

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Appellant,

v.

DUSTIN ALLEN SIMPSON,

Respondent.

No. 40396-0-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — The State charged Dustin Allen Simpson with one count of failing to register as a sex offender under former RCW 9A.44.130(7) and (11) (2008).<sup>1</sup> After the State rested its case, the trial court dismissed the case with prejudice because the charging document was insufficient. The State appeals the trial court’s dismissal with prejudice. We vacate the trial court’s order and remand with instructions to enter an order dismissing the charge without prejudice.

**FACTS**

The State charged Simpson with failing to register as a sex offender. Simpson’s jury trial began on February 2, 2010, in Lewis County Superior Court. After the State rested its case, Simpson moved to dismiss the charge because the information failed to state all elements of the crime charged. The trial court granted Simpson’s motion to dismiss with prejudice because the

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<sup>1</sup> In 2010, the legislature amended RCW 9A.44.130. Laws of 2010, ch. 267, §§ 2-3. RCW 9A.44.130 now describes the procedures for registering as a sex offender, and RCW 9A.44.132 describes the substantive elements of this crime.

jury had already been sworn and, thus, jeopardy had attached.

The State filed a motion for reconsideration requesting that the charges be dismissed without prejudice. The trial court denied the motion. The State appeals the trial court's order dismissing the charge with prejudice.

#### ANALYSIS

The State argues that the trial court erred when it dismissed the charges against Simpson with prejudice. Simpson argues that it was proper to dismiss the charges with prejudice because jeopardy had already attached to his case. Neither party challenges the trial court's decision regarding the sufficiency of the charging document. We agree with the State. Accordingly, we vacate the trial court's order and remand with instructions to dismiss the charge without prejudice.

“We have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal without prejudice to the State's ability to refile charges.” *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). Although the trial court correctly stated that jeopardy attached to Simpson's case when the jury was impaneled, the charges were dismissed on a defendant's motion based on procedural error. Double jeopardy concerns are not implicated because the defendant moved before jeopardy terminated and the case had not reached a final conclusion on the merits. *See Vangerpen*, 125 Wn.2d at 794.<sup>2</sup> Simpson will not be subject to double jeopardy if the State refiles the charges against him. Therefore, the trial court

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<sup>2</sup> “The principle that [the Double Jeopardy Clause] does not preclude the Government's retrying a defendant whose conviction is set aside because of an *error in the proceedings* leading to conviction is a well-established part of our constitutional jurisprudence.” *Vangerpen*, 125 Wn.2d at 794 (alterations in original) (quoting *Burks v. United States*, 437 U.S. 1, 14, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)).

improperly dismissed the charges with prejudice.

Because the trial court has already entered an order dismissing the charge, the only remedy available to us is to vacate the order and remand with instructions to dismiss the charge without prejudice.<sup>3</sup> Accordingly, we vacate the trial court’s order and remand for the trial court to correct the order dismissing the charge without prejudice to the State’s right to refile charges.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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QUINN-BRINTNALL, J.

We concur:

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ARMSTRONG, J.

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PENOYAR, C.J.

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<sup>3</sup> In addition, we note that, under *State v. Phillips*, 98 Wn. App. 936, 991 P.2d 1195 (2000), the trial court also erred in failing to liberally construe the complaint when evaluating Simpson’s motion to dismiss. In *Phillips*, we stated that when a defendant makes a motion to dismiss based on an insufficient charging document, the trial court should construe the complaint liberally, rather than strictly, if the motion comes at a point when the State can no longer amend the complaint. 98 Wn. App. at 942-43. Here, the trial court improperly strictly construed the complaint. Applying the correct, more liberal standard that requires the trial court to decide if (1) the “necessary facts appear in any form, or by fair construction can they be found, in the charging document; and if so, (2) . . . the defendant [can] show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice.” *Phillips*, 98 Wn. App. at 940 (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991)).