless impound / seizure of Ferguson's vehicle is erroneous. The trial court's denial of Ferguson's motion to suppress should be reversed.

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

The State elected to rely on a recording of the warrant application process to establish the basis for the warrant. However, the tape of the warrant application process that was presented by the State was unintelligible. Specifically and crucially, the magistrate's questions for the search warrant affiant, the officer's response to these questions, and the court's ultimate conclusion about probable cause could not be heard on the tape recording. RP 11.

The trial court attempted to decipher what was being said on the recording, but was ultimately unable to clearly make out what was being said. Despite the failure to properly record the warrant application, the court went on to find that there must have been probable cause because he signed the warrant:

I signed the warrant and I think that's the issue. . . . If I had additional questions, if I thought there were not probable cause, I would not have signed the warrant. If I had a question that was unanswered, ah, then I would not have signed the warrant.

RP 11. This ruling, upholding the validity of the search warrant despite the absence of a record of the warrant application was erroneous.

CrR 2.3(b) states that before a court can issue a search warrant,

there must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded telephonic statement. The recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by the party if there is a challenge in court. . . . The court shall record a summary of any additional evidence on which it relies.

Despite the fact that he could not make out the words being spoken on the tape, the trial court found that “based on the inflection” in the voices on the tape, he was satisfied that his questions had been answered. RP 11. Ultimately, the trial court relied on the circular logic, finding that there must have been probable cause because he signed the warrant: “I signed the warrant and I think that’s the issue. . . . If I had additional questions, if I thought there were not probable cause, I would not have signed the warrant.” RP 11.

The trial court’s finding on this point renders meaningless the protections of CrR 2.3 and RCW 9A.72.085. The reason that search warrant applications must be recorded, and the record of search warrant applications preserved for review by both trial and appellate courts, is so that people (like Mr. Ferguson in the instant case) can try to determine how and why the search warrant issued and challenge the basis for issuance of that warrant in the trial court and, if necessary, on appeal. If the State and/or the Superior Court fail to properly record and preserve the

search warrant application records for review, defendants (like Mr. Ferguson) are denied any meaningful opportunity to challenge the issuance of search warrants. This is not only in violation of CrR 2.3; it amounts to a fundamental denial of due process.

Judge Uhrig issued the search warrant in this case. Through no fault of Mr. Ferguson, the tape recording of the warrant application was unintelligible and therefore defective. For Judge Uhrig to uphold the warrant that he issued on the basis that “there must have been probable cause or I would not have issued the warrant,” RP 11, effectively precludes any meaningful review of his decision to issue the warrant.⁴ Preservation of the record of warrant applications is required to avoid just this circumstance.

Because the search warrant application here was not properly recorded or otherwise preserved for appellate review, the evidence seized pursuant to the warrant should have been suppressed. Specifically, the evidence obtained from defendant’s cell phones should have been suppressed. The trial court’s failure to do so was error. The trial court’s denial of Ferguson’s motion to suppress evidence obtained from the cell phones was erroneous and should be reversed.

⁴ The absence of a complete recording of the warrant application makes meaningful review impossible in a CrR 3.6 hearing in Superior Court. Even more troubling, the absence of a record of the warrant application will also preclude any meaningful appellate review of the basis for issuing the warrant.

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.

After both parties had rested, Mr. Ferguson moved to dismiss count II, because it charged him with unlawful possession with intent to deliver **methamphetamine**, a violation of RCW 69.50.401(2)(b), rather than unlawful possession with intent to deliver **cocaine**, a violation of RCW 69.50.402(a). The Amended Information purported to change the crime charged to a cocaine offense, which was a Class C felony. See RCW 69.50.401(2)(b). However, the Amended Information charged a violation of the methamphetamine statute, and described the offense as a Class B felony. See CP 71-73.

Describing the discrepancy as a “scrivener’s error,” the Court allowed the state to amend the information to change the referenced statute and the nature of the charge. The court then found Ferguson guilty of possession of cocaine with intent to deliver, a violation of RCW 69.50.401(a), a statute that was nowhere referenced in the First Amended Information. See CP 71-73.

The trial court erred by describing this as “scrivener’s error.” The trial court also erred by allowing the state to amend the information to

charge a different offense after both sides had rested and the case had been submitted to the trier-of-fact.

A trial court's decision to allow the State to amend a charge is generally reviewed for abuse of discretion. *State v. Hockaday*, 144 Wn. App. 918, 924, 184 P.3d 1273 (2008), citing, *State v. Haner*, 95 Wn.2d 858, 864, 631 P.2d 381 (1981). "It is fundamental that an accused must be informed of the charge he is to meet at trial and that he cannot be tried for an offense not charged." *Hockaday*, at 925, citing, *State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); *State v. Lutman*, 26 Wn. App. 766, 767, 614 P.2d 224 (1980).

Generally, a trial court may allow amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Although the court rules permit liberal amendment, this approach is tempered by Article I, Section 22 of the Washington Constitution, which requires that the accused be adequately informed of the charge against which he must defend at trial. *State v. Pelkey*, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987).

In *Pelkey*, our Supreme Court announced one of the constitutional limitations to CrR 2.1(d). Under *Pelkey*, the State cannot amend a charge after it has rested its case in chief unless the amended charge is a lesser-included offense or a lesser degree of the same offense. *Pelkey*, 109

Wn.2d at 491; *see also State v. Vangerpen*, 125 Wn.2d 782, 789-91, 888 P.2d 1177 (1995) (citing *Pelkey*, 109 Wn.2d at 491); *State v. Markle*, 118 Wn.2d 424, 436-37, 823 P.2d 1101 (1992) (quoting *Pelkey*, 109 Wn.2d at 491). The *Pelkey* court held that because such late amendment “necessarily prejudices” a defendant's constitutional right to demand the nature and 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.” *Hockaday*, 144 Wn. App. at 924; citing *Markle*, 118 Wn.2d at 437; *Pelkey*, 109 Wn.2d at 491.

Here the state failed to formally move to amend the information until after it had rested its case. Indeed, the amendment was not proposed until after Ferguson had begun closing argument. Defense counsel clarified that both sides had rested their cases, and that parties were making closing arguments:

[DEFENSE COUNSEL]: I guess procedurally since it wasn't a jury trial but we are giving closing arguments so I assume both sides rested. The evidence is in at this stage of the trial; is that correct?

THE COURT: It was a stipulated trial on the record so we are having closing arguments now.

[DEFENSE COUNSEL]: Okay. Thank you, Your Honor.

RP 72. The state did not object to this, and by remaining silent appeared

to agree that both sides had rested and that the parties were now offering closing arguments.

When Ferguson argued for acquittal because he had been charged with possession of methamphetamine rather than possession of cocaine, the state moved to amend the information despite the fact that both sides had already rested their respective cases:

[PROSECUTOR]: The State would move, since it has not been, the decision has not been rendered, we move to amend the Information to conform to the proof within the rules and move to amend it so it would read that 69.54.02(a) [sic] which is, contains the, would apply to cocaine and heroin, we believe such an amendment is within the rules and all the proof is, that has been submitted is that it supported the charge of cocaine and that the defendant was not prejudiced.

RP 76. Ferguson promptly and appropriately objected to the untimely amendment:

[DEFENSE COUNSEL]: We object to any further amendment of the Information after that State has rested its case and delivered the closing argument. I don't think it's timely at this point.

RP 77-78. The court, finding it "within the rules to allow amendment at this time," RP 78; allowed the amendment and found Ferguson guilty.

The trial court's decision on this point was erroneous.

Because the State moved to amend the information after it rested its case, prejudice to Mr. Ferguson is presumed. Because such late

amendment **necessarily prejudices** a defendant's constitutional right to demand the nature and 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.” *Hockaday*, 144 Wn.2d at 926, citing, *Markle*, 118 Wn.2d at 437 (emphasis omitted).

The trial court erred by describing this a “scrivener’s error.” The First Amended Information contained written references to “cocaine” and to “methamphetamine,” and cited RCW sections prohibiting unlawful possession of methamphetamine. See, CP 72 (Count II using the word “cocaine” but referencing the methamphetamine statute; Count III charging that Ferguson had unlawfully used his vehicle to sell both “marijuana” and “methamphetamine.” When defense counsel argued that the improper inclusion of the word “methamphetamine” could hardly be described as a “scrivener’s error,” the State moved to dismiss that charge. RP 79-80. The trial court erred by describing the reference to the methamphetamine statute in Count II as a “scrivener’s error.”

The trial court here allowed the State to amend the information after the State had rested its case. This court should reverse Ferguson’s conviction to correct this per se reversible error.

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

After both parties had rested, the Court allowed the state to amend the information to charge possession with intent to deliver cocaine, a violation of RCW 69.50.401(a); rather than possession with intent to deliver methamphetamine, a violation of RCW 69.50.401(2)(b). The court then found Ferguson guilty of possession of cocaine with intent to deliver, as charged after amendment, a violation of RCW 69.50.401(a).

When the case proceeded to sentencing however, the court entered a conviction for a violation of RCW 69.50.401(2)(b), possession with intent to deliver methamphetamine. CP 17. Furthermore, although Ferguson was apparently convicted of unlawful possession of cocaine, a Class C felony, he was sentenced under the methamphetamine statute, and the Judgment and Sentence erroneously describes the offense as a Class B felony. By sentencing defendant under RCW 69.50.401(2)(b), a crime with which the defendant was not charged, the trial court exceeded its authority.

It is axiomatic that a trial court may not impose a sentence for a crime with which the defendant was not charged. Indeed, in such situations, the judgment and sentence is invalid – regardless of prejudice to the defendant: “Where the court exceeded its authority by sentencing

for a crime that did not exist or for which the defendant was never charged, the prejudice has been so obvious that extensive (or sometimes any) discussion of prejudice was unnecessary.” *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 142, 267 P.3d 324 (2011), citing *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000); *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 5 P.3d 1240 (2000).

That the relevant court findings (i.e., the defendant was guilty of possession of cocaine (CP 35)) do not match the sentence imposed (the Judgment and Sentence says “cocaine” but refers RCW 69.50.401(2)(b), the statute prohibiting possession of methamphetamine (CP 17)) is apparent on the face of the judgment and sentence. Accordingly, the judgment and sentence “without further elaboration evidences infirmities.” *In re Pers. Restraint of Thompson*, 141 Wn.2d at 718 (2000).

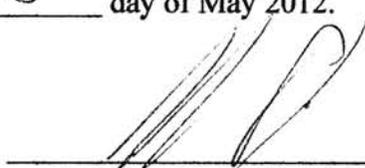
Part of the problem in this case is the way it was handled procedurally. The trial court (improperly) granted the State’s post-trial motion to amend the information. However, **no amended information was ever filed**. This led to the apparent confusion about what crime the court found Mr. Ferguson guilty of. The resulting Judgment and Sentence states a conviction for possession of cocaine, but erroneously lists the methamphetamine statute and describes the offense as a Class B felony. Because of these “infirmities” in the Judgment and Sentence, Mr.

Ferguson's conviction should be reversed.

IV. CONCLUSION

Evidence seized following the unlawful and unreasonable seizure of Mr. Ferguson's vehicle should have been suppressed. Evidence obtained from Mr. Ferguson's cell phones should have been suppressed because the search warrant application was not properly preserved for review. Mr. Ferguson's conviction should be reversed because the court committed per se reversible error by allowing the State to amend the Information after the State had rested its case. Mr. Ferguson's conviction should be reversed because the judgment and sentence cites to a crime with which Mr. Ferguson was not charged. For the foregoing reasons, Mr. Ferguson's conviction should be reversed and the case against him should be dismissed.

Respectfully submitted this 5 day of May 2012.



Andrew Subin, WSBA No. 21436
Attorney for Appellant
114 W. Magnolia St., No. 409
Bellingham, WA 98225
(360) 734-6677

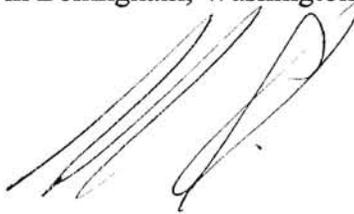
PROOF OF SERVICE

I, Andrew Subin, attorney for appellant, hereby declare, under penalty of perjury, that on May 3, 2012, I personally delivered a copy of the Brief of Appellant to the following parties:

Craig Chambers
Whatcom County Prosecuting Attorney's Office
311 Grand Ave.
Bellingham, WA 98225

Timothy Ferguson
Appellant
c/o Whatcom County Jail
311 Grand Ave.
Bellingham, WA 98225

Signed in Bellingham, Washington this 3rd day of May, 2012.



Andrew Subin, WSBA No. 21436