
Not With a Bang But With a *Wimber*

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*"That's the way the world ends
Not with a bang but with a whimper."*

—T.S. Eliot, *The Hollow Man*, 1925

The Oregon State Supreme Court has extended a trial judge's authority to amend a criminal indictment in sex cases beyond what was previously thought to be appropriate. It held that a trial court may amend an indictment as to the dates within which a sex crime was alleged to have been committed, without the necessity of review by the Grand Jury.

The trial judge interlined on the face of the indictment, to exclude a period before which the statute of limitations had run, so that the allegations presented to the trial jury fell within the applicable statute of limitations. *State v. Wimber*, 315 Or 103 (1992).

Sometimes it is hard to avoid the defense attorney's reflexive hyperbole when reviewing higher court rulings, but *State v. Wimber* may justify it. To quote Judge Unis' dissent "[h]ow can this court rationally conclude that defendant's rights were not affected when the statutes of limitations defense that was available to defendant before the amendment was no longer available to him after the amendment."¹

The facts of *Wimber* are as follows: at trial the judge crossed out the year "1984" and interlined, in his own handwriting, on the face of the indictment "1987 RWR." According to the indictment the crimes charged in counts 10, 11, and 12 occurred between January 25, 1984, and November 27, 1989. The amendment excluded from jury consideration incidents presumably considered by the Grand Jury when it indicted but which were outside the statute of limitations.

The rule is that amendment of a grand jury indictment is permitted only when it relates to a matter of form rather than substance. *State v. Moyer*, 76 Or 396 (1915). Formal matters which are not essential to the charge, such as clerical errors where a defendant cannot be misled to his prejudice, were heretofore the only permissible constitutional changes after the indictment had been returned.

The appellate court cases show a consistent line of cases defining what is a defect of substance. The Court of

Appeals in *State v. Sohn*, 107 Or App 147 (1991), reversed a defendant's conviction for theft holding that there was no authority for the trial court to amend the pleadings to conform to the proof in a criminal case. Where there is a defect of substance in the indictment, the state is required to resubmit the indictment to the grand jury. The trial court cannot itself cure the defect.²

In *State v. Wilcox*, 110 Or App 490, the trial court, in a theft case, amended the indictment by substituting the named victim for another individual not named in the indictment. The appellate court reversed holding that the amendment was a change of substance, rather than a matter of form. *Wilcox* at 496; citing *State v. Erbs*, 9 Or App 95, 98-99, 496 P.2d 38 (1972).

The rule is slightly different in sex cases because generally, the state is not required to prove the specific date of the commission of the crime.³ ORS 135.717 does not require the precise time an offense was committed to be stated in the accusatory instrument unless the time is a material element of the offense. The time that an act occurred is normally not a material element in the crimes of rape or sodomy.⁴ However, the date may become a material element in a sodomy case when the age of the victim at the time of the alleged offense is a material element.⁵

The *Wimber* Court formulated a four part test and ruled that to be constitutionally permissible: 1) the essential nature of the indictment must not be changed nor the availability of a defense or evidence be altered nor a new theory, element or crime added, 2) that there be no violation of the defendant's right to notice of the charges or protection against double jeopardy, 3) the amendment itself must be sufficiently definite and certain, and 4) the remaining allegations must state the essential elements of the offense.

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