

FILED
JUL 26 2006

CLERK OF SUPREME COURT
STATE OF WASHINGTON

78970-3

Supreme Court No. _____
(CoA No. 55583-9-I)

FILED
COURT OF APPEALS
STATE OF WASHINGTON
JUL 18 2006
5:11 PM

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK K. EATON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Mark K. Eaton, requests this Court review the decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Eaton requests review of the unpublished decision of the Court of Appeals in case number 55583-9-1. (Attached hereto as Appendix A.)

C. ISSUE PRESENTED FOR REVIEW

Where a defendant is charged by information with possession of amphetamine and the prosecutor orally amends the information to allege cocaine, but no new information is filed and the defendant is subsequently re-arraigned after a hung jury on the amphetamine allegation, may the court instruct the jury and enter conviction on a charge of possession of cocaine

D. STATEMENT OF CASE

Mr. Eaton was charged by information with possession of amphetamine. CP 1-3. Before trial, the prosecutor sought to amend the information orally to charge possession of cocaine and disorderly conduct. 5/3/04RP 5-6. Through counsel, Mr. Eaton indicated he was prepared to enter pleas of not guilty to the amended charges. Id. at 6. The trial court did not rule on the

motion to amend, but proceeded to trial which ended in a hung jury.

CP 19.

Prior to the retrial, Mr. Eaton was arraigned a second time with specific reference to the amphetamine allegation in the original information and entered a plea of not guilty. 5/18/04RP 3-4. At the conclusion of the prosecution's evidence, Mr. Eaton moved to dismiss based upon the failure to prove he possessed amphetamine as charged. 11/30/04RP 2-4, 7-10. Mr. Eaton also objected to the trial court instructing the jury on a possession of cocaine charge that was not contained in the information upon which he was re-arraigned. 11/30/04RP 17. The trial court denied the motion to dismiss and overruled Mr. Eaton's objection to the jury instructions. 11/30/04RP 12, 17.

The jury found Mr. Eaton guilty of possession of cocaine. CP 41. The Court of Appeals affirmed the conviction "[b]ecause the original amended information charging Mark Eaton was sufficient, and that information was not again amended prior to his retrial on the same charges...." Slip op at 1.

Mr. Eaton seeks review in this Court of the decision of the Court of Appeals.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

CONVICTION ON A CHARGE NOT CONTAINED IN THE INFORMATION UPON WHICH THE ACUSED WAS ARRAIGNED VIOLATES THE STATE AND FEDERAL CONSITTUIONS, THE CODE OF CRIMINAL PROCEEDURE, AND DECISION SOF THIS COURT

The decision of the Court of Appeals conflicts with this Court's decisions interpreting and applying the state and federal constitutions and RCW Title 10. The Court of Appeals held, however, that there is no authority to for Mr. Eaton's assertion that "the State is bound by the information it used in that latter proceeding...." Slip op at 3. This view fails to respect the important part the charging document holds in the criminal process and the strict standards of compliance imposed by this Court.

1. A defendant may only be tried for offenses charged. It is a fundamental tenant of criminal procedure that the accused has the right to demand, and must be informed of, the nature and cause of the accusation against him. U.S. Const., amend. 6; WA Const. Art. 1, § 22.¹ Furthermore, the Legislature has codified these constitutional rights, currently in RCW 10.37.015, which

¹ The Sixth Amendment to the United States Constitution provides in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation...." Wash. Const., Art 1, § 22 provides in pertinent part, "In criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation against him, to have a copy thereof...."

provides that “No person shall be held to answer in any court for an alleged crime or offense, unless upon an information filed by the prosecuting attorney,....” (Emphasis added.) This has been the standard in Washington for more than 100 years. See State v. Stentz, 30 Wash. 134, 139, 70 P. 241 (1902), overruled on other grounds, State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001).

The practical effect of these provisions is to preserve a defendant’s “right to be informed of the charges against him and to be tried only for offenses charged.” State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). See also State v. Frazier, 76 Wn.2d 373, 376, 456 P.2d 352 (1969); State v. Royse, 66 Wn.2d 552, 556-57, 403 P.2d 838 (1965). This Court has reiterated more recently, that “[i]t is an ‘ancient doctrine’ that a criminal defendant may be held to answer for only those offenses contained in the indictment or information. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000), citing Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989).

In a prosecution for possession of a controlled substance, the specific identity of the controlled substance is an essential element of the offense. State v. Goodman, 150 Wn.2d 774, 787, 83 P.3d 410 (2004). Mr. Eaton could not, therefore, be charged

with possessing amphetamine and then convicted of possessing cocaine.

2. Mr. Eaton was convicted of an offense other than the one filed and upon which he was arraigned. The Court of Appeals concluded that because arraignment after mistrial was not required, arraiging Mr. Eaton on a charge other than the one for which his was subsequently tried and convicted should have no legal significance. Slip op at 3. This view fails to recognize the significance of arraignment as a formal proceeding meant to give notice of the charges to the defendant. McNeil v. Wisconsin, 501 U.S. 171, 185, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).

Under the unique facts of Mr. Eaton's case, notice of the formal substance alleged was critical. As noted, he was initially charged with possession of amphetamine based apparently upon a field test of the substance he was alleged to have possessed. 5/3/04RP 6. Other tests indicated the substance in question may have been cocaine. CP 2. Having failed to convince the jury Mr. Eaton possessed cocaine it would be reasonably likely the prosecution might alter either its theory or proof as the second trial.

Having orally amended the information prior to the first trial, re-arraignment on the only formal written charge ever filed was consistent with the practice and evidence known to the parties.

5/18/04RP 3-4. While trial on an allegation of possessing cocaine may also have been supported by the evidence this simply demonstrates the importance of strictly adhering to the requirement of a written information, filed in open court, and a formal arraignment on a written and properly filed information.

This Court long ago held that the sufficiency of the information must be determined by what appears on its face and in this case it is an allegation regarding amphetamine. State v. Ray, 62 Wash. 582, 114 P. 439 (1911). Compare State v. Alferez, where the defendant was found to be entitled to resentencing because while an amended information was filed adding firearm and deadly weapon allegations, the record did not reflect that the amended information was ever served, that Alferez was arraigned on the amended complaint, or advised of the enhanced penalty. 37 Wn.App. 508, 681 P.2d 859 (1984) rev. denied, 102 Wn.2d 1003 (1984). While certainly distinguishable in some aspects, it is Alferez illustrates the importance of strict compliance with the rules and statutes governing amendment of the information.

3. Review is warranted under RAP 13.4(b) because entry of conviction for possession of cocaine was contrary to the state and federal constitutions and the decisions of this Court. All of the authorities are in agreement that a defendant may not be convicted

of an offense that was not charged in the information. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); City of Auburn v. Brooke, 119 Wn.2d 623, 836 P.2d 212 (1992). In this case, the prosecution has also failed to meet its burden of proving each element of the crime charged. In re Winship, 397 U.S. 358, 361, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970).

Because the Court of Appeals opinion is contrary to the foregoing decisions of this Court and the constitutional provisions upon which those decisions were based, this Court should accept review pursuant to RAP 13.4(b)(1) and (3).

F. CONCLUSION

The unpublished decision of the Court of Appeals holds trying a criminal case on a charge other than that in the information upon which the defendant was arraigned is proper where he otherwise received notice of the charge the prosecution would seek to prove at trial. This holding is in conflict with the decisions of this Court and the constitutional provisions requiring written notice of

using the original written information that incorrectly identified the alleged drug as amphetamine.

At the start of his second trial, Eaton moved to dismiss the charges on the basis of the defective information filed at the second arraignment. The court denied the motion. At trial, the evidence referred exclusively to cocaine possession. The jury instructions also identified the drug at issue as cocaine and contained no reference to amphetamines. After the conclusion of the State's evidence, Eaton again moved to dismiss, based on the State's failure to prove that he possessed amphetamine, as charged in the original information. The court denied the motion.

The jury convicted Eaton of possession of cocaine. Eaton appeals.

SUFFICIENCY OF THE INFORMATION

Eaton argues that his conviction must be reversed because the court instructed the jury on a charge not in the information and the jury convicted him on that charge in violation of chapter 10.61 RCW and the state and federal constitutions. We disagree.

"All essential elements of a crime, statutory or otherwise, must be included in a charging document."² The purpose of this rule is to apprise the defendant of the charges against him or her and to allow the defendant to adequately prepare a defense.³ In a prosecution for possession of a controlled

² State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

³ Vangerpen, 125 Wn.2d at 787.

substance, the specific identity of the controlled substance is an essential element of that offense.⁴

Eaton does not argue that the rearraignment was necessary. Rather, he argues that the State, having chosen to rearraign Eaton prior to retrying him, must be bound by that information it mistakenly presented in that proceeding. “[R]earraignment is not necessary when a case is remanded for a new trial. Rather, it is required when a case has been dismissed without prejudice and then refiled,” or when “there has been a substantial amendment to the information.”⁵ Here, Eaton’s case was not dismissed and refiled. He was retried following a mistrial on the same charge, under the same cause number. Eaton argues that, even if the State was not required to rearraign him prior to retrial, having arraigned him a second time, the State is bound by the information it used in that latter proceeding, but he cites no authority for this proposition.

The objective of requiring the essential elements of the crime to be contained in the information is to give notice to an accused of the nature of the crime so that the accused can prepare an adequate defense.⁶ The record clearly indicates that Eaton had notice of the charge against him. First, though the original information identified the controlled substance at issue as amphetamine, the attached statement of probable cause mentioned cocaine

⁴ State v. Goodman, 150 Wn.2d 774, 787, 83 P.3d 410 (2004).

⁵ State v. Whelchel, 97 Wn. App. 813, 819, 988 P.2d 20 (1999).

⁶ Kjorsvik, 117 Wn.2d at 101.

exclusively. The State orally amended the information prior to trial, changing the charge to possession of cocaine. All the evidence presented at the first trial was that the controlled substance was cocaine.

The amended charges were never dismissed and the information from the first trial was never amended to change the charge back to amphetamine possession. Eaton's defense trial memorandum filed for retrial, as well as his pretrial Knapstad⁷ motion to dismiss, acknowledged that the charge against him was possession of cocaine.

Prior to his second trial, a judge denied Eaton's motion to dismiss on the grounds that he had been rearraigned on an incorrect information. The court found that the retrial was restricted to the charge in the amended information, which was still in effect notwithstanding the mistaken rearraignment. Reconfirming that the charge was possession of cocaine, the court found that Eaton had not suffered prejudice from the State's error and that he had sufficient notice of the charges against him. In addition, the court offered Eaton a continuance, which he declined.

Eaton contends that he is not required to show prejudice in order to prevail because under State v. Vangerpen,⁸ the amendment of an information to add an essential element automatically requires reversal. That case however, is distinguishable. There, the State moved to amend the information at the close of

⁷ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

⁸ 125 Wn.2d 782.

its case.⁹ Here, the initial information was amended prior to Eaton's first trial and was never subsequently amended. Moreover, Eaton's argument that "omission of an element from the information is per se prejudicial"¹⁰ fails because, as already discussed, the information on which Eaton was retried did not lack an essential element of the charge.

Finally, as additional authority, Eaton cites State v. Courneya in which the appellate court reversed the defendant's conviction for hit and run after a second trial because the State failed to amend a faulty charging document.¹¹ Courneya, however, is distinguishable. There, the State conceded the original charging document in the first mistrial was defective because it failed to include several non-statutory elements of the charged crime.¹² The State failed to amend that information and the defendant was convicted after a second trial.¹³ The court rejected the State's argument that the policy underlying the notice requirement was satisfied because the missing elements were included in jury instructions in the first trial, holding that jury instructions, closing arguments, information

⁹ Id. at 785, 788 ("With the 'essential elements rule' in mind, the issue in the present case is whether the information was amended too late in the trial process.").

¹⁰ Appellant's Reply Brief at 5 (quoting Vangerpen, 125 Wn.2d at 788-89).

¹¹ 132 Wn. App. 347, 349, 131 P.3d 343 (2006).

¹² Id. at 351-52.

¹³ Id. at 350.

charging similar crimes in the same proceeding, and like sources from a previous trial cannot supply missing elements not contained in the information.¹⁴

Here, the original information was amended prior to the first trial to include all essential elements of the charge. The State retried Eaton on the basis of that same information. Therefore, there was no reliance on other sources from the first trial to provide him with the requisite notice.

We affirm the judgment and sentence.

For the Court:

Cox, J.

Appelwick, J.

Becker, J.

¹⁴ Id. at 354-55.