

NO. 80195-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD S. QUISMUNDO,

Petitioner.

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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

1. Have this Court and the United States Supreme Court determined that dismissal without prejudice to re-file an amended information is the appropriate remedy where the information omits an essential element of the crime?

2. Does a defendant's right to continue a trial with the jury he selected allow the court to grant the State's motion to reopen its case-in-chief so that defendant may be tried on a constitutionally sufficient information?

3. Where a defendant knowingly and voluntarily declines to move for a mistrial, should he be allowed to ask for a mistrial on the same grounds on appeal?

II. STATEMENT OF THE CASE

After the State rested, defendant moved to dismiss the charge because the amended information omitted an element of the offense – that defendant violated the protective orders. 8/22 RP 84. Citing City of Seattle v. Termain, 124 Wn. App. 798, 103 P.3d 209 (2004), defendant argued that the dismissal must be with prejudice. 8/22 RP 86.

The State argued it should be allowed to re-open for the purpose of filing a second amended information. In the alternative,

the State argued that dismissal without prejudice was appropriate if defendant did not want to withdraw his motion. 8/22 RP 87-88.

Defendant argued that State v. Pelke, 109 Wn.2d 484, 745 P.2d 854 (1987), prohibited the State from amending the information after it had rested. Defendant said "the only proper remedy at this point is dismissal with prejudice. 8/22 RP 89 (emphasis added).

The court informed defendant it was granting the State's motion to re-open its case and file a second amended information.

In making the ruling, the court found:

The defendant has shown no prejudice or surprise or hindrance of his defense. In fact, if that's the case, obviously as I've indicated, I would grant the motion to continue and would even consider a motion to dismiss without prejudice or whatever needs to be done.

8/22 RP 89-90.

Defendant then said he would like a continuance of "a few weeks." 8/22 RP 94.

The court informed defendant that it considered the motion for a continuance as "essentially to grant a motion for a mistrial[.]" 8/22 RP 96. The court informed defendant that if he granted a mistrial, the State would be free to re-try defendant. Since the court

had granted the State's motion to file the second amended information, a re-trial would be on that information. 8/22 RP 97.

Defendant responded, "I understand that. My concern would be whether moving for a mistrial waives [my] right to appeal of the decision of the court denying." 8/22 RP 97.

The next day, defendant informed the court that he and counsel "feel it is necessary to go forward with the trial." Defendant then said, "We do not wish to waive any kind of appeal issue." Defendant then stated the motion for mistrial was withdrawn, "if I ever actually made the motion." 8/23 RP 103.

After noting defendant's objection to the court allowing the State to file a second amended information, the court stated:

And just so the record is clear, [defendant], you have conferred with your counsel, and rather than seeking a continuance of the trial, either short or a prolonged continuance, you are desirous of proceeding with trial on the second amended information knowing that you object to the filing of the second amended information; is that correct?"

8/23 RP 104.

After getting an affirmative response from defendant, the court found defendant had made "a decision knowingly and voluntarily to proceed rather than ask for a continuance[.]" 8/23 RP 104.

At the Court of Appeals, defendant did not request dismissal with prejudice as a remedy. Rather, he argued:

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.

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The Court of Appeals affirmed the trial court. It found that "the sole remedy sought by [defendant] was dismissal with prejudice. This was not an available remedy." State v. Quismundo, No. 56924-4-I, slip op. 3.

III. ARGUMENT

A. INTRODUCTION.

At trial defendant moved to dismiss the charge with prejudice. This Court and the United States Supreme Court have long held that the appropriate remedy is dismissal without prejudice. The trial court correctly denied defendant's motion to dismiss with prejudice.

After denying defendant's motion to dismiss with prejudice, the court offered defendant a mistrial with the understanding that the State could re-try him on an information that contained all essential elements of the crime. If the court had granted a mistrial over defendant's objection, double jeopardy would have prevented re-trial. The court's decision to allow the State to reopen its case-

in-chief to amend the information so that it was constitutionally sufficient was not an abuse of discretion.

After the trial court allowed amendment of the information, it offered to grant defendant's motion for a mistrial. Defendant affirmatively withdrew the motion for a mistrial. The court found the decision to proceed with the trial was made knowingly and voluntarily. At the Court of Appeals and here, defendant now asks that he be granted a mistrial with the State being able to try him again for the same crime. Defendant's withdrawal of the mistrial motion should preclude him asking for that mistrial on appeal.

B. THE REMEDY FOR A CHARGING DOCUMENT THAT IS DISCOVERED TO BE MISSING AN ESSENTIAL ELEMENT AFTER THE STATE HAS RESTED IS DISMISSAL WITHOUT PREJUDICE.

A defendant has a constitutional right to a charging document that includes all the statutory and non-statutory elements of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) citing Leonard v. Territory, 2 Wn. Terr. 381, 7 P.2d 872 (1885). U.S. Const. Amend. 6,¹ Const. Art. 1 § 22.² The amended information filed on the morning of trial was clearly missing an essential element. This defect was not brought to the attention of the trial court until after the State rested its case-in-chief.

¹ A copy of U.S. Const. Amend 6 is at Appendix A.

² A copy of Const. Art. 1 § 22 is at Appendix B.

We have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State's ability to re-file charges.

Vangerpen, 125 Wn.2d at 792-93.

In Vangerpen, the defendant was convicted of attempted first degree murder. The charging document "inadvertently omitted the statutory element of premeditation[.]" Immediately after the State rested, the defendant rested. He then moved to dismiss because the information failed to allege the element of premeditation. The trial court permitted the State to amend the information. Vangerpen, 125 Wn.2d at 785-86. This Court affirmed its holding in State v. Pelke, 109 Wn.2d 484, 491, 745 P.2d 854 (1987), that after the State rests, allowing it to amend the information "necessarily prejudices this substantial constitutional right within the meaning of CrR 2.1(e)." Vangerpen, 125 Wn.2d at 789 (emphasis in the original). This Court remanded the case without prejudice to the State's right to file the correct information. Vangerpen, 125 Wn.2d at 797.

The appropriate remedy is dismissal without prejudice. As this Court discussed in Vangerpen, that remedy does not offend the double jeopardy clause of either the United States or Washington State Constitution. Vangerpen, 125 Wn.2d at 794. That remedy

preserves the balance between the defendant's "strong interest in obtaining a fair readjudication of his guilt free from error," and society's "valid concern for insuring that the guilty are punished." Burks v. United States, 437 U.S. 1, 15, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Reversing that long-standing precedent, especially when it is not a remedy asked for by the defendant, his right to a fair trial was not impacted, and he suffered no prejudice, is not warranted.

Further, granting dismissal with prejudice in the situation presented here would encourage a defendant who notices a defect in the information to not bring that defect to the court's attention until after the State had rested. Avoiding such encouragement has been a concern of this Court. State v. Kjorsvik, 117 Wn.2d 93, 103, 812 P.2d 86 (1991), State v. Leach, 113 Wn.2d 679, 700, 782 P.2d 552 (1989) (Brachtenbach, J., concurring). The Court should continue to discourage that practice. The rule announced in Vangerpen, that dismissal without prejudice is the appropriate remedy for an insufficient charging document that is first challenged after the State rests, would discourage that practice. Vangerpen, 125 Wn.2d at 792-93.

C. THE DOUBLE JEOPARDY CLAUSE GIVES DEFENDANT THE RIGHT TO CONTINUE HIS TRIAL WITH THE JURY HE SELECTED.

The double jeopardy clause of the United States Constitution gives a defendant a “valued right to have his trial completed by a particular tribunal.” Arizona v. Washington, 464 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (citations and quotations omitted). A comparison of the double jeopardy provisions of the United States Constitution and the Washington State Constitution “reveals that they are identical in thought, substance, and purpose.” State v. Linton, 122 Wn. App. 73, 76, 93 P.3d 183 (2004), affirmed, 156 Wn.2d 777 (2006).

This right is protected by the rule that when a court grants a mistrial over the objection of the defendant, and that mistrial is not required in the interests of justice, the defendant may not be retried for that offense. State v. Ervin, 158 Wn.2d 746, 753, 147 P.3d 567 (2006).

Here, these principles conflicted with the defendant’s right to be tried on an information that contained all the elements of the offense, and to have the charge dismissed without prejudice if the defect was discovered after the State rested. Vangerpen, 125 Wn.2d at 789.

The bright-line rule announced in Pelke, as interpreted in Vangerpen presented a dilemma for the trial court. While there would have been some prejudice by allowing amendment of the information, it did not rise to the level of a manifest injustice. See State v. Jones, 97 Wn.2d 159, 164, 641 P.2d 708 (1982) (there must be extraordinary and striking circumstances before a court may declare a mistrial over the objection of the defendant). “Manifest injustice” requires an injustice that is “obvious, directly observable, overt, [and] not obscure.” State v. Mendoza, 157 Wn.2d 582, 586, 141 P.3d 49 (2006) (quoting In re Personal Restraint of Matthews, 128 Wn. App. 267, 274, 115 P.3d 1043 (2005)). If the court declared a mistrial over defendant’s objection, double jeopardy would have precluded the State from re-trying defendant for violating the protective orders. Ervin, 158 Wn.2d at 753, State v. Graham, 91 Wn. App. 663, 667, 960 P.2d 457 (1998). By granting the State’s motion to reopen to file an amended information, the court protected both defendant’s right to proceed with the trial before the jury he selected and the State’s right to punish the guilty.

A court’s decision to allow a party to re-open its case is within its sound discretion. State v. Pitegge, 61 Wn. 264, 266, 112 P. 263

(1910). "A trial court's actions in regard to reopening a case will be upheld except upon a showing of manifest abuse of discretion and prejudice resulting to the complaining party." State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court exercised sound judgment to protect the rights of both parties.

Further, even if allowing the State to reopen its case was an abuse of discretion, defendant can not seriously argue that it resulted in prejudice to him. The evidence against defendant was uncontested and overwhelming. A re-trial would almost surely have resulted in another conviction. There was no prejudice.

D. THE KNOWING, VOLUNTARY WITHDRAWAL OF DEFENDANT'S MOTION FOR A MISTRIAL PRECLUDES HIM NOW REQUESTING A NEW TRIAL ON THE SAME GROUNDS.

Defendant moved for dismissal with prejudice. RP 86, 89. He abandoned that position at trial by withdrawing his motion. To the extent he did not abandon that position at trial, he certainly abandoned it before the Court of Appeals. In his Petition for Review, defendant did not ask for dismissal of the charge with prejudice. He requests only that his case now be dismissed without

prejudice. Petition for Review 6-7. This Court does not consider “issues apparently abandoned at trial and clearly abandoned in this court.” Seattle-First National Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 243, 588 P.2d 1308 (1978).

The trial court offered defendant the choice of remedies. He could either continue with his motion for a mistrial, in which case the State would have been free to re-try him on the second amended information at a later time, or he could withdraw his motion. Defendant chose the second alternative.

[W]hen a defendant in the procedural setting of a criminal trial makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right. A criminal defendant is entitled to a fair trial from the state, including due process. He is not denied due process by the state when such denial results from his own act, nor may the state be required to protect him from himself.

State v. Lewis, 15 Wn. App. 172, 177, 548 P.2d 587, review denied, 87 Wn.2d 1005 (1976).

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted this 6th day of March, 2008.

A handwritten signature in black ink, appearing to read "Thomas M. Curtis". The signature is written in a cursive style with a horizontal line underneath it.

THOMAS M. CURTIS, WSBA # 24549

Deputy Prosecuting Attorney

Attorney for Respondent

[Next Part>>](#)

U.S.C.A. Const. Amend. VI-Jury Trials

United States Code Annotated [Currentness](#)

Constitution of the United States

[Annotated](#)

[Amendment VI. Jury Trial for Crimes, and Procedural Rights \(Refs & Annos\)](#)

➔Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

West's RCWA Const. Art. 1, § 22

West's Revised Code of Washington Annotated Currentness
Constitution of the State of Washington (Refs & Annos)

☞ Article 1. Declaration of Rights (Refs & Annos)

➔ **§ 22. Rights of the Accused**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

CREDIT(S)

Adopted 1889. Amended by Amendment 10 (Laws 1921, ch. 13, § 1, p. 79, approved Nov. 1922).

HISTORICAL NOTES

Amendment 10 rewrote the section, which originally read:

"In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."