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APR 20 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

NO. 78970-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK K. EATON,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
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ANSWER TO PETITION FOR REVIEW

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original

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A. ISSUES

1. Did a defendant receive constitutionally sufficient notice of the charges he faced where, four months before retrial on a possession of cocaine charge, the defendant was unequivocally told that his retrial would be on the charge of possessing cocaine, and where his lawyer admitted before retrial that he fully expected the State to retry the defendant on the possession of cocaine charge, even though the defendant had been mistakenly rearraigned on the wrong charge following the first trial?

2. Should review be denied under RAP 13.4 where the court of appeals opinion does not conflict with prior decisions of this court, and where no significant constitutional question is presented?

B. FACTS

Eaton was originally charged with possession of amphetamine. CP 1-3. It is undisputed that, on the first day of trial before the Honorable Carol Ann Shapira, the information was amended to charge count I, possession of cocaine, and count II, disorderly conduct. The prosecutor said, "I would ask permission to file that amended information. I'm handing that forward." RP

(5/3/04) at 5. There followed some discussion regarding the basis for the amendment from amphetamine to cocaine. In short, the prosecutor explained that the original charge was based on a field test, whereas the amended charge was based on the laboratory report from the Washington State Patrol Crime lab. Id. at 6. At that point, defense counsel said, "...at this point, I'd be willing to plead him not guilty to Count I [possession of cocaine] and Count II [disorderly conduct]. Id.

A jury trial on both the cocaine charge and the disorderly conduct charge was conducted in the ensuing days. The jury deadlocked, and a mistrial was declared on May 7th. CP 19-20.

Eleven days later, on May 18th, Eaton appeared before the superior court, likely to set a date for retrial. The hearing was held before a judge pro tempore, Barbara Harris, who had not been the trial judge. The prosecutor who was handling the hearing had not tried the case. RP (5/18/04) 1.¹ It is clear that both the prosecutor and the court were confused as to whether a rearraignment was

¹ See Appendix A. This verbatim report of proceedings was included in Eaton's statement of arrangements but there were difficulties in obtaining the transcript, and the State did not have a copy in its appellate file. Neither party cited to this transcript in the court of appeals briefing. A copy was graciously provided to the state by counsel for appellant purposes of responding to this petition for review. That copy is appended to this Answer in case the transcript is also missing from the file sent to this Court by the Court of Appeals.

necessary. Id. at 3. The prosecutor said, "It looks like we have the original information, but I'm pretty sure we do have to re-arraign." Id. Defense counsel then stated, "I don't know that he needs to be re-arraigned, but we're happy to enter a plea of not guilty again, Your Honor." Id. The prosecutor then read the original information charging possession with amphetamine, id., instead of the amended information charging possession of cocaine. Defense counsel said, "Your Honor, Mr. Eaton will enter a plea of not guilty to one count of unlawfully possessing amphetamines." Id. at 4. A trial date was then set.

Despite the fact that defense counsel knew the original information had been amended fifteen days earlier, despite the fact that he had entered a plea of not guilty to both charges in the amended information, and despite the fact that he had just finished a full jury trial on the amended information, he did not alert the court to the fact that the "rearraignment" was being conducted using the wrong information, nor did he ask the significance, if any, of using the original information instead of the amended information. Moreover, no *second* amended information -- restoring the original charge -- was ever mentioned, presented, or filed.

Months later, on July 27th, defense counsel noted a motion to dismiss for failure to timely retry Eaton. See CP 56-58. The motion was based primarily on CrR 4.1 and CrR 3.3 but the Sixth Amendment to the United States Constitution was mentioned without analysis or elaboration. Counsel started the July hearing by saying that he knew the State still meant to try him on possession of cocaine, but he suggested that they had failed to properly note the matter for retrial.

"This is an odd situation in that what has been filed for a new trial is not the same charge that Mr. Eaton was originally charged with -- I'm sorry -- that he originally went to trial on. He has never been provided notice or given a correct charging document. *I mean, realistically, I don't expect that the prosecutor is going forward on possession of methamphetamine. That is really not an issue in this case.* But, on the other hand, it is more than just a scrivener's error in my mind, because at one point previous to this he was incorrectly charged with methamphetamine in this original charge, and it was corrected. Now, we have the same mistake. I guess my issue in question is: "Why should Mr. Eaton suffer for this?"

RP (7/27/04) 3-4 (italics added). Defense counsel also conceded that rearraignment was a mistake. RP (7/28/04) at 10.

The Honorable Cheryl Carey denied the motion to dismiss, finding that "rearraignment" should never have occurred, and finding that there was absolutely no prejudice to Eaton because

everyone knew that he faced trial on the cocaine charge, not the amphetamine charge. RP (7/27/04) at 10-14.

The case proceeded to trial in November. Before the second trial, Eaton filed a number of documents clearly showing that he knew he was charged with possession of cocaine. See CP 27-30, 31-35, 56-58. Eaton still claimed, however, that the State could not proceed on the possession of cocaine charge, apparently because the written amended information was not in the court file. The second trial judge, the Honorable Anthony Wartnik, denied Eaton's claim, in part because it had earlier been denied by Judge Carey. RP (11/30/04) at 10-12. The prosecutor made clear that he was still relying on the amended information:

The State is not moving to amend its information at this time. State doesn't need to amend its information at this time because, as the Judge Carey ruled on the 27th [of July], he was at that time charged with Violation of the Uniform controlled Substances Act, possession of cocaine, not methamphetamine.

And with respect to notice, at that time, on July 27th, Judge Carey made it very clear that he was charged with that crime, and that occurred some --- that occurred in late July.

Trial started in late November. If that's not sufficient notice, I simply don't know what is.

RP (11/30/04) at 11-12.

At this point, Judge Wartnik revisited the merits of the motion, and ruled as follows:

Additionally, the record ... verifies that the original charge of possession of a controlled substance, amphetamine, was amended. This has been verified orally as well by [present defense counsel] Mr. Johnson and by [the deputy prosecutor] Ms. Smith, amended it by Judge Schapira after the case had been assigned to her for trial from amphetamine to cocaine.

There is no indication -- nothing presented to the Court to indicate that Mr. Eaton [sic] plea to the amendment, even if it was an oral amendment.

At this point, I have to assume it may well have been an oral amendment or alternative, if it was a written statement, it never got filed.

And I indicated yesterday I had received from counsel a copy of an Amended Information charging count one, possession of a controlled substance cocaine, and count two, the disorderly conduct.

Okay. Now, that being the case, when the mistrial occurred, the only charge in play was violation of the Uniform Controlled Substances Act, possession of cocaine.

When the arraignment took place following the mistrial, there's no indication that there was any motion before the Court to amend the information back to violation of the Uniform Controlled Substances Act, possession of amphetamine.

Under the law of the case, when mistrial occurs and the case is presented for retrial, following the rule which says the speedy trial date starts to run immediately from the date of mistrial, I can only assume that the State gave notice to the defense that it intended to retry the case.

Mr. Eaton knew the case was being tried, and that the case had been tried as possession of cocaine case.

New arraignment isn't required. The fact that it took place certainly could have been misleading, but that was corrected by Judge Carey on July 27th when she informed the defense that in fact the charge was possession of cocaine, not possession of amphetamine. For those reasons, the motion is denied.

RP (11/30/04) 13 -16. Defense counsel then argued that his time for trial rights had been violated. The trial court rejected that argument, too.

...I'm going to deny this motion for the same reason that I just articulated. ... There was never a Motion to Amend the information back to the original charge of possession of amphetamine. ... Therefore, there was no new case, same cause number. Law of the case with regard to the mistrial is that case is retried, it's retried the same as if it were tried the first time, including it's the same instructions on the law.

RP (11/30/04) 16.

C. **REVIEW IS NOT APPROPRIATE BECAUSE THERE WAS NO CONSTITUTIONAL VIOLATION AND THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND THIS COURT'S DECISIONS.**

Review by the Supreme Court is appropriate under limited circumstances.

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals;

or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved;
or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Eaton asserts in his petition for review that he was convicted of a crime that was not charged, that such a conviction violates his constitutional rights to notice and due process, and that the Court of Appeals opinion conflicts with decisions from this Court. His petition erroneously summarizes the facts and mischaracterizes the court of appeals decision. His petition should be denied.

Eaton was charged by amended information with possession of cocaine, he was twice tried for of possession of cocaine, and, although there was an extraneous "arraignment" between the first trial (in May) and second trial (in November) -- at which the original information was incorrectly used -- any confusion on this point was cleared up by the trial court in July, four months before the second trial. After that date, it was clear to everyone, including Eaton, that he would be tried for possession of cocaine. In fact, his counsel stated during the July hearing that "I mean, realistically, I don't expect that the prosecutor is going forward on possession of

methamphetamine. That is really not an issue in this case." RP (7/27/04) 3-4. After the court denied his motion to dismiss, there could have been no doubt, whatsoever, that Eaton faced a charge of possession of cocaine on retrial. His pleadings approaching the second trial in November prove this. See CP 30, 31, 56-57. Thus, it is clear that Eaton had actual notice in this case, contrary to his suggestion in the petition for review.

Eaton is thus mistaken to compare this case to cases where essential elements are missing from the information. Rather, the problem in this case was two-fold. First, the amended information apparently never became part of the formal, written record, even though it was handed to the first trial judge, RP (5/3/04) at 5, and even though the second trial judge also had a written copy. RP (11/30/04) at 13. Second, an extraneous "rearraignment" was held using the original information, not the amended information. This *could* certainly have caused confusion, and it was a mistake. But, fortunately, counsel and Eaton had notice long before trial that the state was still proceeding on the amended information.

There is no question that this case illustrates the folly and the inefficiency of proceeding on the basis on an amended information that has not been officially made a part of the written

record in the superior court. But, as this Court decided in State v. Barnes, 146 Wn.2d 74, 43 P.3d 490 (2002), an properly amended information, even if inadvertently missing from the court record, is an effective amended information. In particular, this Court held that "amendment of an information under CrR 2.1(d) [does not] require... filing with the clerk before the amended information becomes effective. ... Although the procedure is not to be commended, there was nevertheless no error when the State did not file the amended information which had been approved by the court, accepted by the Petitioner at arraignment, and used by the trial court in presenting the case to the jury." Barnes, 146 Wn.2d at 87-88. That reasoning applies here, too.

As stated above, it is regrettable that this occurred but it did not deprive the defendant of the constitutionally required notice, because he had already been given proper notice, and tried, on the possession of cocaine charge. A charging document is constitutionally deficient under the "essential elements rule" if essential elements were wholly omitted from a charging document or if the wrong charge had actually been filed. See e.g. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (element of premeditation omitted from information charging first degree

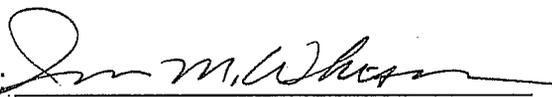
murder). Here, the amended information was sufficient, and there is no claim that it was missing essential elements. Rather, an extraneous procedure simply created the potential for confusion, but no actual confusion.

For these reasons, the State respectfully requests that this Court deny review, as the criteria of RAP 13.4 have not been met.

DATED this 19th day of April, 2007.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

By: 
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Senior Deputy Prosecuting Attorney
Attorneys for Respondent

APPENDIX A

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IN AND FOR KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON

IN RE:

STATE OF WASHINGTON,

Plaintiff,

v.

MARK EATON,

Defendant.

)
)
)
) Cause No. 04-1-09201-5 SEA

)
) COA No. 55583-9-I

COPY

Official record of proceedings
Held before the Honorable
Pro Tem Judge Barbara Harris
Held on May 18, 2004
In Seattle, Washington

Stina Despres, Transcriptionist
Flygare & Associates, Inc.
1715 South 324th Place, Suite 250
Federal Way, WA 98003

**DISK
ENCLOSED**

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1 MR. JORGENSEN: Your Honor, next we have Mark Eaton,
2 04-1-09201-4 SEA [sic]. Your Honor, this was a hung jury. I
3 believe he needs to be re-arraigned, but Mr. Benjamin and I were
4 not positive on the Court's procedure for that.

5 JUDGE HARRIS: Well, if there's a hung jury, is the
6 State re-filing?

7 MR. JORGENSEN: I believe the State is not re-filing,
8 Your Honor. It looks like we have the original information, but
9 I'm pretty sure we do have to re-arraign.

10 JUDGE HARRIS: Yes, he has to be re-arraigned if he's
11 going to --

12 MR. JORGENSEN: Is your true name --

13 JUDGE HARRIS: -- be tried again.

14 MR. BENJAMIN: I don't know that he needs to be re-
15 arraigned, but we're happy to enter a plea of not guilty again,
16 Your Honor.

17 MR. JORGENSEN: Okay. Just for the record, Your
18 Honor, is your true name Mark Hensley Eaton?

19 MR. EATON: Correct.

20 MR. JORGENSEN: You've been charged with the violation
21 of the uniform controlled substance act. The State is alleging
22 that on or about December 5, 2002 that you unlawfully did
23 possess amphetamine.

24 JUDGE HARRIS: Does speedy just start up again? How
25 is that going to work then?

1 UNIDENTIFIED FEMALE SPEAKER: It's not from the date
2 of the hung --

3 JUDGE HARRIS: Right. It's from --

4 MR. JORGENSEN: Which was --

5 UNIDENTIFIED FEMALE SPEAKER: May 17th.

6 MR. JORGENSEN: It looks like May 17.

7 UNIDENTIFIED FEMALE SPEAKER: May 7th. I'm sorry.

8 MR. JORGENSEN: May 7th, Your Honor, was the date of
9 the hung jury.

10 JUDGE HARRIS: Okay. So, commencement is going to be
11 today?

12 MR. JORGENSEN: Your Honor, if I think -- I think if
13 he's not arraigned, it's from the date of the hung jury; if he
14 is arraigned today, it's from today.

15 I think that proper commencement, Your Honor, the
16 information we have, it should be May 7th. Put expiration August
17 4th.

18 JUDGE HARRIS: Okay. That's fine, as long as we have
19 something and he knows speedy is running.

20 MR. BENJAMIN: Your Honor, Mr. Eaton will enter a plea
21 of not guilty to one count of unlawfully possessing
22 amphetamines.

23 JUDGE HARRIS: All right. That plea of not guilty is
24 entered. And then we're going to have a return date of June
25 10th, 9:00 am.

1 MR. BENJAMIN: He has to have a second appearance
2 again? All right.

3 JUDGE HARRIS: We've got to do something --

4 UNIDENTIFIED FEMALE SPEAKER: What date is the trial
5 set?

6 JUDGE HARRIS: Is the trial set?

7 MR. BENJAMIN: Yeah, that's fine with us.

8 JUDGE HARRIS: Does he already have -- okay. Well,
9 then we'll -- so omnibus will be July the 2nd, 8:30 am, with a
10 trial date of July 12th, 9:00 am.

11 MR. BENJAMIN: All right. Very good.

12 MR. JORGENSEN: Thank you, Your Honor.

13 JUDGE HARRIS: You're welcome. Bye-bye.

14 (Court is adjourned.)
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IN RE: STATE OF WASHINGTON V. MARK EATON
CAUSE No. 04-1-09201-5 SEA
COA No. 55583-9-I

AFFIDAVIT

I, Stina Despres, do certify that the audio recording provided to me of the proceedings held before the Honorable Pro Tem Judge Barbara Harris in the Superior Court for King County, Washington, were transcribed by me to the best of my ability.

COPY
Stina Despres Transcriptionist

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Donnan, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Answer to Petition for Review, in STATE V. EATON, Cause No. 78970-3, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

4/19/07
Date