

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.

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DIVISION ONE

FEB 10 2006

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

The Honorable Anthony Wartnick
The Honorable Cheryl Carey
The Honorable Carol Schapira

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MR. EATON WAS CONVICTED OF A CHARGE NOT IN THE INFORMATION IN VIOLATION OF RCW 10.61 AND THE STATE AND FEDERAL CONSTITUTIONS.

RCW 10.61¹ 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. U.S. Const. Amend 6; Washington Constitution, Article I, section 22; State v. Peterson, 133 Wn. 2d 885, 892, 948 P.2d 381 (1997). In Mr. Eaton's case, the jury was instructed on a charge not contained 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.

2. THE INFORMATION IN MR. EATON'S CASE MISSTATED AN ESSENTIAL ELEMENT.

The State argues that a "technical error" in a charging document does not require reversal. Brief of Respondent at 7.

¹ Upon 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 any degree inferior thereto, or of an attempt to commit the offense.
RCW 10.61.003.

However, the error in Mr. Eaton's information was more than merely technical. The State relies on State v. Garcia, 65 Wn.App. 681, 829 P.2d 241 (1992), for the proposition that the error in Mr. Eaton's information is analogous to a technical error in the charging document. In Garcia, the information misstated the party to whom the defendant allegedly delivered cocaine and heroin. That fact is fundamentally different from Mr. Eaton's case. Neither the instructions nor the statute required the jury to determine the person to whom the defendant delivered drugs. Id. at 684-85.

In Mr. Eaton's case, the jury was required to determine what drug the defendant allegedly possessed. Jury instruction number 8 read in part

To convict the defendant of the crime of possession of a controlled substance, as charged in count I, each of the following **elements** of crime must be proved beyond a reasonable doubt:

(1) That on or about the 5th day of December, 2002, the defendant possessed a controlled substance, **cocaine**; and

(2) That the acts occurred in the State of Washington.

CP 8 (emphasis added).

In Mr. Eaton's case the drug he was charged with possessing was an element of the crime. Elements of a crime are

[t]hose constituent parts of a crime which must be proved by the prosecution to sustain a conviction.

Black's Law Dictionary, 467, Fifth Edition (1979). The State was required to prove Mr. Eaton specifically possessed cocaine in order to sustain a conviction.

The Washington Supreme Court has found that

[i]t is clear under Apprendi the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant.

State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004).

Here, the defendant was charged with possession of amphetamine under RCW 69.50.401(d). CP 1-3 (Information). Crimes under that section of the statute carried a maximum prison term of five years in 2002, the time of Mr. Eaton's alleged crime. Former RCW 69.50.401(d). However, based on the jury verdict Mr. Eaton was convicted of possession of cocaine, which was prohibited under RCW 69.50.401(a) (1) (i) because it was a "controlled substance classified in schedule . . . II. RCW 69.50.401(a) (1) (i). See RCW 69.50.206(4) (list of schedule II substances). RCW 69.50.401(a) (1) (i) carried a maximum sentence of ten years in 2002. The crime in the information charging Mr. Eaton and the crime for which Mr. Eaton was

convicted carried different penalties. Therefore, the specific controlled substance Mr. Eaton possessed was an element of the offense he was charged with. Goodman, 150 Wn.2d at 784.

The State must prove possession of a specific substance to secure a conviction under the statute.

[S]quarely before us is whether *the State* must allege and prove the specific identity of the controlled substance or whether the State must prove the substance is merely a controlled one. We conclude under Appendi **the State must allege the specific identity of the controlled substance.**

Goodman, 150 Wn.2d at 787 (emphasis added). Where Mr. Eaton was convicted of a different and more severe offense than that with which he was charged and arraigned, the error is not merely technical, and his conviction cannot stand.

3. THE DEFENDANT DOES NOT HAVE THE BURDEN OF SHOWING ACTUAL PREJUDICE.

The State argues Mr. Eaton cannot show prejudice because he was already tried once for possession of cocaine, and that trial ended in a hung jury. However, Mr. Eaton need not show prejudice to prevail. Under State v. Vangerpen, 125 Wn.2d 782, 789-90, 888 P.2d 1177 (1995), amendment of an information to add an essential element automatically requires reversal. Here the State never amended the information to include an essential element.

[A] charging document is constitutionally adequate only if all essential elements of the crime, statutory and non-statutory, are included in the document. . . .

Id. at 787. Omission of an element from the information is per se prejudicial error requiring a new trial. Id.

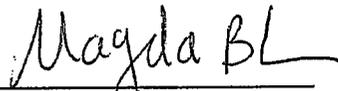
The jury was required to determine what drug Mr. Eaton allegedly possessed, and that fact is an element of the crime, not a mere technicality. Mr. Eaton does not have an affirmative duty to show prejudice, and reversal is required.

B. CONCLUSION.

For the reasons stated above and in his opening brief, Mr. Eaton asks this court to reverse his conviction.

DATED this 8th day of February, 2006.

Respectfully submitted,



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