

NO. 78984-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS T. WILLIAMS,

Petitioner.

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27 RONALD B. CHAMBERLAIN
CLERK

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

1. Is the penalty class of Bail Jumping an essential element of the crime of Bail Jumping?

2. Where Bail Jumping is charged and the information alleges the underlying crime is felony Possession of a Controlled Substance, must the information particularly identify the controlled substance possessed? Was the defendant prejudiced where the original information and affidavit of probable cause identified the substance?

3. Did the trial court's "to-convict" instruction contain all essential elements of bail jumping? May the defendant challenge the instruction where he proposed an instruction containing identical language? Is any defect in the instruction harmless in the context of the trial evidence and arguments?

4. Was the defendant's sentence authorized under Apprendi and Blakely?

II. STATEMENT OF THE CASE

The defendant was charged in Snohomish County Superior Court with possession of a controlled substance (cocaine). The state's first information alleged the defendant did, "on or about the 11th day of February, 2003, ... unlawfully possess a controlled

substance, to-wit": cocaine". CP 102-03. The affidavit of probable cause, filed contemporaneously with the information, alleged that, after the defendant was arrested, a search of his person revealed "a baggy of white powder and several \$100.00 bills" in the defendant's pants pocket. The affidavit further stated "the Washington State Patrol Crime Laboratory has confirmed this white powder is 1.3 grams of cocaine." CP 100-01.

When the defendant missed his omnibus hearing, a bench warrant issued for his arrest. The state then filed an amended information adding a count of Bail Jumping to the possession charge. CP 92.

The defendant later appeared for a pre-trial suppression hearing. At the conclusion of the suppression hearing, the trial court suppressed all evidence pertaining to the possession charge. RP (Decision on 3.5/3.6 Hearing) 9.

Immediately prior to trial, the state filed a second amended information charging the defendant with one count of Bail Jumping only. CP 86-87. The information alleged:

BAIL JUMPING, committed as follows: That the defendant, on or about the 4th day of December, 2003, being charged with Possession of a Controlled Substance, a felony, and having been released by court order with the requirement of a subsequent personal appearance before Snohomish

County Superior Court, a court of the State of Washington, for Omnibus Hearing on December 4, 2003, and knowing of the requirement of the subsequent personal appearance, did fail to appear as required, proscribed by RCW 9A.76.170(1), a felony.

CP 86-87.

A Snohomish County jury convicted the defendant. The defendant appealed. On appeal the defendant asserted for the first time the penalty class of Bail Jumping was an essential element of the crime that must be included in both the information and to-convict instruction. Regarding the underlying offense, the defendant further claimed the information should have identified the precise controlled substance the defendant was alleged to have possessed. The defendant also challenged the adequacy of the court's "to-convict" jury instruction.

III. THE COURT OF APPEALS' DECISION

The Court of Appeals rejected the defendant's assertion the penalty class of Bail Jumping comprised an essential element of the crime. Applying this Court's analysis in State v. Miller¹, the court concluded the express language of RCW 9A.76.170(1) set forth all of the essential elements of Bail Jumping. The Court of Appeals further observed that, while the penalties for Bail Jumping

¹ 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

were divided into classes, the crime itself was not divided into classes. Finally, the Court of Appeals observed that nothing in the Bail Jumping statute or case law indicated the penalty class was an implied essential element. Ultimately, the Court of Appeals determined the information was sufficient under either a strict or liberal reading.

The Court of Appeals also rejected the defendant's challenge to the "to-convict" instruction. The Court of Appeals concluded the penalty class of the underlying crime merely established the sentence that could be imposed following conviction. Regarding the potential applicability of Apprendi, the Court of Appeals characterized the classification of Bail Jumping as a sentencing question not properly within the jury's province.

IV. ARGUMENT

A. THE PENALTY CLASS FOR BAIL JUMPING IS NOT AN ESSENTIAL ELEMENT OF BAIL JUMPING. ALTERNATIVELY, THE INFORMATION SATISFIED DUE PROCESS WHEN LIBERALLY CONSTRUED. THE DEFENDANT RECEIVED ACTUAL NOTICE OF THE IDENTITY OF THE SUBSTANCE HE POSSESSED AND SUFFERED NO ACTUAL PREJUDICE.

Washington's Bail Jumping statute provides:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or

who fails to surrender for service of sentence as required is guilty of Bail Jumping.

...

RCW 9A.76.170(1).

Section 2 of the statute sets forth an affirmative defense that is not pertinent here. Thereafter, section (3) establishes the penalty classes of Bail Jumping:

- 1) Bail Jumping is:
 - a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;
 - b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
 - c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;
 - d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

RCW 9A.76.170(3).

The Court of Appeals' decision in this case extensively cites the analysis of another recent decision. State v. Gonzalez-Lopez, 132 Wn. App. 622, 132 P.3d 1128 (2006). In Gonzales-Lopez, the defendant alleged his information should have specified the class of the underlying charge of attempted first degree child molestation.

In both Gonzales-Lopez and the instant decision, the Court of Appeals recognized the structure and plain language of the Bail Jumping statute indicate the penalty classes are not elements of the crime. The Court of Appeals observed that section 1 of the statute defines the express essential elements of Bail Jumping for the purpose of determining guilt. The court found it “significant” that section 1 of the statute neither incorporates nor references section 3 of the statute, which in turn outlines the assorted penalty classes for Bail Jumping. The court characterized the statute as plain and unambiguous. Ultimately, the Court of Appeals found the express essential elements of the crime of Bail Jumping did not include the penalty classes of the crime. Williams, 133 Wn. App. at 716; Gonzalez-Lopez, 132 Wn. App. at 629.

The Court of Appeals’ analysis is consistent with the analysis this Court employed in a recent decision. State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004). Like the defendant here, Goodman raised a post-verdict challenge to the sufficiency of his information. Goodman was charged with possessing methamphetamine under RCW 69.50.401. That statute is similar to the Bail Jumping statute in that it sets forth the prohibited act in subsection (1) and outlines applicable penalties in subsection (2). Subsection (2) of the statute

references the assorted schedules applicable to various controlled substances. The schedules listing the various controlled substances which are illegal to possess or possess with intent to deliver are contained in separate statutes. See RCW 69.50.204, .206, .210, and .212. The particular schedule within which a particular substance is listed determines whether the defendant faces a class B or a class C felony.

Goodman did not find the pertinent schedule was an element of the offense. Similarly here, the penalty class is not an element of Bail Jumping. Accordingly, the information in the present case was not required to state the applicable penalty class to satisfy due process.

Another recent decision of this Court supports the conclusion the information here satisfied due process. State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005). In Miller, this Court rejected the defendant's assertion "validity" of a no-contact order was an element of the crime of violating a no-contact order. Noting the statute outlining the elements of violating a no-contact order did not reference the "validity" of Washington orders, Miller concluded "validity" was not an element of the offense. Ultimately, Miller

determined issues relating to validity were questions of law for the court (rather than the jury) to determine.

Similarly here, the penalty class of Bail Jumping is a question of law properly determined by the sentencing court. Consistent with Miller, this Court should reject the defendant's assertion the penalty classes of Bail Jumping comprise an element of the crime of Bail Jumping.

In his petition, the defendant argues the Court of Appeals' decision "directly conflicts" with several Washington decisions. See, e.g., State v. Ibsen, 98 Wn. App. 214, 989 P.2d 1184 (1999); State v. Green, 101 Wn. App. 885, 889, 6 P.3d 53 (2000), review denied, 142 Wn.2d 1018 (2001); State v. Pope, 100 Wn. App. 624, 999 P.2d 51, review denied, 141 Wn.2d 1018 (2000). As the following will show, Ibsen, Green, and Pope do not conflict with the decision in this case.

Ibsen and Green considered challenges to the sufficiency of informations alleging Bail Jumping. However, the charging documents in those cases failed to identify in any meaningful way the underlying offense for Bail Jumping. Thus, in Ibsen, the information simply indicated the defendant had "been admitted to bail with the requirement of a subsequent personal appearance" in

Superior Court. Ibsen, 98 Wn. App. at 218. In Green, the information contained the cause number of the offense on which the defendant had failed to appear but did not name the underlying offense. Pope did not directly address the sufficiency of an information, but did conclude a jury instruction characterizing the underlying offense for Bail Jumping as “a felony matter” failed to inform the jury of the elements necessary to convict. Pope, 100 Wn. App. at 629.

Here, in contrast, the information identified the underlying crime as “Possession of a Controlled Substance, a felony.” Thus, the information meaningfully identified the underlying offense. In addition, the information in this case listed many pertinent details relating to the underlying crime. Thus, the information stated the defendant had been 1) released by court order with a requirement he subsequently make a personal appearance before Snohomish County Superior Court; 2) was required to appear for an Omnibus Hearing on December 4, 2003; and, 3) had failed to appear as required. In the aggregate, the foregoing particulars assisted the defendant in preparing a defense, and distinguish the information from the informations disapproved in Ibsen and Green.

Alternatively, the defendant seeks relief for the reason the information did not identify the particular controlled substance he allegedly possessed. A recent decision of this Court is pertinent to this claim as well as the defendant's assertion the penalty class should have been pled. State v. Goodman, 150 Wn.2d 774, 83 P.2d 410 (2004).

In Goodman, the state's original information alleged Goodman possessed methamphetamine. However, subsequent informations simply alleged that Goodman possessed "meth." Goodman challenged the adequacy of the later-filed informations, alleging they did not fully identify the controlled substance he possessed.

Citing Apprendi², Goodman determined that the identity of the controlled substance was an essential element of the crime charged. Goodman, 150 Wn.2d at 785. Goodman reasoned that, where the identity of the controlled substance had the potential to increase Goodman's sentence, the identity of the substance comprised an essential element.

In the first place, Goodman arguably does not apply here for

² Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.435 (2000).

the reason the defendant in the present case was not charged with possessing a controlled substance. Rather, the defendant was charged with the different crime of Bail Jumping.

However, assuming *arguendo* Goodman applies, the defendant is not entitled to relief. For here, as in Goodman, the defendant challenges the sufficiency of the information for the first time on appeal. Accordingly, the charging document must be “constru[ed] ... liberally in favor of validity”. Goodman, 150 Wn.2d at 787-88; see State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Under the two-part test enunciated in Kjorsvik, an information challenged for the first time on appeal is sufficient if the necessary facts appear “in any form, or by fair construction can ... be found” in the charging document.

In the present case the information stated the underlying crime for Bail Jumping was “Possession of a Controlled Substance, *a felony*” and further indicated the crime with which the defendant was charged (Bail Jumping) was a felony (“proscribed by RCW 9A.76.170(1), *a felony*”). CP 86-87.

The foregoing language put the defendant on notice he was charged with *felony* Bail Jumping. Thus, the information told the defendant he was not charged with a misdemeanor class of Bail

Jumping. Simple consultation of the portion of the Bail Jumping statute setting forth the various penalty classes would permit the defendant to learn he was not charged with an A felony penalty class of Bail Jumping (pertinent only where murder is charged). In fact, the defendant was charged with a C felony penalty class of Bail Jumping, the lowest felony class (of two remaining classes) possible.

Indeed, insofar as every possessory drug offense in Washington comprises either a class B or a class C felony³, the applicable penalty class for Bail Jumping was the C felony penalty class as a matter of law. Matters of law need not be set forth in an information. See RCW 10.37.150 (“neither presumptions of law nor matters of which judicial notice is taken need be stated in an information.”) Accordingly, it was not necessary for the information to specify the penalty class (or to specify the identity of the controlled substance) in order to satisfy due process.

In sum, where the information made the defendant aware he faced a felony penalty class of Bail Jumping, and in fact the lowest possible felony penalty class (class C) applied as a matter of law,

³ RCW 69.50.401 and the schedules it references establishes that possessory controlled substance offenses comprise either class B or class C felonies in Washington.

the defendant was not deprived of information aggravating the applicable statutory maximum sentence he faced. The language of the information, though inartful, put the defendant on notice of all the necessary information. Accordingly, when liberally construed in favor of validity, the information satisfied due process.

In addition, the defendant was not prejudiced by the information for the reason he received actual notice of the substance he was alleged to have possessed. The state's original information stated the defendant was charged with possessing "a controlled substance, to-wit: cocaine". CP 102-03. In addition, the state's affidavit of probable cause, filed contemporaneously with the state's original information, alleged that a search of the defendant's person incident to arrest revealed "a baggy of white powder and several \$100.00 bills" and further stated that a test confirmed the powder was "1.3 grams of cocaine." CP 100-01. Here, as in Goodman, the defendant received actual notice of the identity of the controlled substance supporting the underlying offense for Bail Jumping. Accordingly, the defendant suffered no prejudice such that the second prong of Kjorsvik is not met.

Further evidence the defendant was not prejudiced is found in the trial record. At the close of the evidence, the defendant

argued he should not be found guilty of Bail Jumping because he did not “knowingly act” when he failed to appear for court. RP (Trial) 94. Defense counsel argued the defendant may have been unaware of his duty to appear:

This is a quick case. ... Not a single person testified they saw Mr. Williams receive a copy of that order It is possible he signed ... and never even knew he was supposed to appear

RP (Trial) 96.

It is apparent from defense counsel’s comments that neither the classification level of the underlying felony nor the identity of the controlled substance possessed were in any way pertinent to the defendant’s trial strategy. This court should deny relief where it is apparent the defendant was in no way prejudiced by any inartful language in the information.

B. THE “TO-CONVICT” INSTRUCTION CONTAINED ALL ESSENTIAL ELEMENTS OF THE CRIME OF BAIL JUMPING. ALTERNATIVELY, ANY ERROR IN THE INSTRUCTION WAS INVITED AND/OR HARMLESS.

To-convict instructions must contain all elements of the charged crime because the instruction dictates how the jury will measure the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). As argued above, neither the penalty class of Bail Jumping nor the identity of

the controlled substance for the underlying offense comprise essential elements of the crime of Bail Jumping. Accordingly, the trial court did not err in giving a “to-convict” instruction making no reference to those particulars.

In any event, the penalty class of Bail Jumping is a question of law properly determined by the court and not by the jury. Here, the jury properly made the factual determination whether the defendant was charged with a particular crime when he knowingly failed to appear for a required court appearance. The jury was not required to resolve the legal question as to how that particular crime was classified by the legislature.

Miller employed the foregoing reasoning in rejecting the defendant’s assertion the “validity” of a no-contact order was an element of the crime of violating such an order. Miller concluded the “validity” of a court order was a “question of law appropriately within the province of the trial court to decide.” Miller, 156 Wn.2d at 24.

A prior Washington decision is consistent with Miller. State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003). Carmen determined the trial court, not the jury, was required to determine the validity of predicate convictions for purposes of finding whether

the defendant was guilty of felony violation of a no-contact order. Accordingly, the defendant's challenge to the sufficiency of the "to-convict" instruction (which made no reference to the "validity" of prior convictions) was rejected.

This court should employ the reasoning of Miller and Carmen and reject the defendant's challenge to the "to-convict" instruction here.

Alternatively, should this Court find the "to-convict" instruction was somehow deficient, the defendant's proposed "to-convict" instruction and the state's "to-convict" instruction used identical language in referencing the underlying offense for Bail Jumping ("the defendant was charged with Possession of a Controlled Substance."). CP 107; 75. Accordingly, the invited error doctrine bars any challenge to the instruction. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002); State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990).

In any event, any error in the "to-convict" instruction was harmless in the context of the trial evidence. For, during trial, the state introduced into evidence a copy of the original information alleging possession of a controlled substance only. CP 102-03; RP (Trial) 37. That document alleged the defendant did "unlawfully

possess a controlled substance, to-wit: cocaine, proscribed by RCW 69.50.401(d), a felony.” The defendant did not testify and in no way refuted the state’s evidence. RP (Trial) 79. Later, in his closing argument, the prosecutor referenced the court’s “to-convict” instruction and suggested the jury consider the original information in determining whether the element “the defendant was charged with Possession of a Controlled Substance” had been met. RP (Trial) 87. Defense counsel’s closing made no reference to the underlying offense for Bail Jumping. Rather, defense counsel argued the defendant may not have been aware of his need to appear in court due to the fast pace of court hearings and the potential illegibility of court orders. RP (Trial) 95-96.

Where undisputed trial evidence established the defendant failed to appear for court while charged with felony possession of a controlled substance (cocaine), there is no possibility the jury would have returned a different verdict had the “to-convict” instruction for Bail Jumping identified the substance and/or referenced the penalty class of the underlying crime. Accordingly, this court should determine any error in the “to-convict” instruction was harmless. State v. Thomas, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004);

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002); Neder v. United States, 527 U.S.1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

In sum, the trial court's "to-convict" instruction set forth all essential elements of bail jumping. Alternatively, any challenge the defendant might attempt is barred by the invited error doctrine. At worst, the "to-convict" instruction contains a harmless error for which the defendant is not entitled to relief.

C. NO SENTENCING ERROR OCCURRED BELOW.

The defendant has argued his sentence was not wholly derived from the jury's verdict. This argument fails for the reason the sentencing court imposed the lowest sentence authorized by law. For, the jury found the defendant guilty of "Bail Jumping as charged". CP 69. The information alleged the defendant failed to appear after he was charged with "Possession of Controlled Substance, a felony" and further indicated felony Bail Jumping was implicated.

Where the trial court imposed a low-end, standard range sentence for the lowest possible penalty class of felony Bail Jumping, its sentence was "wholly derived" from the jury's verdict

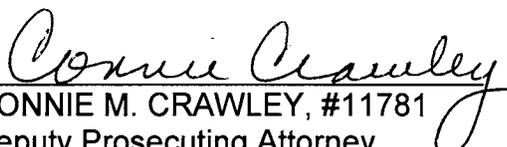
such that any Apprendi/Blakely⁴ claim should be rejected by this Court.

V. CONCLUSION

The Court of Appeals' decision should be affirmed.

Respectfully submitted on May 2, 2007.

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⁴ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).