

56924-4

56924-4

80195-9
No. 56924-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RONALD QUISMUNDO,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 MAR 24 PM 4:41

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

The Honorable Ronald Castleberry

APPELLANT'S OPENING BRIEF

DAVID L. DONNAN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....1

C. STATEMENT OF THE CASE2

D. ARGUMENT.....3

THE TRIAL COURT ABUSED ITS DISCRETION BY
PERMITTING THE STATE TO AMEND THE
INFORMATION AFTER IT HAD RESTED ITS CASE-
IN-CHIEF 3

1. The trial court permitted the State to reopen its
case to amend the information after it had rested..... 3

2. Charging documents must allege all the essential
elements of the crime..... 3

3. Permitting the state to reopen to file a second
amended information was an abuse of discretion..... 5

4. Prejudice requiring reversal is inherent in the
amendment after the prosecution rested 7

E. CONCLUSION8

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992).....	4
<u>Leonard v. Territory</u> , 2 Wash.Terr. 381, 7 P. 872 (1885).....	5
<u>State v. Holt</u> , 104 Wn.2d 315, 704 P.2d 1189 (1985).....	5
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992).	8
<u>State v. Johnson</u> , 119 Wn.2d 143, 829 P.2d 1078 (1992).....	5
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 106, 812 P.2d 86 (1991).....	8
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989)	5
<u>State v. Markle</u> , 118 Wn.2d 424, 823 P.2d 1101 (1992).....	8
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987).....	6, 7, 8
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	4, 8

Decisions Of The Washington Court Of Appeals

<u>State v. Debolt</u> , 61 Wn.App. 58, 808 P.2d 794 (1991)	6
<u>State v. Hull</u> , 83 Wn.App. 786, 924 P.2d 375 (1996), <u>rev. den.</u> , 131 Wn.2d 1016 (1997)	7, 8

United States Constitution

14 th Amendment	4
5 th Amendment.....	4
6 th Amendment	4

Washington Constitution

Article 1 § 22 (amendment 10)4, 6

Article 1 § 3.....4

Rules Of The Court

CrR 2.1(d).....6

A. ASSIGNMENT OF ERROR.

The trial court erred by failing to grant Mr. Quismundo's motion to dismiss and instead permitting amendment of information to add additional elements after the prosecution rested its case in chief.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. A charging document in Washington must allege all statutory and nonstatutory elements. Where the amended information does not allege contact with a protected person does it include the essential elements of the offense of violating a no contact order?

2. Where the essential element of having contact with a protected person is omitted from the information, does the filing of a second amended information including that element constitute an amended to a lesser degree or lesser included offense?

3. Where the information fails to allege an offense because it omits an essential element and Washington law bars amending the charge after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense, may the prosecution circumvent the constitutional rule by reopening its case for the sole purpose of filing a second amended information?

C. STATEMENT OF THE CASE.

Mr. Quismundo was charged with violating a no contact order contrary to RCW 26.50.110. CP 62-63. An amended information was filed prior to trial. CP 53-54. The amended information alleged in pertinent part that:

the defendant, on or about the 31st day of May, 2005, with knowledge that he/she was the subject of a protection order ... as per Snohomish County Judgment and Sentence #04-1-00021-6 ordered by Judge Bowden on February 18, 2004, protecting Kelly Quismundo and Snohomish County Judgment and Sentence #00-1-01330-7 ordered on November 9, 2000 protecting Kelly Quismundo, and said order being valid and in effect, and the defendant had at least two prior convictions for violating the provision of a no contact order ... and the victim was a family or household member, as defined in RCW 0/99.020; proscribed by RCW 26.50.110, a felony.

CP 53.

Mr. Quismundo presented a defense of necessity. CP 55. He testified at trial that he went to the apartment of his estranged wife, Kelly Quismundo, after she telephoned him and indicated she was leaving their three children unattended. RP 109-11. He testified she was not at the apartment when he arrived and he had no contact with her as alleged.

D. ARGUMENT.

THE TRIAL COURT ABUSED ITS DISCRETION BY
PERMITTING THE STATE TO AMEND THE
INFORMATION AFTER IT HAD RESTED ITS CASE-
IN-CHIEF

1. The trial court permitted the State to reopen its case to amend the information after it had rested. After the prosecution presented its case in chief and rested, Mr. Quismundo moved through counsel to dismiss because the amended information failed to allege that “Mr. Quismundo ever violated the order, or had contact with Kelly Quismundo.” RP 83-84.

The prosecutor acknowledged the element of contact with a protected person was not alleged in the amended information, but that it was a “scrivner’s error” and Mr. Quismundo was otherwise aware of the allegations. RP 84. The prosecutor observed that the information had been amended prior to trial in order to remove an allegation of assault. RP 84.

2. Charging documents must allege all the essential elements of the crime. Every defendant in Washington has a constitutional right under Article 1 §§ 3 and 22 (amendment 10)¹

¹ Const. Art. 1, § 3 provides that “No person shall be deprived of life, liberty, or property, without due process of law.”

Const. Art. 1, § 22 provides that “in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him.”

and the 5th, 6th, and 14th Amendments² of the federal constitution to be apprised with reasonable certainty of the nature of the accusations against him or her. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). These provisions bar trying an accused person for an offense that has not been charged. Auburn v. Brooke, 119 Wn.2d 623, 627, 836 P.2d 212 (1992).

This “essential elements” rule has been settled law in Washington since before statehood. Leonard v. Territory, 2 Wash.Terr. 381, 7 P. 872 (1885). A charging document is constitutionally adequate only if all essential elements of the crime, both statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992); State v. Leach, 113 Wn.2d 679, 687, 782 P.2d 552 (1989); State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985) (omission of any statutory element of a crime in the charging document is a defect requiring dismissal).

² U.S. Const. Amend. 5 provides in part: “No person shall ... be deprived of life, liberty, or property, without due process of law;....”

U.S. Const. Amend. 6 provides in part: “In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation;...”

U.S. Const. Amend 14 provides in part: “No State shall ... deprive any person of life, liberty, or property, without due process of law;”

3. Permitting the state to reopen to file a second amended information was an abuse of discretion. In Mr. Quismundo's case, the prosecutor never disputed that the amended information failed to allege the essential element of contact with a protected person. RP 84-88. Nevertheless, the trial court allowed the State to reopen its case-in-chief to file a second amended information adding the previously omitted element. RP 89-90, citing State v. Debolt, 61 Wn.App. 58, 808 P.2d 794 (1991). DeBolt however involved simply changing the charging date in the information, not the addition of a material element of the crime. Therefore, the amendment of the date was a matter of form rather than substance. Absent an alibi defense or a showing of other substantial prejudice to the defendant the amendment was within the discretion of the trial judge.

Contrary to the trial judge's ruling, CrR 2.1(d) permitting amendment of the information is limited by the application of WA Const. Art. 1, § 22 (amend. 10), requiring the defendant be adequately informed of a charge he is to meet at trial. State v. Pelkey, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987).³ The

³ The Court explained the reason for this bright line rule: The constitutionality of amending an information after trial has already begun presents a different question. All of the pretrial motions, voir dire of the jury, opening argument, questioning and cross

Pelkey Court articulated a bright-line rule: “A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.” 109 Wn.2d at 491; State v. Hull, 83 Wn.App. 786, 800, 924 P.2d 375 (1996), rev. den., 131 Wn.2d 1016 (1997).

In Mr. Quismundo’s case, the second amended information did not seek to allege a lesser degree or included offense. Instead, the second amended information charged an offense where none was charged in the information upon which the trial had been conducted.

4. Prejudice requiring reversal is inherent in the amendment after the prosecution rested. An amendment of the information to something that is neither a lesser degree, nor a lesser included offense is reversible error per se. Hull, 83 Wn.App. at 800; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992). “Whether a defendant was prejudiced by a defective information is **only** to be considered if the information is challenged for the first time after a

examination of the witnesses are based on the precise nature of the charge alleged in the information. Where a jury has already been empaneled, the defendant is highly vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information.
State v. Pelkey, 109 Wn.2d at 490

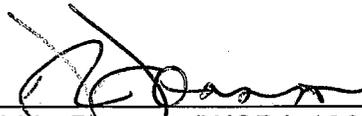
verdict.” State v. Kjorsvik, 117 Wn.2d 93, 106, 812 P.2d 86 (1991) (emphasis added); State v. Hopper, 118 Wn.2d 151, 155-56, 822 P.2d 775 (1992).

Washington courts have clearly and repeatedly held that where the information fails to state an offense because it omits an essential element, a subsequent amendment to add the missing element does not fall within the rule delineated in Pelkey. State v. Vangerpen, 125 Wn.2d 782; State v. Hull, 83 Wn.App. at 801-02. The trial judge therefore abused his discretion in permitting amendment of the information rather than dismissal without prejudice to the State’s ability to renew the prosecution.

E. CONCLUSION

For the reasons set forth herein, Mr. Quismundo respectfully requests this Court reverse his conviction and remand to the superior court’s for further proceedings as appropriate.

Respectfully submitted this 24th day of March 2006.



David L. Donnan (WSBA 19271)
Washington Appellate Project - 91052
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
V.)	COA NO. 56924-4-1
)	
RONALD QUISMUNDO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 24TH DAY OF MARCH, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

SNOHOMISH COUNTY PROSECUTING ATTORNEY
3000 ROCKEFELLER AVENUE, M/S# 504
EVERETT, WA 98201-4046

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF MARCH, 2006.

x _____ 

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 MAR 24 PM 4:41