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No. 41771-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

Jeremy Mason,

Appellant.

Lewis County Superior Court Cause No. 10-1-00564-6

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Mason's conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charge against him.
2. Mr. Mason's conviction violated his state constitutional right to notice of the charge against him, under Wash. Const. Article I, Sections 3 and 22.
3. The First Amended Information was deficient because it failed to outline specific facts describing Mr. Mason's alleged conduct.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal Information must set forth all essential elements of an offense. Prior to verdict, Mr. Mason challenged the Information for its failure to allege that he was required to register "with the county sheriff for the county of [his] residence." Did the Information omit an essential element of the charged crime violation of Mr. Mason's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?
2. An accused person is constitutionally entitled to be informed of the factual allegations against him. The Amended Information in this case did not outline any specific facts describing Mr. Mason's alleged conduct. Was Mr. Mason denied his constitutional right to adequate notice of the charge under the Fifth, Sixth, and Fourteenth Amendments, and under Wash. Const. Article I, Sections 3 and 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Jeremy Mason with Failure to Register. CP 1-2.

The charge read, in pertinent part:

[T]he above-named defendant, having been convicted of a felony sex offense or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense and having a duty to register as a sex offender under former RCW 9A.44.130 in effect at the time of the charged offense, did knowingly fail to comply with any of the registration requirements of former RCW 9A.44.130 in effect at the time of the charged offense; contrary to former Revised Code of Washington 9A.44.130(11) in effect at the time of the charged offense. CP 1.

The charge was tried to a jury. CP 3. After the state rested, the defense moved to dismiss the charge. Arguing that the charge was insufficient, Mr. Mason's attorney pointed out that Failure to Register was not an alternate-means crime. Because of this, the duty to register with the sheriff is an element of the charge. RP¹ 40-47.

The court denied the motion. RP 47. The jury convicted Mr. Mason, and the court sentenced him. CP 3-15. Mr. Mason timely appealed. CP 16-27.

¹ The only volume of the Verbatim Report of Proceedings referred to in this brief is from January 13, 2011.

ARGUMENT

I. MR. MASON’S CONVICTION WAS ENTERED IN VIOLATION OF HIS RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ARTICLE I, SECTIONS 3 AND 22.

A. Standard of Review.

The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

Constitutional violations are also reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

Where an accused person challenges the sufficiency of a charging document prior to verdict, “the charging language is strictly construed to determine whether all the elements of the crime are included.” *State v. Bacani*, 79 Wash.App. 701, 703, 902 P.2d 184 (1995); *see also State v. Kjorsvik*, 117 Wash.2d 93, 812 P.2d 86 (1991). If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. The Amended Information was legally insufficient because it omitted an essential element of Failure to Register.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth,

and Fourteenth Amendments to the federal constitution, as well as Article I, Section 3 and Article I, Section 22 of the Washington State Constitution. The right to a constitutionally sufficient Information is one that must be “zealously guarded.” *State v. Royse*, 66 Wash.2d 552, 557, 403 P.2d 838 (1965).

All of the essential elements of a crime must be alleged in the charging document. *State v. Brown*, 169 Wash.2d 195, 198, 234 P.3d 212 (2010). An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992) (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

A convicted sex offender is required to “register with the county sheriff for the county of the person's residence...” Former RCW 9A.44.130(1)(a)(2010). A person is guilty of Failure to Register if he or she “knowingly fails to comply with any of the requirements” of the registration statute. RCW 9A.44.130(1)(a).

Because one of the requirements of the statute is the obligation to register “with the county sheriff for the county of the person’s residence,” that obligation is an essential element of the offense. Thus registration with someone other than the sheriff (or with the sheriff of the wrong

county) constitutes a failure to comply with the statute, and subjects the accused person to criminal penalties.

In this case, the Amended Information alleged that Mr. Mason had been convicted of a felony sex offense and, “having a duty to register as a sex offender under [the statute] did knowingly fail to comply with any of the registration requirements...” CP 1. Because Mr. Mason challenged the charging document prior to verdict, it must be strictly construed.

Bacani, at 703.

The Amended Information was legally deficient because it did not allege that Mr. Mason’s sex offense conviction required him to register “with the county sheriff for the county of [his] residence;” nor did it allege that he failed to register “with the county sheriff for the county of [his] residence. Former RCW 9A.44.130 (2010). Because of this deficiency, his conviction must be reversed and the case dismissed without prejudice.

Brown, supra.

C. The Amended Information was factually deficient because it failed to notify Mr. Mason of the specific facts alleged by the state.

A charging document must notify the accused person of the underlying facts; the rule

requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged. This is not the same as a requirement to “state every *statutory element* of the crime charged.

State v. Leach, 113 Wash.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original).² Following *Leach*, the Supreme Court elaborated further:

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 that crime... [T]he “core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime.”

Auburn v. Brooke, 119 Wash.2d 623, 629-630, 836 P.2d 212 (1992)

(footnotes omitted, emphasis in original).

A prosecuting authority must include in the charging document reference to the specific facts of the offense, rather than relying solely on the abstract and general language of the statute. *Id.* This reflects the historical practice that has prevailed in Washington since before the adoption of the state constitution.

For example, an 1888 indictment charging first-degree murder used the following language:

Henry Timmerman is accused by the grand jury...of the crime of murder in the first degree, committed as follows: He (said Henry Timmerman) in the said county of Klickitat, on the 3d day of

² The *Leach* court explained that this rule applies to charging documents other than citations issued at the scene: “Complaints must be more detailed since they are issued by a prosecutor who was not present at the scene of the crime. Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint refers... [Where a citation is issued at the scene, the defendant] presumably know[s] the *facts* underlying [the] charges.” *Leach*, at 699.

October, 1886, purposely, and of his deliberate and premeditated malice, killed William Sterling, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said William Sterling with a pistol which he (the said Henry Timmerman) then and there held in his hand, and from which mortal wound the said William Sterling instantly died.

Timmerman v. Territory, 3 Wash.Terr. 445, 448, 17 P. 624 (1888). The *Timmerman* Indictment thus contains a recitation of both the legal elements required for conviction and the specific conduct committed by the accused person.

In this case, the Amended Information was factually deficient because it did not allege any particular facts relating to the offense, other than the date and the county in which it ostensibly occurred.

First, it failed to identify the manner in which Mr. Mason allegedly violated the statute. CP 1. It did not suggest that he had changed his residence, become homeless, enrolled in a school, moved to Washington, commenced work outside the state, or done any of the other things that might trigger the registration deadlines. *See* Former RCW 9A.44.130 (4)(a) (2010).

Second, it did not specify the prior conviction that allegedly obligated him to register. CP 1.

The charging document was factually deficient because it failed to allege any details outlining Mr. Mason's allegedly criminal conduct.

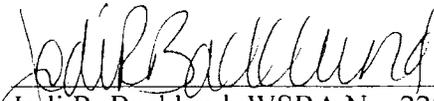
Brooke, at 629-630. Accordingly, Mr. Mason need not demonstrate prejudice. *Kjorsvik, supra*. His conviction must be reversed, and the case dismissed without prejudice. *Id.*

CONCLUSION

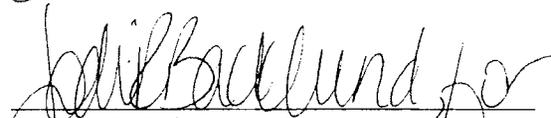
For the foregoing reasons, Mr. Mason's conviction must be reversed, and the case dismissed without prejudice.

Respectfully submitted on April 25, 2011.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 25, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 25, 2011.



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