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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP2141-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN M. SMITS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN BROWN COUNTY CASE 2015CM1575, THE HONORABLE JUDGE DONALD ZUIDMULDER PRESIDING, AND FROM AN ORDER DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON GROUNDS THAT DEFENDANT DID NOT HAVE PROPER NOTICE

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATEMENT OF ISSUES

Issue presented: Should Smits be granted a new trial because there was no notice given to him when the State added an additional charge after the close of evidence during the jury trial?

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT

Oral argument would be of marginal value in this case because the issues on appeal can be fully developed in writing with citations to the record and citation to relevant legal authorities.

STATEMENT ON PUBLICATION

The law relating to a defendant's right have notice of the crimes he is facing at trial is well established. However, there are few published decisions that address this fact pattern, where the State amends the charge at the close of evidence of the trial. Therefore, the defendant believes that publication of this decision would further clarify and develop existing case law.

STATEMENT OF THE CASE

Brian M. Smits ("Smits") was charged with one count of obstructing an officer, operating a motor vehicle while intoxicated-2nd offense, and operating with prohibited alcohol concentration-2nd offense. *R. 1.* Smits had a jury trial on these counts. *R. 33.* During the jury trial, the State amended the criminal complaint, adding a second count of obstructing an

officer after the close of evidence. *R. 33; R. 39; R. 74-225 to R. 74-226.*

The State started their case in chief with the testimony of Officer Gonnering. *R. 74-100 to R. 74-155.* During this testimony, the Judge excuses the jury and makes the following statements:

> THE COURT: All right. You can be seated, everybody. I'll just come out because I want to be able to -- Mr. Lasee and -- and Mr. Reid, you know, the -- what the jury's heard thus far is, you know, this incident in the back of the squad car, and then I believe the officer's testified to this incident at the hospital. So I want the parties to understand that because I would require unanimity on the obstructing an officer that I believe I'm going to have to *sua sponte* send two obstructing charges to the jury, and I'll specifically say that the first charge relates to the incident in the squad car so they know factually where they should have their attention, and then assuming the evidence comes in this afternoon with regard to this fight in the emergency room, those constitute two separate obstructings, and the def – and my obligation is to see that the jury has unanimity.
>
> Mr. Smits, the jury has to be unanimous with regard to the offense, and if I allow two separate fact scenarios that fit a crime, then I can't guarantee that the jury – half of them aren't convicting you for what they allegedly say happened in the car and half aren't going with the hospital. So this is not to prejudice you. It's to

– it's to protect your rights and also to protect my appellate record.

So I'm just advising the parties that given the state of the record at this point, I – I'm going to – I'm going to entertain that – I'll entertain that. So we'll see where it ends up, but I want to give everybody notice that that's where I'm going on this thing. So there – we may end up with two separate charges of obstructing, but I'll focus them in the verdicts and in my jury instructions as to these different places. Okay?

R. 74-138 to R. 74-139. The jury trial proceeded on after these comments. The issue of adding a second count of obstructing was not brought up again until after the both parties rested their case and they were reviewing jury instructions. *R. 74-225 to R. 74-228.* At that point the Court asked the District Attorney how he wanted to proceed:

THE COURT: I suppose, Mr. Lasee, the question that the court has are you going to amend also on a disorderly conduct with the testimony with regard to what happened in the emergency room, or are you just going to let that go? It's up to you. It's up to you.

MR. LASEE: I think, your Honor, I am going to ask rather than adding a disorderly conduct do what the court suggested which is add a count for obstructing for each of the two incidents just so that's clear for the jury, and we're not --

THE COURT: All right.

MR. LASEE: -- running into a lack of unanimity.

R. 74-225. The record shows that the Court leaves the option up to the District Attorney, who follows the suggestion of the Court and adds a second obstructing charge after the close of the evidentiary portion of the trial. Then the parties are determining how to proceed with jury instructions that include the added charge:

> THE COURT: I think the only thing that we have to do is discuss on -- on the last page it says the fourth element requires that the – that the defendant knew that -- I think we should have Officer Gonnering and Officer Sands were officers acting in an official capacity because you know, Sands says he lay -- I mean I'm just asking the lawyers. Sands says he – you know, he physically had to lay on top of the defendant, and I think both Sands and Gonnering testified they had to restrain him at the emergency room. So I think – I think that should – should say the fourth element requires that the defendant knew that Officer Gonnering and Officer Sands were officers acting in an official capacity with lawful authority. Or do you --
>
> MR. LASEE: Or do you want to—
>
> THE COURT: Or do you want to have two --
>
> MR. LASEE: Separate them out, say with respect to Count 1, the fourth element requires the defendant knew Officer Gonnering, and then with respect to Count 4, the fourth element requires that the defendant knew that Officer

> Gonnering and Officer Sands. That's only for the – that's only for the fourth count where those two officers are involved.
>
> THE COURT: Right. Do you have a preference, Mr. Reid?
>
> MR. REID: I guess it depends on the State's theory of Count 4. So I guess I'll leave it up to you.

R. 74-227 to R. 74-229. After this, the instructions were read to the jury, including two instructions for two counts of obstructing an officer. *R. 76-238 to R. 76-255.* Ultimately, the jury ended up convicting Smits on all four counts, including the added count of obstructing. *R. 76-280-281; R. 45.*

Smits filed a post-conviction motion, seeking a new trial based on the grounds that the lack of notice violated his due process rights. *R. 53.* Specifically, by adding a count after the close of trial Smits did not have notice of this charge to defend it.

A post-conviction hearing was held on February 17, 2017 and continued on October 10, 2017. Judge Zuidmulder denied Smits's post-conviction motion for a new trial. *R. 80; R. 82-6.* Smits now appeals from the judgment finding him guilty of count 4, obstructing an officer and denying his motion for a new trial. *R. 62.*

ARGUMENT

Smits is entitled to a new trial or to have count four, obstructing an officer be dismissed and the judgment vacated because the lack of notice in adding this charge violated his due process rights guaranteed to him by the United States and Wisconsin Constitutions which require notice of the charges

against a person. *See* State v. Neudorff, 170 Wis.2d 608 (1992).

The State, as well as the Court in this matter have relied on the statute, Wis. Stats. 971.29(2), to argue that the State did have leave to add count four at the close of trial. *Wis. Stats. 971.29(2).* This statute allows the court to allow an amendment of the complaint to conform to the proof, as long as the amendment is not prejudicial to the defendant. *Id.* The problem with them relying on this statute is that they are not acknowledging the second part of the statute. The second half explains that an amendment can be made as long as it does not prejudice the defendant. *Id.*

Adding an additional count, with additional penalties, most certainly is prejudicial to Smits. With the addition of a new charge, the defendant was not only facing an additional conviction, but facing exposure of another nine months. Additionally, there are further costs associated with an additional criminal conviction. There are also future implications, in terms of being charged as a repeater if he were ever charged with a crime in the future.

The Court of Appeals of Wisconsin and the Supreme Count of Wisconsin have decided a case wherein the State amended the charge and did not provide sufficient notice to the defendant.

In State v. Duda, the Wisconsin Supreme Court held that the State could not make a substantive amended to the complaint after the close of trial. State v. Duda, 60 Wis. 2d 431, 201 N.W.2d (1973). In this case, the Court mentions the State argues Wis. Stats. 971.29(2) cures the defect in the State's case. Id. at 439. However, the Court rejects this argument, stating, "We are of the opinion that the sentence regarding amendment after verdict was intended to deal with

technical variances in the complaint such as names and dates." Id. at 440.

Similar to the facts in Duda, here the State made a material amendment to the complaint when it added a new charge after the close of trial. By doing this, it did not allow Smits to have a chance to defend himself during his jury trial. Even trial counsel acknowledges he is not sure what the State's theory of the case is when going over jury instructions:

> MR. LASEE: Separate them out, say with respect to Count 1, the fourth element requires the defendant knew Officer Gonnering, and then with respect to Count 4, the fourth element requires that the defendant knew that Officer Gonnering and Officer Sands. That's only for the – that's only for the fourth count where those two officers are involved.
>
> THE COURT: Right. Do you have a preference, Mr. Reid?
>
> MR. REID: I guess it depends on the State's theory of Count 4. So I guess I'll leave it up to you.

R. 74-229.

The type of amendment that was made in this case cannot be cured by Wis. Stats. 971.29(2), as it is a material amendment.

Secondly, the State could not provide proper notice to add a charge when it was added after the close of evidence in a jury trial. In State v. Neudorff, the Wisconsin Court of Appeals held even when a charge may be related to the transaction or facts considered at the preliminary hearing, the

prosecution cannot be legally sustained when there is no adequate notice of the charge. State v. Neudorff, 170 Wis.2d 608, 621 489 N.W.2d 689 (1992). In State v. Neudorff, the state amended the information the morning of trial and the Court of Appeals held that this lack of adequate notice violated the defendant's due process rights. Id. at 611.

In this matter, the facts are even more egregious than in Neudorff, as the amendment was made after the trial was completed. The Court of Appeals found that amending the charge the morning of trial in Neudorff was not sufficient notice for the defendant to properly defend himself. Smits did not have any notice of the amendment to try to defend himself in the matter. Even though the Court alluded to adding a second count of obstructing after the testimony of the first witness, the State did not actually add the charge until after the defense had rested their case. *R. 74-225.* To make matters worse, the State debated on what charge it would even add; the record shows there was contemplation of adding a disorderly conduct instead of the second count of obstructing. *R. 74-225.* Ultimately, the State choose the latter, however, the defendant could not possible prepare a defense when he does not even know what the charge would be until after the close of evidence in a trial.

The addition of a new charge after the close of trial did not provide Smits with proper notice of the charges against him, and the addition of a whole new charge cannot be cured by Wis. Stats. 971.29(2) as it was a material amendment. Therefore, Smits is entitled to have a new trial with proper notice of the charges, or to have count four of the criminal complaint dismissed and an order vacating the judgment of conviction as it relates to count four.

CONCLUSION

Smits was denied his constitutional right to be put on notice of the charge(s) he was facing at trial. As such, Smits is entitled to a new trial or an order vacating the judgment of conviction as it relates to count four of the amended criminal complaint and for the Court to instruct the clerk of circuit court to enter a judgment of acquittal on count four.

Dated this 9th day of February, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,361 words.

Dated this 9th day of February, 2018.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of February, 2018.

Signed:

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