

NO. 35189-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

CARL W. VANCE,

Appellant

FILED
COURT OF APPEALS
DIVISION II
07 FEB -6 PM 2:01
STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Daniel J. Berschauer, Judge
Cause No. 03-1-00783-1

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
PATRICIA A. PETHICK, WSBA 21324
Attorneys for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

P.M. 2-5-2007

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| A. ASSIGNMENTS OF ERROR..... | 1 |
| B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... | 1 |
| C. STATEMENT OF THE CASE..... | 2 |
| D. ARGUMENT..... | 3 |
| 01. A CONVICTION FOR VIOLATION OF SEX OFFENDER REGISTRATION PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ELEMENTS OF THE OFFENSE MUST BE REVERSED AND DISMISSED | 3 |
| 02. IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY ON UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME OF VIOLATION OF SEX OFFENDER REGISTRATION | 7 |
| 03. GIBSON WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO OR BY ASSENTING TO THE COURT’S INSTRUCTIONS 5 AND 8 ON THE GROUND THAT THE INSTRUCTIONS INCLUDED UNCHARGED ALTERNATIVE MEANS OF COMMITTING VIOLATION OF SEX OFFENDER REGISTRATION..... | 10 |
| 04. THE SENTENCE IN THIS CASE SHOULD HAVE BEEN CONCURRENT TO THE SENTENCE IN ANOTHER CASE IMPOSED ON THE SAME DAY AT THE SAME SENTENCING HEARING | 12 |

E. CONCLUSION..... 14

TABLE OF AUTHORITIES

| | <u>Page(s)</u> |
|--|----------------|
| <u>Washington Cases</u> | |
| <u>Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992)..... | 5 |
| <u>State ex rel. Royal v. Board of Yakima City Comm’rs</u> , 123 Wn.2d 451, 869 P.2d 56 (1994) | 13 |
| <u>State v. Bray</u> , 52 Wn. App. 30, 756 P.2d 1332 (1998)..... | 9 |
| <u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997)..... | 7 |
| <u>State v. Carothers</u> , 84 Wn.2d 256, 525 P.2d 731 (1974) | 7, 8 |
| <u>State v. Chino</u> , 117 Wn. App. 531, 72 P.3d 256 (2003) | 8 |
| <u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996) | 9, 11 |
| <u>State v. Early</u> , 70 Wn. App. 452, 4853 P.2d 964 (1993), <u>review denied</u> , 123 Wn.2d 1004 (1994) | 10 |
| <u>State v. Fesser</u> , 23 Wn. App. 422, 595 P.2d 955 (1979)..... | 8 |
| <u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 116 S. Ct. 131 (1995)..... | 11 |
| <u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969) | 10 |
| <u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995) | 10 |
| <u>State v. Hanna</u> , 123 Wn.2d 704, 871 P.2d 135 (1994) | 8 |
| <u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990)..... | 11 |
| <u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992)..... | 4 |
| <u>State v. Irizarry</u> , 111 Wn.2d 591, 763 P.2d 432 (1988)..... | 7 |

State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991) 6

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991)..... 4, 5, 6, 7

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989)..... 4

State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd,
111 Wn.2d 66, 758 P.2d 982 (1988) 11, 12

State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000)..... 6

State v. Royse, 66 Wn.2d 552, 403 P.2d 838 (1965)..... 4

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988) 8

State v. Severns, 13 Wn.2d 542, 125 P.2d 659 (1942)..... 7, 9

State v. Smith, 74 Wn. App. 844, 875 P.2d 1249 (1994), review denied,
125 Wn.2d 1017 (1995) 13

State v. Tarica, 59 Wn. App. 368, 798 P.2d 296 (1990)..... 11

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995)..... 7

State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972) 10

State v. Williamson, 84 Wn. App. 37, 924 P.2d 960 (1996)..... 7

Federal Cases

In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct.
1068 (1970) 8

Constitution

Sixth Amendment..... 4

Const. art. 1, Section 22 (amend. 10)..... 4

Statutes

RCW 9.94A.525 13
RCW 9.94A.535 13
RCW 9.94A.589 13

Rules

CrR3.5 2
CrR 3.6 2
RAP 2.5(a)(3) 8

Other

2 C. Torcia, Wharton on Criminal Procedure (13th ed. 1990)..... 3, 8

A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking the case from the jury for failure of the information to allege all of the elements of violation of sex offender registration.
02. The trial court erred in instructing the jury on uncharged alternative means of committing the crime of violation of sex offender registration.
03. The trial court erred in permitting Vance to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instructions 5 and 8 on the ground that the instructions included uncharged alternative means of committing violation of sex offender registration.
04. The trial court erred in imposing sentence in the instant case consecutive to the sentence on another case imposed on the same day at the same sentencing hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether a conviction for violation of sex offender registration pursuant to an information that fails to allege all of the elements of the offense must be reversed and dismissed? [Assignment of Error No. 1].
02. Whether it was reversible error to instruct the jury on uncharged alternatives means of committing the crime of violation of sex offender registration? [Assignment of Error No. 2].
03. Whether the trial court erred in permitting Vance to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instructions 5 and

8 on the ground that the instructions included uncharged alternative means of committing violation of sex offender registration? [Assignment of Error No. 3].

04. Whether a criminal defendant's sentence should be concurrent to the sentence in another case imposed on the same day at the same sentencing hearing? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Carl W. Vance (Vance) was charged by First Amended Information filed in Thurston County Superior Court on April 30, 2003, with violation of sex offender registration, contrary to RCW 9A.44.130. [CP 6].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or 3.6 hearing. [CP 12]. Trial to a jury commenced on July 24, 2006, the Honorable Daniel J. Berschauer presiding. Neither objections nor exceptions were raised to the jury instructions. [RP 07/24/06 60].

The jury returned a verdict of guilty as charged, Vance was sentenced to 365 days for the unranked offense and timely notice of this appeal followed. [CP 39, 44, 46, 53].

02. Substantive Facts

On February 19, 2003, the Lacey Police Department sent an envelope to Vance at a Lacey address containing a letter "that

Detective Knight wrote, along with requirements for registered sex offender documents that Mr. Vance was supposed to fill out and send back.” [RP 07/24/06 27-29]. The envelope “was returned by the post office as moved, left no address, unable to forward.” [RP 07/24/06 27]. Exhibits introduced by the State demonstrated that Vance did not live at this address from September through December 2002 [RP 07/24/06 37-38, 40-41], though he had previously registered as a sex offender residing at this address on November 26, 2001. [RP 07/24/06 49]. Since that date, Vance provided no further notices or registrations. [RP 07/24/06 50]. Vance stipulated that he was a sex offender before resting without presenting evidence. [RP 07/24/06 55].

D. ARGUMENT

01. A CONVICTION FOR VIOLATION OF SEX OFFENDER REGISTRATION PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ELEMENTS OF THE OFFENSE MUST BE REVERSED AND DISMISSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the

crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information “will be more liberally construed in favor of validity....” State v. Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

State v. Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts constituting the offense in ordinary and concise language....” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” State v. Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

RCW 9A.44.130(5)(a) provides, in relevant part:

If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send signed written notice of the change of address to the county sheriff within seventy-two hours of moving. If any person required to register pursuant to this section moves to a new county, the person must send written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register with that county sheriff within twenty-four hours of moving. The person must also send signed written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered....

Here, the information charging Vance with this offense did not alleged these elements.

In that the defendant, CARL W. VANCE, in the State of Washington, during the period of

November 1, 2002 through April 21, 2003, having been previously convicted of a sex offense, to-wit: Child Molestation in the First Degree, did knowingly fail to comply with sex offender registration requirements, to-wit: moved from his residence in Thurston County and failed to notify the Thurston County Sheriff's Office as required by law.

[CP 6].

This information failed to apprise Vance of the nature of the charge. It did not allege that he knowingly failed to notify the Thurston County Sheriff's Office within seventy-two hours of moving to an address within the same county or within 10 days of moving to a new address in a new county, though this language did appear in the court's to-convict instruction as elements of the offense of violation of sex offender registration, as well as the court's definitional instruction for the offense. [Court's Instructions 5 and 8; CP 33, 36]. "(S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury instructions](,)" State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000), the information is defective, and the conviction obtained on this charge must be reversed and dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Vance need not show prejudice, since Kjorsvik calls for a review of prejudice only if the "liberal interpretation" upholds

the validity of the information. See State v. Kjorsvik, 117 Wn.2d at 105-06.

02. IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY ON UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME OF VIOLATION OF SEX OFFENDER REGISTRATION.

An accused must be informed of the criminal charge to be met at trial and cannot be tried for an offense that has not been charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Vangerpen, 125 Wn.2d at 787. When a statute provides that a crime may be committed by alternative means, an information may charge one or all of the alternatives. However, when an information charges only one of the alternative means of committing a crime, it is error to instruct the jury that they may consider other alternative means by which the crime may have been committed, regardless of the strength of the evidence admitted at trial. State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996); State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense. See State v. Carothers, 84 Wn.2d 256, 263, 525 P.2d 731 (1974). A defendant cannot be tried for an uncharged offense. State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986). It is error to instruct on an

alternative means not alleged in the information. State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

A claimed manifest error affecting a constitutional right may be raised be raised for the first time on appeal. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). An erroneous instruction which may have affected a criminal defendant's right to a fair trial may be considered for the first time on appeal. State v. Fesser, 23 Wn. App. 422, 423-24, 595 P.2d 955 (1979); See State v. Hanna, 123 Wn.2d 704, 709, 871 P.2d 135 (1994). The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense. See State v. Carothers, 84 Wn.2d at 263.

Moreover, the State may not benefit from any presumption against the defendant in a criminal case. It has the burden of proving beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

In the court's to-convict instruction 8, the jury was instructed on the uncharged alternative means of committing violation of sex offender registration under RCW 9A.44.130(5)(a) by either knowingly failing

to provide written notice to the Thurston County Sheriff within 72 hours of moving to an address within Thurston County, or within 10 days of moving to an address in a new county....
[Emphasis added].

[Court's Instruction 8; CP 36]. As previously noted, the court's definitional instruction for the offense also included reference to the above-uncharged alternative means. [Court's Instruction 5; CP 33].

The charging document, set forth herein, supra at 6, did not alleged either of these alternatives [CP 6], and it was reversible error to try Vance under the uncharged statutory alternatives since it violated his right to notice of the crime charged. See State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996)(citing State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)). The error was prejudicial because the jury could have convicted Vance under either uncharged alternative means, State v. Severns, 13 Wn.2d at 552, with the result that reversal for a new trial is necessary.

//

//

//

03. GIBSON WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO OR BY ASSENTING TO THE COURT'S INSTRUCTIONS 5 AND 8 ON THE GROUND THAT THE INSTRUCTIONS INCLUDED UNCHARGED ALTERNATIVE MEANS OF COMMITTING VIOLATION OF SEX OFFENDER REGISTRATION.¹

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

¹ While it has been argued in preceding section of this brief that instructions that include uncharged alternative means of committing a crime constitute constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. at 188 (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Assuming, arguendo, this court finds that trial counsel waived the issue relating to the court's instructions 5 and 8 previously argued herein by either affirmatively assenting to the instructions or by not objecting to the instructions, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have assented to the court's instructions or failed to object to the instructions or to offer correct instructions. For the reasons set forth in the preceding section of this brief, had counsel done so, the trial court would not have given the instructions at issue.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270

(1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: for the reasons set forth in the preceding section of this brief, but for counsel’s failure to properly object to the instructions or by assenting to the instructions, the trial court would not have given the court’s instructions 5 and 8 and the jury would have been precluded from convicting Vance based on instructions that included uncharged alternative means of committing violation of sex offender registration.

04. THE SENTENCE IN THIS CASE SHOULD HAVE BEEN CONCURRENT TO THE SENTENCE IN ANOTHER CASE IMPOSED ON THE SAME DAY AT THE SAME SENTENCING HEARING.

Sentencing in the instant case, and sentencing under cause number 06-1-00609-1 occurred on the same date at the same sentencing hearing. [RP 08/03/06 469-484]. The sentencing court ordered the sentence in this case to run consecutively to Vance’s sentence under the other cause number. [CP 47; RP 08/03/06 482].

Under the Sentencing Reform Act of 1981 (SRA), a sentencing court has discretion to impose consecutive sentences subject to the following provision:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535....

RCW 9.94A.589(1)(a). The SRA defines other current offenses as “[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed....” RCW 9.94A.525(1).

When the statutory language is plain and unambiguous, the meaning of the wording is derived from the statute. State ex rel. Royal v. Board of Yakima City Comm’rs, 123 Wn.2d 451, 458, 869 P.2d 56 (1994). The plain meaning of RCW 9.94A.525(1) indicates that all convictions sentenced on the same date are “current offenses.” Under RCW 9.94A.589, current offenses are to be served concurrently unless the sentencing court complies with the exceptional sentence provisions of RCW 9.94A.535. In State v. Smith, 74 Wn. App. 844, 853-54, 875 P.2d 1249 (1994), review denied, 125 Wn.2d 1017 (1995), this court held that under the SRA, sentences for multiple convictions entered on the same date cannot be ordered to run consecutively absent a determination that grounds for imposing an exceptional sentence exist, which did not happen

here, with the result that Vance's sentence must be reversed and remanded.

E. CONCLUSION

Based on the above, Vance respectfully requests this court to reverse and dismiss his conviction and/or to remand for resentencing.

DATED this 5th day of February 2007.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

COURT OF APPEALS
DIVISION I

07 FEB -6 PM 2:01

STATE OF WASHINGTON

DEPT. OF JUSTICE


CERTIFICATE

I certify that I mailed a copy of the above brief by depositing same
in the United States Mail, first class postage pre-paid, to the following
people at the addresses indicated:

Jim Powers
Senior Dep Pros Attorney
2000 Lakeridge Drive SW
Olympia, WA 98502

Carl W. Vance #978944
WCC
P.O. Box 900
Shelton, WA 98584

DATED this 5th day of February 2007.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634