NO. 43204-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

CHRISTOPHER NELSON MAYNARD,

Respondent.

OPENING BRIEF OF APPELLANT

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17. The trial court erred in dismissing the charges of one count of Malicious Mischief in the Second Degree, and five counts of Malicious Mischief in the Third Degree.

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1. Did the trial court have substantial evidence to support its findings of fact?

2. Did the trial court err in determining that preaccusatorial delay violated the defendant's due process rights?

3. Did the trial court err in concluding that the defendant received ineffective assistance of counsel?

III. STATEMENT OF THE CASE

On September 15, 2010, the Cowlitz County Prosecuting Attorney's Office received Woodland Police Department report #10-2316. CP 18 at 1. On September 22, 2010, that report was assigned to a deputy prosecuting attorney to review for a charging decision. CP 18 at 1.

On October 20, 2010, the State reviewed the submitted report and made the decision not to charge at that time as more information was needed before a finding of probable cause to support a diversion referral. CP 18 at 1-2. On the case evaluation sheet, the State requested that the investigating officer include any photos of the graffiti, the name of the reporting party for specific instances of graffiti and the exact location of certain graffiti. CP 18 at 2.

On November 17, 2010, the Woodland Police Department resubmitted the report to the Cowlitz County Prosecutor's office. CP 18 at

2. On November 24, 2010, the assigned deputy prosecuting attorney reviewed the police report, found there was probable cause, and submitted it to the Cowlitz County Juvenile Department's diversion unit for consideration. CP 18 at 2.

The juvenile department's diversion unit rejected Maynard and on December 10, 2010, returned the report to the prosecutor's office. Cp 18 at 2. Upon review, the deputy prosecuting attorney determined that more information was needed to file charges and returned the report to the Woodland Police Department with a request for follow-up information. CP 18 at 2.

On January 20, 2011, the Woodland Police Department returned the report to the Cowlitz County Prosecuting Attorney's Office. CP 18 at 2. On that same date it was once again assigned to a deputy prosecuting attorney. CP 18 at 2.

Between January 20, 2011 and April 15, 2011, the State made a request to the investigating officer for more information, specifically in regards to restitution amounts owed to the victims. CP 18 at 2.

On April 15, 2011, the investigating officer responded through email to the previous inquiry about restitution for each of the cases. CP 18 at 2.

On April 18, 2011, the deputy prosecuting attorney then responded back to the investigating officer and requested further information before charging. CP 18 at 2. The officer responded to that inquiry on April 23, 2011. CP 18 at 2. A further request for information from the officer was made by the State on May 9, 2011 and responded to by the officer on May 25, 2011. Cp 18 at 2-3.

On June 16, 2011, after the final information was received from the Woodland Police Department, the State reviewed and charged it. CP 18 at 3. At this time the Information was sent to the Cowlitz County Juvenile Department for filing. CP 18 at 3.

On July 12, 2011, the respondent was summonsed into the Cowlitz County Superior Court – Juvenile Department by the juvenile probation office for his first appearance on cause number 11-8-00242-2. CP 18 at 3. At that hearing, Maynard was present when probable cause was found, Tierra Busby was appointed as his counsel and an arraignment date of July 19, 2011 was set. CP 18 at 3.

On July 19, 2011, Maynard was present with counsel where he waived a formal reading of the information, entered a plea of not guilty and dates were set for a pre-trial hearing on August 9, 2011, readiness hearing September 13, 2011 and a fact-finding on September 15, 2011. CP 18 at 3.

On July 25, 2011, the State made an Offer/Sentencing Recommendation in regards to Maynard's charges which was sent to his attorney. CP 12, Ex. 12. The State then called the deputy Superior Court Clerk assigned to the juvenile offender cases to determine whether or not the court's jurisdiction had been extended at the arraignment as the State's case file notes did not indicate it had been. CP 18 at 3. The clerk's notes also did not reflect the extension of jurisdiction either. CP 18 at 3. Then, the State sent an electronic message to Tierra Busby noting the respondent's birth date and that the juvenile court, according to both the State's notes and those of the court clerk, had not extended jurisdiction. CP 18 at 3. The deputy prosecuting attorney inquired about what defense counsel wanted to do in that situation and informed her of the consequences of not taking any action. CP 18 at 3. The State never received a response to that communication. CP 18 at 3.

On August 9, 2011, Maynard appeared in court for his pre-trial hearing. CP 18 at 4. At that time the State moved to dismiss the case as the defendant had turned 18 on August 1, 2011 without a written order extending the jurisdiction of the juvenile court being filed prior to his 18th birthday. CP 18 at 4. The court granted the motion as the statutory requirements were not met. CP 18 at 4.

On August 15, 2011, the report was referred to the adult superior court for re-filing. CP 18 at 4. The matter was subsequently filed in adult superior court on August 26, 2011. CP 1. In adult superior court, the defendant appeared pursuant to a summons, at which time the court appointed a new attorney to represent the defendant. CP 12. The attorney then filed a motion to dismiss the charges on December 8, 2011. CP 11. The superior court held a hearing on that motion and granted the motion to dismiss. RP 1-56.

IV. ARGUMENT

I. STANDARD OF REVIEW

The Court reviews a trial court's grant of a motion to dismiss for abuse of discretion. State v. Michielli, 132 Wash.2d 229, 240, 937 P.2d 587 (1997). A trial court abuses its discretion when it bases its decision

on untenable or unreasonable grounds. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

A. THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT AS THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THESE FINDINGS.

A court's finding of fact must be supported by substantial evidence. State v. Stevenson, 128 Wn.App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *Id.*

In Maynard's case, finding of fact #10 reads as follows:

> Between December 10, 2011 and June 16, 2011, the prosecutor exchanged a number of e-mails with the Woodland Police department, seeking "more information, specifically in regards to restitution amounts owed to the victims." *See* Affirmation of Lacey Skalisky, Deputy Prosecuting Attorney. The state made these repeated requests in spite of the fact that the police reports and the probable cause statements already provided contained a detailed statement of the damages each victim has sustained.

CP 20. The probable cause sheet referenced a single offense of Malicious Mischief 2. CP 3. It did not list any other counts of malicious mischief in the "Offense" section, but the actual probable cause statement does detail more incidents of graffiti. CP 3. The next pertinent part of the probable cause sheet is that of the "Victim Information." CP 3. It lists five separate victims as follows: City of Woodland, Woodland Little League, Woodland

Auto Supply, Eager Beaver, and U-Haul. CP 3. However, the probable cause statement only lists restitution as follows amounts: one for City of Woodland - $316.88, another for City of Woodland - $538.00, one from Lewis River Little League - $860.80 and one from U-Haul - $609.00. CP 3. This same information was contained in the police reports.

There was no evidence that either the probable cause statement or the police reports contained the information the State requested for the other victims. A charge of Malicious Mischief in the second degree may be based on a dollar amount of damage, thus it is information a prosecutor should request prior to making a charging decision. Therefore, there was not substantial evidence to support finding of fact #10, and it was made in error.

In Maynard's case Finding of Fact #13 states:

> On July 12, 2011, the defendant appeared on the summons, at which time the juvenile court appointed Tierra Busby to represent him. The court then put the matter over one week for arraignment. Although the normal procedure during the first appearance would have been for the court to extend jurisdiction for an offender such as the defendant who was close to turning eighteen years of age, the court did not do so in this case. Neither the court, the prosecutor and the probation officer in charge of the case mentioned that the defendant would be eighteen years old within a few weeks. [sic].

CP 20. Tierra Busby, the defendant's juvenile court appointed attorney, testified that she is not present for a defendant's first appearance in court, only the prosecutor and probation officer. RP12. There is no other testimony provided concerning the "normal procedure" for the court except that given by Ms. Busby who admitted she is not present at those appearances. Additionally, there is no testimony, nor is there anything contained within this cause number's record that would support a finding that there was nothing mentioned concerning the defendant's age at the time of first appearance. The only conclusion that can be drawn based on the evidence provided is that the juvenile court did not extend jurisdiction at that time. Thus, there is no substantial evidence to show what the normal procedure of the court is, nor is there substantial evidence to support the defendant's age was not mentioned at the initial appearance as stated in finding of fact #13.

A few findings of fact contain basic f actual errors. In Finding of Fact #11, it states the defendant was charge five counts of malicious mischief, when he was charged with one count of malicious mischief in the second degree and five counts of malicious mischief in the third degree. CP 1. Finding of Fact #12 states in pertinent part that the defendant was summonsed "to

appear on July 12, 2011, which was 19 days before he turned 21-years-old." CP 20. Turning age 21 has no bearing on the matter. The age at issue would be 18 years of age as that is when the juvenile court no longer has jurisdiction over a person unless it has been extended in writing prior to that date. RCW 13.40.300. The defendant's birth date is August 1, 1993, thus he would have turned 18 on August 1, 2011. RP 18. Furthermore, Finding of Fact #15 states the State's recommendation of the deferred disposition in the juvenile case was based upon a plea to two of the charges. CP 20. However, the State's offer indicates that the defendant had to plea to all counts charged for it to agree to the deferred disposition. CP 12, Exhibit 12. Additionally, Finding of Fact #16 states in pertinent part that "the defendant's attorney did not read this e-mail until after the defendant's birthday." CP 20. This is not consistent with the defendant's attorney testimony where she stated "I vaguely recall it…I don't know when it might have been received by me." RP 37. Thus, the defendant's attorney did not recall when she read the email, thus a date is unable to be assigned to when it was reviewed and there is no substantial evidence to support the finding.

Finding of Fact #14 states in pertinent part, "[h]ad any party noticed this fact and mentioned it, the court could have entered an order extending jurisdiction, and that would be the usual practice." CP 20. This portion of the finding requires the court to engage in speculation about the juvenile court's actions as well as those of the parties involved in the case.

Finding of Fact #19 states "[j]uvenile counsel's failure to note the defendant's age at arraignment and failure to then move to extend jurisdiction fell below the standard of a reasonably prudent attorney." CP 20. This statement while characterized as a finding contains both facts and a conclusion of law. The State does not dispute that Maynard's defense counsel in his juvenile case failed to note his age at his arraignment, nor does the State dispute that counsel failed to move to extend jurisdiction. However, the portion of the statement relating to whether or not defense counsel fell below the standard of a reasonably prudent defense attorney requires an analysis of the facts of a case, thus making it a conclusion, not a fact. There is no evidence that demonstrates this statement. It is only once the facts of the case are analyzed that a court may reach that conclusion. Therefore, it should not be included as a finding of fact.

Finding of Fact #20 states "[h]ad juvenile court defense counsel timely moved to extend jurisdiction, the court could have granted the motion without objection from the state or the probation department and the defendant could later have entered into the plea agreement with the state and obtained a deferred sentence. This is in line with standard practice." CP 20. This is entirely a hypothetical situation. There are no facts to prove or disprove this assertion as it is only that, an assertion of what could have happened. The court should not place itself in the position of fabricating a reality that did not nor does not exist.

Finding of Fact #21 states, "[j]uvenile court defense counsel's failure to note the defendant's age at arraignment and failure to then move to extend jurisdiction cause prejudice to the defendant through (1) the loss of juvenile court jurisdiction, and (2) the loss of an opportunity to obtain a deferred sentence." CP 20. Similar to the preceding argument the State does not dispute defense counsel failure to note the age of her client at arraignment, nor the failure to move for an extension of jurisdiction. However, the State proffers that the rest of the finding is not a fact, but a conclusion that relies on facts presented, thus it should not be included as a finding of fact.

B. PREACCUSATORIAL DELAY DID NOT EXIST AS THE DEFENDANT WAS ARRAIGNED PRIOR TO HIS EIGHTEENTH BIRTHDAY.

A delay in prosecution may violate a defendant's due process rights. To determine whether the delay "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency'" the court has developed a three prong test. State v. Oppelt, 172 Wash.2d 285, 289, 257 P.3d 653 (2011), citing United States v. Lovasco, 431 U.S. 783, 790, 52 L.Ed.2d 752 (1977). First, the defendant must show he was prejudiced by the delay; second, the court must determine the reasons for the delay; and third the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution. Oppelt, 172 Wash.2d at 295.

When a defendant loses juvenile court jurisdiction, the defendant carries his burden of showing minimal prejudice. See e.g. State v. Lidge, 111 Wash.2d 845, 848-49, 765 P.2d 1292 (1989), State v. Schifferl, 51 Wash.App. 268, 270, 753 P.2d 549 (1988). A deliberate delay to circumvent the juvenile justice system clearly violates due process. State v. Alvin, 109 Wash.2d 602, 604, 746 P.2d 807 (1987). However, only in certain circumstances does a negligent delay arise to this level. See id.

In determining the cause of delay, courts find requests for additional investigation, even if fruitless, do not amount to deliberate or negligent delay. See Lidge, 111 Wash.2d at 849-52. Courts do not hold the investigation of juvenile matters to a greater or lesser degree than adult investigations. See id. at 849. Additionally, the determination of sufficient evidence for filing charges is left to the expansive discretion of the prosecution. See id. at 850. Courts warn that

> the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function."

Id. citing Lovasco, 431 U.S. at 790. Courts state "[f]orcing prosecutors to proceed precipitously may waste scarce resources on cases in which the defendant's guilt cannot be established beyond a reasonable doubt." Id. In State v. Warner, 125 Wa.2d 876, at 890, 889 P.2d 479 (1995), the Supreme Court listed the following legitimate reasons for a delay in filing charges: (1) "sequential prosecution in order to secure the testimony of a codefendant" (State v. Dixon, 114 Wash.2d at 857, 861, 792 P.2d 137(1990); State v. Boseck, 45 Wash.App. 62, 67, 723 P.2d 1182 (1986));

(2) "waiting for lab results because of backlog at state crime lab" (State v. Calderon, 102 Wash.2d 348, 354, 684 P.2d 1293 (1984); (3) 55-day delay between confession and filing during "ongoing large scale undercover drug buying operation" (State v. Robbers, 46 Wash.App. 558, 564-65, 731 P.2d 522 (1986), *review denied,* 108 Wash.2d 1005 (1987)); and (4) 1.5-month delay between signed confession and filing due to "routine administrative practices such as vacation time, compensation time, and training time" (State v. Alvin, 109 Wash.2d 602, 605-06, 746 P.2d 807 (1987)). In addition, the courts have found no unreasonable delay for a failure to file when (1) a police referral was received by the State 15 days prior to the defendant's eighteenth birthday (State v. Anderson, 46 Wash.App. 565, 569-70, 731 P.2d 519 (1986), *review denied,* 108 Wash.2d 1005 (1987)); and (2) the defendant was arrested 23 days before his eighteenth birthday, the State requested additional investigation 20 days before the birthday, the investigation was completed and received 13 days before the birthday, but there was not enough time left before the birthday to file charges and arraign the defendant (State v. Lidge, 111 Wash.2d at 845, 765 P.2d 1292). The Washington Supreme Court has gone so far to say it would require unusual circumstances to merit dismissal solely on the grounds of frustration of the purposes of the

Juvenile Justice Act. State v. Cantrell, 111 Wash.2d 385, 391, 758 P.2d 1 (1988).

In the present case, the State followed its usual process and procedures. The Deputy assigned the case promptly reviewed the police reports and directed the officer to perform reasonable additional investigation. In light of the above cited cases, there is no evidence the State acted with deliberate delay.

The question before the court is did the State act with negligent delay violating the fundamental concept of justice. In comparison with Alvin and Schifferl, the State's actions were inadvertent at most. The final police report with all of the requested information was received two months before the Defendant's eighteenth birthday. Upon receipt of the final information on May 25th, 2011, the State once again reviewed the full report and made a charging decision on June 16th, 2011. It is clear in case law, the State is not required to keep track of a defendant's birthday, but upon realizing the potential of losing jurisdiction, the State did everything in its power to attempt to gain jurisdiction. The State at realizing the need, contacted defense counsel and alerted her to the birth date of her client and inquired as to what course of action defense counsel wanted to take. There was no response on defense counsel's part. The State did

everything in its power to aid the defendant in obtaining juvenile jurisdiction.

In balancing the interests of the State against the Defendant's interests, there is no evidence of a violation of the fundamental concept of justice. As in Alvin and Shifferl, the Defendant is not entitled to a perfect process, simply meaningful process.

Furthermore, there is a major distinguishing factor between the cases cited involving preaccusatorial delay and the instant case. Each of those cases had a defendant who was never charged in a juvenile court. Due to timing issues those individuals were all filed against as adults, they never had the opportunity to appear in juvenile court. Here, the defendant made two separate appearances in the juvenile court prior to turning eighteen. RCW 13.40.300 provides guidance for the issue at hand. It states in pertinent part,

> [a] juvenile may be under the jurisdiction of the juvenile court or the authority of the department of social and health services beyond the eighteenth birthday only if prior to the juvenile's eighteenth birthday...[p]roceedings are pending seeking the adjudication of a juvenile offense and the court by written order setting forth its reasons extends jurisdiction of juvenile court beyond his or her eighteenth birthday.

RCW 13.40.300. Once a juvenile court loses jurisdiction it cannot reinstate it retroactively. State v. Rosenbaum, 56 Wash.App. 407, 411-

412, 784 P.2d 166 (1989). Juvenile court jurisdiction is strictly construed. Id. Additionally, there is no constitutional right to be tried as a juvenile. State v. Dixon, 114 Wash.2d 857, 869, 792 P.2d 137 (1990).

The statute clearly controls what happens to cases where the defendant is under age eighteen initially, but turns eighteen prior to disposition of the case. It requires that a written order be entered explaining the reasons for the extension of juvenile court jurisdiction. If this is not done, then the juvenile court no longer has jurisdiction and cannot recapture jurisdiction. This is exactly what happened in the instant case. The defendant had the opportunity to proceed in the juvenile court because he was under the age of eighteen at filing and at the time of his arraignment, yet jurisdiction was lost because he turned eighteen during the pendency of the matter without a written order extending it. Thus, the trial court's ruling dismissing the charges due to preaccusatorial delay should be reversed, remanded and the charges reinstated.

C. DEFENSE COUNSEL WAS INEFFECTIVE IN HER REPRESENTATION OF THE DEFENDANT, HOWEVER, THE APPROPRIATE REMEDY IS NOT DISMISSAL.

Ineffective assistance of counsel is determined based on "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). To make this determination the court relies on a two pronged test analyzing: 1.) whether trial counsel's performance was below that of a reasonably competent defense attorney and 2.) whether the convicted defendant was prejudiced by the deficient performance. Strickland, 466 U.S. at 687, 80 L.Ed. at 693, 104 S.Ct. at 2064-65. See also State v. Thomas, 109 Wash.2d 222, 225-226, 743 P.2d 816 (1987). Prejudice is shown when there is a reasonable probability, that but for counsel's errors, the outcome would have been different. Strickland, 466 U.S. at 694, 80 L.Ed. at 698, 104 S.Ct. at 2068.

When analyzing an ineffective assistance of counsel claim the court should view the matter with a strong presumption that counsel's representation was effective. McFarland, 127 Wash.2d at 335, 899 P.2d

1251. However, the presumption may be rebutted if it can be shown the attorney's representation was unreasonable under prevailing professional norms, and that the challenged action was not sound strategy. Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) citing Strickland, 466 U.S. at 688-89.

Here, the State concedes that defense counsel was ineffective in not making a motion to the court to extend jurisdiction. However, even if defense counsel was ineffective the trial court did not impose the proper remedy. The standard remedy for a successful ineffective assistance of counsel claim is for remand back to the trial court. Thomas, 109 Wash.2d at 231, 743 P.2d 816. However, in the instant case the trial court involved in the ineffective assistance of counsel claim no longer has jurisdiction as it is a juvenile court. To determine the appropriate remedy in a case such as this the Court should look to similarly situated cases such as automatic declination cases, when the crime the defendant is initially charged with requires automatic adult court jurisdiction, yet through amendment to the information or conviction of a lesser-included crime the statutes does not mandate an automatic decline to adult superior court. The court held the trial court should first determine whether declination of juvenile jurisdiction would have been appropriate and that if the trial court finds that declination was appropriate, then the conviction stands, but if the

conviction is set aside, then the defendant is entitled to a new trial in adult court because he or she is now over 18 years of age. See In re Personal Restraint Petition of Dalluge, 152 Wash.2d 772, 782-783, 100 P.3d 279 (2004). This is similar to the case at hand. Originally, the defendant was arraigned in the juvenile court, but the defendant's eighteenth birthday passed prior to a written order being entered extending jurisdiction.

The trial court's ruling in the instant case essentially denied the state the ability to proceed with the effective administration of justice in this case. The ruling also limits the accountability of offenders and denies society protection. The State cannot refile in juvenile court as jurisdiction has been lost, but neither can it proceed in adult superior court as counsel was ineffective according to the current ruling. Thus, a quandary exists as to what to do in cases where a juvenile who has been arraigned in a juvenile court, yet turns eighteen prior to the trial causing dismissal under the statute for loss of jurisdiction who can display counsel was ineffective by not making a motion to have juvenile court jurisdiction extended. Therefore, it behooves the court to balance the equalities of the outcomes. Whether justice is served by a defendant having all charges against him dismissed with prejudice because of his counsel ineffectiveness versus the State's ability to no longer proceed with a case where it believes there is

sufficient evidence to support a conviction and gain potential recompense for the victim.

Because of the need to balance the equities the appropriate remedy if to proceed with the new case in adult superior court. This Court should reverse the lower court's ruling, reinstate the charges and remand.

V. CONCLUSION

For the foregoing reasons the State asks the Court to reverse the decision of the trial court dismissing the case as a result of preaccusatorial delay and ineffective assistance of counsel. The State asks the Court to reinstate the charges and remand to the trial court for further proceedings.

Respectively submitted this 27th day of July, 2012.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 27th, 2012.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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