

IN THE SUPREME COURT OF THE STATE OF MONTANA

<p>WILLIE JOHN SCHWINDT, Petitioner, v. GALLATIN COUNTY JUSTICE COURT, & THE HONORABLE JUSTICE OF THE PEACE BRYAN ADAMS, Respondents.</p>	<p>Cause No. _____ Gallatin County Justice Court Cause No. TK-21-3238</p>
---	--

PETITION FOR WRIT OF SUPERVISORY CONTROL

COUNSEL FOR PETITIONER

Lindy Henry
Attorney for Willie Schwindt
Office of the State Public Defender
Bozeman Office
502 S. 19th, Suite 211
Bozeman, MT 59718
Tel: (406) 582-2450
Fax: 406) 582-2451
lindy.henry@mt.gov

COUNSEL FOR RESPONDENTS

Austin Knudsen
Montana Attorney General
Office of the Attorney General
215 N. Sanders Street
P.O. Box 201401
Helena, MT 59601
Phone: (406) 444-2026
Fax: (406) 444-3549

Marty Lambert
Gallatin County Attorney
Ashley Carroll
Deputy Gallatin County Attorney
1709 West College, Ste. 200
Bozeman, MT 59715
Tel: (406) 582-3745
Fax: (406) 582-3758

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	3
INTRODUCTION.....	4
FACTUAL AND PROCEDURAL BACKGROUND.....	4
STATEMENT OF ISSUE.....	5
ARGUMENT.....	6
CONCLUSION.....	10
CERTIFICATE OF COMPLIANCE.....	11
EXHIBIT TABLE OF CONTENTS.....	12

TABLE OF AUTHORITIES

CASES

<i>City of Red Lodge v. Kennedy</i> , 2002 MT 89	7, 8
<i>State v. Brown</i> (1976), 172 Mont. 41	8
<i>State v. Sor-Lokken</i> (1991), 247 Mont. 343	7
<i>State v. Spotted Eagle</i> , 2010 MT 222	8

STATUTES

§ 45-5-206 MCA.....	8, 9
§ 45-11-205 MCA.....	5, 7
§ 61-8-401 MCA.....	4, 5, 9

OTHER AUTHORITIES

Mont. Const., Art. II, § 2(2).....	6
------------------------------------	---

RULES

Montana Rule of Appellate Procedure 14(3).....	4, 6
Montana Uniform Rules for the Justice and City Courts, Rule 21(b)	4, 9, 10

I. INTRODUCTION

Petitioner Willie John Schwindt, by and through counsel, petition the Court under Montana Rule of Appellate Procedure 14(3)(a) and (b). A writ is necessary to prevent a gross miscarriage of justice from a mistake of law or when a constitutional issue of state-wide importance is involved, both of which are implicated in this case. The Gallatin County Justice Court is proceeding under a mistake of law by granting the State's Motion for Leave to File an Amended Complaint for a substantive change within five days of trial in the underlying matter. Montana Uniform Rules for the Justice and City Courts, Rule 21(b). Additionally, Petitioner has no other remedy, as this ruling would evade review on a *de novo* appeal. As Such, Mr. Schwindt petitions this Court to reverse the ruling of the Gallatin County Justice Court, and remand for further proceedings.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 4, 2021, Petitioner was cited by the Montana State Highway Patrol for driving under the influence of "any other drug," second offense in violation of Montana Code Annotated Section 61-8-401(1)(c). (Defendant's Ex. A). On July 9, 2021, Petitioner entered a not-guilty plea before Justice of the Peace Rick West. (Def. Ex. B). Following Petitioner entering a not-guilty plea the Justice Court, *inter alia*, set Petitioner's conditions of release, scheduled an omnibus hearing for September 22, 2021 at 2:00 p.m., and appointed the Office of State Public Defender

to the case. (Def. Exs. C and D). Following Petitioner's omnibus hearing, the Justice Court issued a scheduling order setting Petitioner's final pre-trial conference for November 24, 2021, and his jury trial for December 9, 2021. (Def. Ex. E). Petitioner's final pre-trial conference was then reset for December 1, 2021. (Def. Ex. F).

On December 3, 2021, the State filed its Motion for Leave to File Amended Complaint to amend the charge against Petitioner from an alleged violation of Montana Code Annotated Section 61-8-401(1)(c) to a violation of Section 61-8-401(1)(b). (Def. Ex. G). Petitioner filed his response in opposition to the State's motion to amend arguing that the amendment was untimely, as it was within five days of the trial in the underlying matter, and that the change was one of substance and not form in violation of Montana Code Annotated Section 45-11-205. (Def. Ex. H). Later that same day the State filed its Reply to Petitioner's Response. (Def. Ex. I). On December 7, 2021, the Gallatin County Justice Court entered an Order granting the State's Motion for Leave to File Amended Complaint. (Def. Ex. J). Trial for the underlying matter is currently scheduled for December 9, 2021, at 8:30 a.m.

III. STATEMENT OF ISSUE

A. Did the Justice Court err when it granted the State's Motion for Leave to File Amended Complaint?

IV. ARGUMENT

A. A Writ of Supervisory Control is Necessary and Appropriate.

This Court has “general supervisory control over all other courts.” Mont. Const. Art. VII, Section 2(2).

Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:

- (a) The other court is proceeding under a mistake of law and is causing a gross injustice;
- (b) Constitutional issues of state-wide importance are involved;
- (c) The other court has granted or denied a motion for substitution of a judge in a criminal case.

Mont. R. App. P. 14(3).

This case meets the requirements for the exercise of supervisory control. Urgency exists because Petitioner is currently scheduled to proceed to trial in two days. Further, this issue is likely to evade review and there is no appeal and no plain, speedy, or adequate review because an appeal *de novo* after trial would be unable to address the present issue. Lastly, the single inquiry raised in this Petition is purely legal, requiring this Court to make no factual determinations.

B. The State's Motion for Leave to File Amended Complaint was filed and granted by the Justice Court within five days of trial.

Montana Code Annotated Section 45-11-205 states:

Amending information as to substance or form. (1) The court may allow an information to be amended in matters of substance at any time, but not less than 5 days before trial, provided that a motion is filed in a timely manner, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts that show the existence of probable cause to support the charge as amended. A copy of the proposed amended information must be included with the motion to amend the information.

(2) If the court grants leave to amend the information, the defendant must be arraigned on the amended information without unreasonable delay and must be given a reasonable period of time to prepare for trial on the amended information.

(3) The court may permit an information to be amended as to form at any time before a verdict or finding is issued if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.

(2019). This Court has held that, based on the reading of the statute, the State may alter a criminal complaint as to *form* any time prior to the verdict. *City of Red Lodge v. Kennedy*, 2002 MT 89, ¶ 11, 309 Mont. 330, 46 P.3d 602. However, this statute “unequivocally prohibits” the court to accept a substantive amendment from the State within five days of the trial. *Id.*, see also Mont. Code Ann. § 45-11-205(1). “An amendment is one of form when the same crime is charged, the elements of the crime and the proof required remain the same and the defendant is informed of the charges against him.” *Kennedy*, 2002 MT 89 at ¶ 11 (citing *State v. Sor-Lokken*

(1991), 247 Mont. 343, 349, 805 P.2d 1367). To differentiate amendments of form and substance, the Court is to examine “whether an amendment to an information or complaint alters the nature of the offense, the essential element of the crime, [and] the proofs or the defenses.” *Id.* at ¶ 14.

This Court has clearly and routinely held, that an amendment to a complaint that substitutes one statutory subsection for another may charge a completely new offense that requires different proofs and defenses. *Id.* at ¶ 15; *See also State v. Brown* (1976), 172 Mont. 41, 560 P.2d 533; *State v. Hallam* (1978), 175 Mont. 492, 500, 575 P.2d 55, 61; *State v. Spotted Eagle*, 2010 MT 222, 385 Mont. 22, 243 P.3d 402.

In *Spotted Eagle*, the defendant was charged with “caus[ing] bodily injury to his partner,” in violation of Montana Code Annotated Section 45-5-206 and specifically subsection (1)(a) of that statute. 2010 MT 222 at ¶ 11. This Court held that the District Court erred when it allowed an instruction to be given to the jury regarding “reasonable apprehension of bodily injury,” which falls under subsection (1)(c) of Section 45-5-206, because it changed an essential element of the charge, “replacing bodily injury with reasonable apprehension of bodily injury.” *Id.* The Court held that because an essential element of the charge was changed, the “nature and substance of the charge” had changed. *Id.*

Here, as in *Spotted Eagle*, the Justice Court allowed State to amend the

subsection that Petitioner is charged under. The Justice Court allowed the State to amend the subsection of Section 61-8-401 from subsection (1)(c), “any other drug,” to subsection (1)(b), “dangerous drug.” Allowing this amendment has changed the essential elements and also the proof required by the State in the underlying matter. This allowed change now requires that the State prove that Petitioner was under the influence of a “dangerous drug,” which has a distinct statutory and definition difference from the currently charged “any other drug,” which the State has acknowledged in its Motion for Leave to File Amended Complaint. (*See* Def. Ex. G). Moreover, the allowed amendment by the State is likely require a change to the currently accepted Jury Instructions in the underlying matter, and likely the submitting of additional instructions. Therefore, the State’s Motion was untimely and should not have been granted by the Justice Court.

C. The State filed, and the Justice Court granted the State’s Motion to Amend the Complaint within five days of trial.

Pursuant to Montana Code Annotated Section 45-11-205(1), “the court may allow an information to be amended in matters of substance at any time, *but not less than* 5 days before trial.” (emphasis added). Further, under the Montana Uniform Rules for the Justice and City Courts, Rule 21(b), “When the period of time proscribed or allowed is ten days or less, intermediate Saturdays, Sundays, and legal holidays *shall be excluded.*” (emphasis added).

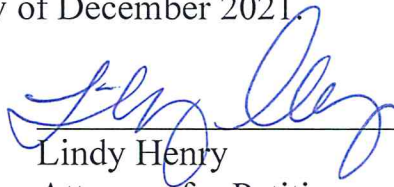
The State's motion was filed on Friday, December 3, 2021. Trial in the underlying matter is currently scheduled for Thursday, December 9, 2021. The State's motion and proposed amendment were filed within five days of Trial in the underlying matter when time is computed according to Montana Uniform Rules for the Justice and City Courts, Rule 21(b), which excludes weekends. Therefore, the State's Motion was untimely and should not have been granted by the Justice Court.

V. CONCLUSION

For these reasons Petitioner requests the following relief:

- (1) That the Court accept original jurisdiction over this matter;
- (2) That the Court issue a writ of supervisory control and reverse the Justice Court's ruling on the State's Motion for Leave to File Amended Complaint.
- (3) That the Court grant such other and further relief as may be just and equitable under the circumstances.

Respectfully submitted on this 7 day of December 2021.



Lindy Henry
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with Times New Roman, proportionately spaced typeface of 14 points, is double spaced except for footnotes and quoted and indented material, and the text has 2055 words as counted by the attorney's word processing software, excluding table of contents, *table* of citations, certificate of service, certificate of compliance and exhibits.

Dated this 7 day of December 2021.


Lindy Henry
Counsel for Petitioner

EXHIBIT TABLE OF CONTENTS

Exhibit 1 (A-J) Exhibits pertaining to TK-21-3238

Exhibit A	Citation, dated 7-4-2021
Exhibit B	Gallatin County Justice Court Minutes, dated 7-9-2021
Exhibit C	Conditions of Release and Omnibus Setting Order, dated 7-9-2021
Exhibit D	Public Defender Appointment, dated 7-9-2021
Exhibit E	Order Setting Final Pre-Trial Conference and Jury Trial, dated 9-23-2021
Exhibit F	Order Resetting Final Pre-Trial Conference, dated 11-26-2021
Exhibit G	State's Motion for Leave to File Amended Complaint, dated 12-3-2012
Exhibit H	Defendant's Response to State's Motion for Leave to File Amended Complaint, dated 12-6-2021
Exhibit I	State's Reply Regarding Motion to Amend Complaint, dated 12-6-2021
Exhibit J	Order Granting Leave to File Amended Complaint, dated 12-7-2021

CERTIFICATE OF SERVICE

I, Lindy Henry, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 12-07-2021:

Ashley N. Carroll (Govt Attorney)
1709 West College
Suite 200
Bozeman MT 59715
Representing: Bryan Adams, Gallatin County Justice Court
Service Method: eService

Martin D. Lambert (Govt Attorney)
1709 W. College
Bozeman MT 59715
Representing: Bryan Adams, Gallatin County Justice Court
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Bryan Adams, Gallatin County Justice Court
Service Method: eService

Bryan Adams (Limited Court Judge)
615 S. 16th Av.
Bozeman MT 59715
Service Method: eService
E-mail Address: bryan.adams@gallatin.mt.gov

Electronically Signed By: Lindy Henry
Dated: 12-07-2021