

78970-3

NO. 55583-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARK EATON,

Appellant.

FILED ON #1  
COURT OF APPEALS  
STATE OF WASHINGTON  
2005 OCT 11 PM 4:45

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Anthony Wartnik  
The Honorable Cheryl Carey  
The Honorable Carol Schapira

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

RCW 10.61 prohibits a court from instructing a jury on a charge that is not either in the information or a lesser included offense of the charge in the information. RCW 10.61 and the Washington and federal constitutions also prohibit conviction for such a charge. In Mr. Eaton's case, the jury was instructed on a charge not in the information, and the jury found him guilty of the charge they were instructed on. Reversal is required under RCW 10.61 and the state and federal constitutions.

B. ASSIGNMENTS OF ERROR.

1. The court instructed the jury on a charge not in the defendant's information, in violation of RCW 10.61.

2. The jury found the defendant guilty of a charge not in his information in violation of RCW 10.61.

3. The jury found the defendant guilty of a charge not in the information in violation of the state and federal constitutions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. RCW 10.61 allows a trial court to instruct a jury only on a charge in the information. Here the trial court instructed the jury on a charge not in the information, despite defense objections. Did the trial court wrongly instruct the jury? (Assignment of Error 1).

2. RCW 10.61 allows conviction only for a charge in the information. Here, the defendant was convicted of a charge not in the information. Is the conviction in error? (Assignment of Error 2).

3. The state and federal constitutions forbid conviction for a charge not in the information. Here, the defendant was convicted of a charge not in the information. Does his conviction violate due process? (Assignment of Error 3).

D. STATEMENT OF THE CASE.

On December 5, 2002, Lake Forest Police Officers arrested Mark Eaton, who was drunk and disrupting traffic, for disorderly conduct, and they searched him incident to

arrest, finding nothing. 11/24/04RP 96, 103, 127, 163;  
11/29/04RP 34.<sup>1</sup> When Mr. Eaton refused to sign a citation  
for disorderly conduct, Officer Robert Gross transported him  
to the King County Jail, where he was immediately placed  
alone in a cell due to his uncooperative behavior.

11/29/04RP 36-37, 42. Officer Gross watched Mr. Eaton  
while waiting for his paperwork to be processed and saw him  
unzip his pants and urinate in the cell. 11/29/04RP 46-50.  
He took a few seconds to notify a booking officer of Mr.  
Eaton's behavior and then continued to observe the  
defendant. 11/29/04RP 51.

A jail officer entered the cell where Mr. Eaton was  
detained shortly thereafter and saw Mr. Eaton kicking a bag  
near the cell's drain. 11/29/04RP 52. The bag contained  
cocaine. 11/29/04RP 152. Despite Mr. Eaton's stating he  
was not aware of the origin of the bag, the State charged  
him with possession of amphetamines. 11/29/04RP 55; CP  
1. On May 3, 2004, before Mr. Eaton's initial trial, the State

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<sup>1</sup> The Verbatim Report of Proceedings will be referred to by their  
date, followed by "RP" and the page number.

amended the information to more accurately charge Mr. Eaton with possession of cocaine. 5/3/04RP 5-6. 11/30/04 RP 4. Mr. Eaton's first trial ended in a hung jury on May 6, 2004. CP 19; 11/30/04RP 4.

On May 18, 2004, before Mr. Eaton's second trial, the State re-arraigned him on the charge of possession of amphetamines, using the first information it had filed. 11/30/04RP 5; CP \_\_\_\_\_, Sub No. 20. The State never moved to amend that information to possession of cocaine, even after defense counsel brought a motion to dismiss based on the fact that Mr. Eaton had been arraigned on an information that mischarged him. CP 59-65; 7/27/04RP 3-14. The court denied that motion. 7/27/04RP 14.

On November 18, 2004, the State began Mr. Eaton's second trial for possession of cocaine. The State still had not amended the information Mr. Eaton had been most recently arraigned on. At the close of the State's case, but before the trial court instructed the jury, the defendant asked the court to require the State to proceed on the charge of possession of amphetamines, not cocaine, based on the information. 11/30/04RP 2-5. The court denied that motion,

reasoning that the State did not need to re-arraign Mr. Eaton following the mistrial, so the information he was arraigned on was irrelevant. 11/30/04RP 12. Defense then objected to the jury instructions, arguing they should require the jury find the defendant guilty of possession of amphetamines in order to convict. 11/30/04RP 17. The court summarily denied that motion. 11/30/04RP 17.

The jury found Mr. Eaton guilty of possession of cocaine. CP 41. This appeal timely follows.

E. ARGUMENT

1. THE CONVICTION ON A CHARGE NOT IN THE INFORMATION VIOLATES RCW 10.61.

a. RCW 10.61 prohibits a conviction for a charge other than that in the information, a lesser degree of that crime or a lesser included offense of that crime. RCW

10.61.003 reads

[u]pon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of a degree inferior thereto, or of an attempt to commit the offense.

With only one other exception, the jury may not find the defendant guilty of a crime not charged in the information. RCW 10.61.006 allows a conviction for a lesser included offense of that charged:

[i]n all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

Other than the exceptions in RCW 10.61.003 and RCW 10.61.006, a defendant may be convicted only of those crimes of which he or she is charged in the information. See State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000) (it is an "ancient doctrine" that a criminal defendant may be held to answer for only the offenses charged in the indictment or information); State v. Galen, 5 Wn. App. 353, 355-56, 487 P.2d 273 (1971) ("crimes which a person can be convicted and those on which a jury is properly instructed are strictly limited to those which are charged in the information," and the only exceptions are RCW 10.61.003 and 10.61.006).

The crimes of which a person can be convicted, and those on which a jury is to be properly instructed, are strictly limited to those crimes charged by the information.

State v. Bishop, 6 Wn.App. 146, 152, 291 P.2d 1359 (1971).

A person may be convicted of a crime not charged in the information only when that crime is necessarily included in the crime charged. Id.

b. Mr. Eaton was convicted of possession of cocaine on violation of RCW 10.61. Here, Mr. Eaton was arraigned before his second trial on possession of amphetamines. CrR 4.1 requires the court arraign a defendant and states in part,

[t]he indictment or information shall be read to defendant, unless the reading is waived, and then a copy shall be given to the defendant.

CrR 4.1(f).

Arraignment is a formal proceeding meant to give notice and convey the weight of the charges a defendant faces. McNeil v. Wisconsin, 501 U.S. 171, 185, 111 S. Ct. 2204, 115 L.Ed.2d 158 (1991). It is a critical stage of proceedings, requiring the right to counsel. State v. Dechmann, 51 Wn.2d 256, 528, 317 P.2d 527 (1957).

Arraignment is necessary to let the defendant know the

nature of the action against him. Const. Art. 1, section 22. It is such an important stage of proceedings that it must be held unless waived by the defendant. State v. Tatum, 61 Wn.2d 576, 379 P.2d 372 (1963).

While the State may not have needed to re-arraign Mr. Eaton on following the mistrial for possession of cocaine, it chose to do so and must be bound by the information it used at that arraignment and did not seek to amend, even with the notice of the defense's pre-trial motion to dismiss.

The Information at Mr. Eaton's arraignment alleged

That the defendant MARK KENSLEY EATEN in King County, Washington, on or about December 5, 2002, unlawfully and feloniously did possess **amphetamine**, a controlled substance;

Contrary to RCW 69.50.401(d), and against the peace and dignity of the State of Washington.

CP 1 (emphasis added), CP\_\_\_ Sub No. 20, 11/30/04RP 5.

However, the jury was instructed that to convict Mr.

Eaton, they needed to find, in part,

That on or about the 5<sup>th</sup> day of December, 2002, the defendant possessed a controlled substance, **cocaine**. . . .

CP 14 (emphasis added).

The jury found Mr. Eaton guilty "of the crime of possession of Cocaine."

CP 41.

In violation of Bishop, supra, the court instructed the jury on possession of cocaine, and the jury convicted Mr. Eaton of that charge. The jury was instructed on, and convicted Mr. Eaton of, an entirely different crime than that in the information, possession of amphetamine. Possession of cocaine is not a lesser degree offense or lesser included offense of possession of amphetamines, the charge in the information, but a completely different offense. The jury instructions and verdict violated RCW 10.61.

c. The appropriate remedy is reversal. In State v. Vangerpen, 125 Wn.2d 782, 785, 888 P.2d 1177 (1995), the defendant was charged with attempted murder in the first degree, but the information failed to contain all the essential elements of that crime. The trial court allowed the State to amend the information after it rested its case and instructed the jury on all elements of attempted murder. The Washington Supreme Court found allowing the State to

amend the information after resting was an error and the appropriate remedy was reversal. Id. at 787, 791.

When a conviction is reversed due to an insufficient charging document, the result is a dismissal of charges without prejudice to the right of the State to recharge and retry the offense for which the defendant was convicted or for any lesser offense.

Id. at 791. Similarly, the appropriate remedy in the present case is reversal and remand for a new trial.

2. THE CONVICTION FOR A CHARGE NOT IN THE INFORMATION VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

a. The state and federal constitutions require the information to contain all charges against a defendant. Pursuant to the Sixth Amendment to the United States Constitution and Article 1, § 22 of the Washington Constitution, criminal defendants are guaranteed the right to be informed of the nature of the charges against them. State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993) (citing State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); accord State v. Markle, 118 Wn.2d 424, 432, 823 P.2d 1101 (1992)).

Article 1, § 22 of the Washington Constitution reads in part

In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him [and] **to have a copy thereof. . . .**

(emphasis added). That section of the state constitution prevents a criminal defendant from being convicted of an offense not charged. Vangerpen, 125 Wn.2d at 787. See also State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987) (under Washington Constitution, defendant may not be tried for an offense not charged).

The Sixth Amendment and Cost. Art I, Sec. 22 entitle the defendant to notice of the charge he will face at trial and, therefore, he may be convicted only of charges contained in the information.

State v. Peterson, 133 Wn. 885, 892, 948 P.2d 381 (1997).

In the present case, the information from Mr. Eaton's re-arraignment charged him with possession of amphetamine. However, he was tried and convicted for possession of cocaine.

b. Convicting Mr. Eaton of a crime not charged in the information violated due process. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). In the present case, the Information charged Mr. Eaton with possession of amphetamines.

The State did not prove one of the elements as charged in the Information: that the drug Mr. Eaton possessed was amphetamines. Additionally, the court erred by failing to dismiss the charge as unsupported by the evidence. State v. Ong, 88 Wn. App. 572, 578, 945 P.2d 749 (1997).

c. Dismissal is the appropriate remedy. As stated above, the appropriate remedy for an incorrect charging document is reversal and remand. Vangerpen, 125 Wn.2d at 791. This court must reverse Mr. Eaton's conviction for possession of cocaine and remand for a new trial because the information charges him with possession of

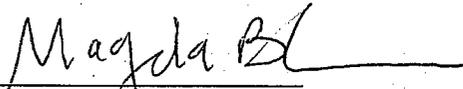
amphetamines and he was convicted of possession of Cocaine.

F. CONCLUSION.

RCW 10.61 and the state and federal constitutions prohibit conviction for a crime not charged in the information. Here, Mr. Eaton was arraigned on an information charging possession of amphetamines, and the State did not amend that information prior to trial. Therefore, this court must reverse Mr. Eaton's conviction for possession of Cocaine, which was not charged in the information.

DATED this 11<sup>th</sup> day of October, 2005.

Respectfully submitted,



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