

NO. 41535-6-II

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

STATE OF WASHINGTON, Respondent

v.

JOSE LOUIS ANGUIANO-ALCAZAR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01641-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. THE INFORMATION WAS DEFECTIVE IN COUNT 1; COUNT 1 MUST BE REVERSED AND DISMISSED WITHOUT PREJUDICE.
- II. THE INFORMATION WAS NOT DEFICIENT IN COUNT 2; MR. ANGUIANO-ALCAZAR RECEIVED NOTICE THAT THE STATE WAS REQUIRED TO PROVE HE KNEW THE SUBSTANCE HE SOLD FOR PROFIT WAS A CONTROLLED SUBSTANCE.
- III. IT IS UNNECESSARY FOR THIS COURT TO ADDRESS MR. ANGUIANO-ALCAZAR'S THIRD ASSIGNMENT OR ERROR WHERE THE STATE HAS CONCEDED ERROR UNDER MR. ANGUIANO-ALCAZAR'S FIRST ASSIGNMENT OF ERROR.
- IV. MR. ANGUIANO-ALCAZAR'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW DOES NOT CONTAIN ANY REFERENCE TO FACTS WITHIN THE RECORD AND THE STATE THEREFORE CANNOT RESPOND.

B. STATEMENT OF THE CASE

With the exception of Mr. Anguiano-Alcazar's third assignment of error, review of which is unnecessary in light of the State's concession to the first assignment error (see Parts I and III, below), the issues in this appeal solely pertain to the sufficiency of the charging document. The facts are not in dispute and Mr. Anguiano-Alcazar does not suggest that the evidence is insufficient to sustain his convictions. As such, the State accepts the Statement of the Case presented by Appellant.

C. ARGUMENT

I. THE INFORMATION WAS DEFECTIVE IN COUNT I; COUNT I MUST BE REVERSED AND DISMISSED WITHOUT PREJUDICE.

The State concedes that count 1 of the Information is defective because while it purported to charge Mr. Anguiano-Alcazar with delivery of a controlled substance in its title, the charging language alleged that Mr. Anguiano-Alcazar possessed a controlled substance with the intent to deliver. During a pre-trial hearing, defense counsel stated that Mr. Anguiano-Alcazar was charged with possession with the intent to deliver. See RP Vol. 1 at p. 3. At trial, the jury was instructed on the crime of delivery of a controlled substance, not possession of a controlled substance with the intent to deliver. At page 12 of his brief, Mr. Anguiano-Alcazar asserts that the proper remedy is reversal and dismissal of the conviction under count I without prejudice to the State's ability to re-file the charges. The State agrees. See *State v. Vangerpen*, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995).

II. THE INFORMATION WAS NOT DEFICIENT IN COUNT 2;
MR. ANGUIANO-ALCAZAR RECEIVED NOTICE THAT THE
STATE WAS REQUIRED TO PROVE HE KNEW THE
SUBSTANCE HE SOLD FOR PROFIT WAS A CONTROLLED
SUBSTANCE.

The defendant asserts that count 2 of the Information, charging Mr. Anguiano-Alcazar with selling a controlled substance for profit, omitted an essential element of the crime. Count 2 charged Mr. Anguiano-Alcazar as follows:

That he, JOSE LOUIS ANGUIANO-ALCAZAR, in the County of Clark, State of Washington, on or about September 17, 2009, did sell for profit a controlled substance classified in Schedule 1, RCW 69.50.204, to wit: heroin, contrary to Revised Code of Washington 69.50.410 (1), (3)(a).

CP 3. Mr. Anguiano-Alcazar contends first, that knowledge that the substance sold for profit is a controlled substance is an essential non-statutory element of the crime; and second, that the Information failed to put Mr. Anguiano-Alcazar on notice of this element.

The crime of selling a controlled substance for profit is defined by RCW 69.50.410 and occurs where a person sells for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana. Selling means the passing of title and possession of a controlled substance from the seller to the buyer for a price whether or not the price is paid immediately or at a

future date. See RCW 69.50.410(1)(a). "For profit" means the obtaining of anything of value in exchange for a controlled substance. See RCW 69.50.410(1)(b). The statute does not require knowledge that the substance delivered is a controlled substance.

The question of whether the information contained all essential elements of the crime charged may be raised for the first time on appeal. *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989). Charging documents which are challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before or during trial. *State v. Kjorsvik*, 117 Wn.2d 93, 103, 812 P.2d 86 (1991).

Liberal construction balances the defendant's right to notice against the risk of what Professor Wayne R. LaFare termed "sandbagging"—that is, that a defendant might keep quiet about defects in the information only to challenge them after the State has rested and can no longer amend it. When a defendant challenges the information for the first time on appeal, we determine if the elements "appear in any form, or by fair construction can they be found, in the charging document." We read the information as a whole, according to common sense and including facts that are implied, to see if it "reasonably apprise[s] an accused of the elements of the crime charged." If it does, the defendant may prevail only if he can show that the unartful charging language actually prejudiced him.

State v. Nonong, 169 Wn.2d 220, 227, 237 P.3d 250 (2010) (internal citations omitted).

Mr. Anguiano-Alcazar cites no authority which holds that knowledge is a non-statutory element of the crime of selling a controlled substance for profit. This appears to be an issue of first impression. Instead, Mr. Anguiano-Alcazar cites case law pertaining to the crime of delivery of a controlled substance. The Supreme Court has held that knowledge that the substance delivered is a non-statutory element of the crime of delivery of a controlled substance. *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979). The theory behind this non-statutory element is that an innocent person such as a mail carrier would find himself in violation of the statute where he innocently delivered a package that in fact contained a controlled substance and that such a result could not have been intended by the legislature. *State v. Warnick*, 121 Wn.App. 737, 742, 90 P.3d 1105 (2004), citing *Boyer* at 344. A review of the relevant case law, including *Warnick* and *Boyer*, supra, as well as *State v. Hartzog*, 26 Wn.App. 576, 592, 615 P.2d 480 (1980), reversed in part on other grounds at 96 Wn.2d 383, 635 P.2d 694 (1981) and *State v. Hennings*, 3 Wn.App. 483, 475 P.2d 926 (1970) (holding that drug trafficking crimes are malum in se offenses for which knowledge that the substance is a controlled substance is required) strongly suggests that Mr. Anguiano-Alcazar is correct that knowledge is a non-statutory element of selling a controlled substance for profit.

In this case, however, reversal is unnecessary. Mr. Anguiano-Alcazar was placed on notice that the State was required to prove that he knew the substance he sold for profit. In count 1, Mr. Anguiano-Alcazar was placed on notice that the State intended to prove that he: "In the County of Clark, State of Washington, on or about September 17, 2009, did *knowingly* possess a controlled substance with intent to deliver, to wit: Heroin, contrary to Revised Code of Washington 69.50.401(1), (2)(a)." This Court must review the charging document as a whole. *State v. Nonong*, 169 Wn.2d at 226. "When a defendant challenges the information for the first time on appeal, we determine if the elements 'appear in any form, or by fair construction can they be found, in the charging document.'" *Nonong* at 227; citing *Kjorsvik* at 105. In *Nonong*, the defendant argued that where the information charging him with interfering with the reporting of a crime of domestic violence failed to allege, in the charging language for that particular count, what the crime of domestic violence was, the information omitted an essential element of the crime. *Nonong* at 223. The Supreme Court acknowledged that "*Kjorsvik* and some later cases considered only the count charging the crime at issue" in multi-count information cases. *Nonong* at 254, citing *State v. Davis*, 119 Wn.2d 657, 662, 835 P.2d 1039 (1992); *State v. Hopper*, 118 Wn.2d 151, 154, 822 P.2d 775 (1992). The Court went on to reject that approach,

citing *State v. Valdobinos*, 122 Wn.2d 270, 286, 858 P.2d 199 (1993).

Valdobinos is on point in this case. In *Valdobinos*, the Supreme Court held that counts in an information charging intent to deliver and conspiracy to deliver a controlled substance reasonably apprised the defendant of the non-statutory knowledge element of an unlawful delivery charge in another count. *Valdobinos* at 286. The *Nonong* Court said:

Valdobinos makes clear that, although the specific count at issue must charge all of the elements of the crime, we may consider the whole information when liberally construing the count to see if it reasonably apprises an accused of the elements of the crime charged.

Nonong at 228. The *Nonong* Court ultimately held that the defendant in that case was reasonably apprised of the elements of the crime because the charging document as a whole notified him of the crimes of domestic violence he was alleged to have interfered with the reporting of (to wit: residential burglary and violation of a no contact order). *Nonong* at 229.

Just as in *Nonong* and *Valdobinos*, Mr. Anguiano-Alcazar was reasonably apprised in the information that the State bore burden of proving that he knew the substance he delivered and sold for profit was a controlled substance. The State's concession that count 1 of the charging document was defective in that its caption was inconsistent with the language contained within its body does not impair this Court's ability to find that the language in count 1 nevertheless apprised Mr. Anguiano-

Alcazar that the State was required to prove that he knew the substance he delivered and sold for profit was a controlled substance.

Because Mr. Anguiano-Alcazar was reasonably apprised of the elements of the crime, he can only prevail in this claim if he can demonstrate that the inartful charging language actually prejudiced him. *Kjorsvik* at 106. He has not argued in this appeal that he was prejudiced by the inartful wording of the charging document. Further, he cannot demonstrate actual prejudice where, as here, the jury was instructed it could only find Mr. Anguiano-Alcazar guilty of selling a controlled substance for profit if the State proved that he *knew* the substance he sold was a controlled substance. See Jury Instructions 12 and 13. CP 56-57. Mr. Anguiano-Alcazar did not object to these instructions. RP Vol. 3A, p. 339-341.

Mr. Anguiano-Alcazar was reasonably notified that the State was required to prove that he knew the substance he sold for profit was a controlled substance. The State respectfully asks this Court to affirm his conviction in count 2 and reject his claim of error.

III. IT IS UNNECESSARY FOR THIS COURT TO ADDRESS MR. ANGUIANO-ALCAZAR'S THIRD ASSIGNMENT OR ERROR WHERE THE STATE HAS CONCEDED ERROR UNDER MR. ANGUIANO-ALCAZAR'S FIRST ASSIGNMENT OF ERROR.

Mr. Anguiano-Alcazar contends that his convictions under counts 1 and 2 merge and violate his right to be free from double jeopardy.

Because the State concedes that reversal is required under count 1, it is unnecessary for this Court to consider this assignment of error. Should the State choose to re-file count 1 utilizing correct charging language, the proper forum for Mr. Anguiano-Alcazar to raise this issue is before the trial court.

IV. MR. ANGUIANO-ALCAZAR'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW DOES NOT CONTAIN ANY REFERENCE TO FACTS WITHIN THE RECORD AND THE STATE THEREFORE CANNOT RESPOND.

Mr. Anguiano-Alcazar makes many claims in his Statement of Additional Grounds for Review, none of which appear in the record. There is no citation to any portion of the transcript or clerk's papers where the information can be found. The State is unable to respond to these claims of error.

D. CONCLUSION

Mr. Anguiano-Alcazar's conviction in count 1 must be reversed and dismissed without prejudice. His conviction in count 2 should be affirmed.

DATED this 15th day of September, 2011.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: Anne M. Cruser
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

September 15, 2011 - 1:34 PM

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