68852-9

No. 68852-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCCONNELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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1. The prosecution of this case, 12 ½ years after the crime, was barred by the statute of limitations.

2. The prosecution of this case, 12 ½ years after the crime, violated Mr. McConnell's right to due process under the Fourteenth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The statute of limitations for rape is 10 years, and the period begins to run from the date of commission or the "date on which the identity of the suspect is conclusively established by DNA testing," whichever is later. A rape occurred in June of 1998, and in November of 1998 the crime lab performed DNA testing on samples taken from the victim's clothing and identified the unique DNA profile of the rapist. Twelve and a half years later, the State charged Michael McConnell with the crime. Did the prosecution violate the statute of limitations, requiring reversal of the conviction and dismissal of the charge?

2. Preaccusatorial delay violates due process where, considering the prejudice to the defendant and the reasons for the delay, the late prosecution offends fundamental notions of justice. The State did not file an information in this case until almost thirteen years after the crime, even though it collected evidence and created a DNA profile right after the

crime. It did not re-test the DNA or re-check the database for matches during the intervening twelve years, and it destroyed all of the other evidence, including physical evidence, photographs, and statements of other suspects and witnesses, in 2003. A potential alibi witness died in 2010. Did the preaccusatorial delay violate Mr. McConnell's right to due process, requiring reversal of the conviction and dismissal of the charge?

C. STATEMENT OF THE CASE

In June of 1998 an elementary-school teacher was raped in her classroom. CP 353. The Washington State Patrol Crime Laboratory extracted DNA from the victim's underpants and identified three unique profiles. CP 286-87. One was the victim's, one was her husband's, and one was the presumed rapist's. CP 287. Although the lab identified the unique genetic profile of the perpetrator, it was not able to match it to a name in its database. The State's forensic scientist noted, "The DNA profile of the semen donor will be occasionally compared to the data bank to see if it matches any of the new entries." CP 287. The crime lab produced its report on November 23, 1998. CP 287.

In the meantime, the Snohomish County Sheriff's Office investigated the crime. Detectives Wilkins, Scharf, and Ward went to the school and collected evidence, took photographs, and wrote reports. CP 270, 271. Detective Wilkins interviewed multiple suspects, including a

person of interest named Larry Crawford. CP 271. Thirty items of evidence were booked into the Snohomish County Sheriff's Office. CP 339-40.

Although the crime lab identified the unique genetic profile of the rapist, the prosecutor's office did not file an information. This was so even though the prosecutor's office regularly charges people based on DNA profile rather than name. *See* CP 292, 296, 303-05, 310, 313, 344. Instead, the case sat dormant for years.

In 2003, Detective Wilkins ordered the destruction of all evidence in the case, because he believed the statute of limitations had run. CP 270-71, 341. The destroyed items included all of the detectives' reports, written statements from suspects and witnesses, photographs of the crime scene, items of clothing from both the victim and suspected perpetrator, the telephone the perpetrator allegedly yanked out of the wall, and other physical evidence. CP 270-71, 339-40. The only evidence not destroyed was "a single sperm cell" at the lab. 5/21/12 RP 6.

Seven years later, Detective Scharf "became interested in this case" again, and asked the crime lab to compare the rapist's DNA profile to another known sample. CP 273-74. In the twelve years since the rapist had been identified, his profile had not been "occasionally compared to the data bank" as promised in the State Patrol's 1998 report. CP 287. But in

2010, after Detective Scharf expressed an interest, the lab retested the sample using contemporary techniques ("STR" as opposed to "RFLP"), and searched the database again for a match.[1] CP 274. The lab concluded the profile matched that of Michael McConnell, whose genetic identity had been entered into the database in 2000. CP 341, 284. On March 25, 2011, the State charged Michael McConnell with the 1998 rape. CP 356.

In 1998, Michael McConnell was a 17-year-old child living with his mother. In 2011, Mr. McConnell was an adult with no history of sex offenses. CP 21; 5/21/12 RP 18. His mother had died in 2010. CP 342.

Mr. McConnell moved to dismiss the charge against him as barred by the statute of limitations, and in the alternative as a violation of due process. CP 291-324, 337-52. The trial court denied the motion. CP 265. Mr. McConnell was convicted following a stipulated facts bench trial, and he preserved his right to appeal the denial of the motion to dismiss. CP 38, 259.

At sentencing, the State acknowledged that the case "came down to a single piece of evidence ... a single sperm cell." 5/21/12 RP 6. The prosecutor conceded, "the rest of the evidence in the case was destroyed by the State." 5/21/12 RP 6.

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[1] "STR" stands for "short tandem repeat". "RFLP" stands for "restriction fragment length polymorphism". CP 341.

D. ARGUMENT

1. The prosecution of this case was barred by the statute of limitations.

The purpose of a statute of limitations is "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970). Such limitations reflect a recognition that time "erode[s] memories or [makes] witnesses or other evidence unavailable." *Stogner v. California*, 539 U.S. 607, 615, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003). Statutes of limitations "encourag[e] law enforcement officials promptly to investigate suspected criminal activity." *Toussie*, 397 U.S. at 115. Finally, they "prevent prosecution of those who have been law abiding for some years." Wayne R. LaFave, *Criminal Procedure*, § 18.5(a) at 184 (3d ed. 2007).

As explained below, the statute of limitations and its purposes were violated by the late charges in this case, and this Court should reverse.

a. The statute of limitations for rape is 10 years, but Mr. McConnell was charged almost 13 years after the crime and 12 ½ years after the State ascertained the unique DNA profile of the rapist.

The rape at issue here occurred on June 24, 1998. CP 356. The Washington State Patrol's Crime Laboratory extracted samples from the victim's clothing, performed DNA testing, and obtained "interpretable DNA results" in November of 1998. CP 286-87. The lab identified three unique DNA profiles in the samples: the victim's, her husband's, and the presumed rapist's. CP 286-87. However, the State did not file charges until 12 ½ years later. On March 25, 2011, the State charged Michael McConnell with the crime. CP 356.

The statute of limitations for rape is 10 years. RCW 9A.04.080(1)(b)(iii)(A). The period begins to run "from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing, whichever is later." RCW 9A.04.080(3). The trial court adopted the State's argument that the identity of the rapist was not conclusively established until the DNA profile was matched to the name "Michael McConnell" in a computer database. The trial court erred, because the identity of the rapist was conclusively established by DNA testing in 1998 when the lab extracted a sample and identified the rapist's unique DNA profile.

b. The limitations period began to run in 1998 when the rapist's unique DNA profile was identified, not 12 years later when it was matched to a name in a database.

This issue is one of statutory construction, a question of law this Court reviews de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In determining the meaning of a statute, courts look first to the text; if the statute is clear on its face, its meaning is to be derived from the language alone. *State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010). If the statute is susceptible to more than one reasonable interpretation, "we may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal citation omitted). Where a statute is ambiguous, the rule of lenity requires it be interpreted strictly against the State and in favor of the accused. *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005); *accord Toussie*, 397 U.S. at 115 (statutes of limitations must be construed "in favor of repose").

The phrase at issue here is "the date on which the identity of the suspect is conclusively established by [DNA] testing." RCW 9A.04.080(3). The DNA in this case was extracted and tested in 1998. The rapist's identity was conclusively established: the lab generated a

unique DNA profile. CP 286-87. The State was required to charge the suspect within ten years of that date. As Mr. McConnell pointed out in the trial court, the State regularly charges people by unique DNA profile rather than by name, but it simply failed to charge anyone in this case in a timely manner. CP 292, 296, 303-05, 310, 313. The State's own practice of charging DNA profiles demonstrates the fallacy of its argument that the word "identity" means "name".

"Identity" means "the state of having unique identifying characteristics held by no other person or thing." *Collins English Dictionary – Complete and Unabridged* (HarperCollins Publishers, 2003). Thus, the identity of a suspect is not conclusively established by associating a name with him, because unlike DNA profiles, names are not unique. There are at least 820 people in this country with the name "Michael McConnell". http://names.whitepages.com (last viewed November 8, 2012). But there is only one person in the world with the DNA profile identified in this case in 1998. *See* "No two of us are alike -- even identical twins: Pinpointing genetic determinants of schizophrenia," *ScienceDaily*, Retrieved November 8, 2012, from http://www.sciencedaily.com /releases/2011/03/110328151740.htm (noting even "identical" twins are not genetically identical; "[i]nstead, each person's DNA profile is truly a unique identifier"). Courts have

recognized this principle. *See, e.g., State v. Dabney*, 663 N.W.2d 366, 372 (Wis. Ct. App. 2003) ("[A] DNA profile is arguably the most discrete, exclusive means of personal identification possible. A genetic code describes a person with far greater precision than a physical description or a name."). In sum, the identity of the rapist was conclusively established in 1998, when DNA testing resulted in a unique genetic profile.

Even if the plain meaning of the word "identity" did not resolve the issue, the surrounding context reinforces the conclusion that the limitations period began to run in 1998. The clock begins to run when the identity is conclusively established by DNA testing. RCW 9A.04.080(3). DNA testing occurred in this case in 1998, and it generated a unique profile. The State argued that the limitations period did not start running until a computer search matched the profile to a name, but this is not what the statute says. In fact, the legislature rejected proposed language that would have stated "the statute of limitations is triggered when a DNA profile is matched with a DNA profile from any certified database." House Bill Report, SSB 5042 (2005); CP 321. The limitations period begins to run when DNA testing conclusively establishes the identity of the suspect, not when a computer search matches this unique identity to a name. RCW 9A.04.080(3).

Finally, even if the word "identity" or the phrase "by DNA testing" were ambiguous, the rule of lenity requires the statute be construed strictly against the State. *Toussie*, 397 U.S. at 115, 122; *Mullins*, 128 Wn. App. at 642. Strictly construing the statute, as we must, the limitations period expired in 2008, and the 2011 prosecution was improper.

c. The remedy is reversal and dismissal of the charge with prejudice.

The statute of limitations creates an absolute bar to prosecution. *State v. Eppens*, 30 Wn. App. 119, 124, 633 P.2d 92 (1981). The remedy for the error in this case is reversal of the conviction and dismissal of the charge with prejudice. *See id.* at 130 (vacating convictions for three charges filed after statute of limitations had run).

2. The prosecution of this case violated Mr. McConnell's Fourteenth Amendment right to due process.

If this Court does not hold the prosecution violated the statute of limitations, it should hold that the delay in charging violated Mr. McConnell's right to due process. The State's negligence caused the delay and prejudiced Mr. McConnell. The prosecution offends fundamental notions of justice, and the conviction should be reversed.

a. Preaccusatorial delay violates due process where, considering the prejudice to the defendant and the reasons for the delay, the late prosecution offends fundamental notions of justice.

Even if a charge is filed within the statute of limitations, preaccusatorial delay may violate the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; *State v. Oppelt*, 172 Wn.2d 285, 287, 257 P.3d 653 (2011). "The core question a court must answer is whether fundamental conceptions of justice would be violated by allowing the prosecution." *Oppelt*, 172 Wn.2d at 287. To resolve this issue, Washington courts apply a three-step analytical framework: (1) the defendant must show actual prejudice from the delay; (2) the court must determine the reasons for the delay; and (3) the court must weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution. *Id.* at 295.

A defendant is not required to show the State acted in bad faith; mere negligent delay may violate due process. *Id.* at 292 (citing *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985)). Whether preaccusatorial delay violates due process in a given case is a question of law this Court reviews de novo. *Id.* at 290.

b. The 12 ½ year preaccusatorial delay violated Mr. McConnell's right to due process because the State destroyed all but one piece of evidence 5 years after the crime and did not retest the DNA until 12 years after the crime.

In this case, the prejudice of the State's delay to Mr. McConnell outweighs its reasons for the delay. The late prosecution violated Mr. McConnell's right to due process, and this Court should reverse.

The prejudice in this case is much greater than that in *Oppelt*, where the Court held the defendant showed some prejudice but that on balance due process was not offended. In that case, the delay was only six years – the crime occurred in 2001 and the defendant was charged with child molestation in 2007. *Oppelt*, 172 Wn.2d at 286-87. The defendant argued he was prejudiced because one of the witnesses could not remember the events surrounding the alleged crime very well. Specifically, the relative who had put lotion on the victim's vagina could not remember the brand she used. The defendant argued this prejudiced his ability to argue that the lotion, not a criminal act, caused the inflammation observed by doctors. *Id.* at 287-88. The Supreme Court agreed that this memory loss constituted some degree of prejudice, but held that on balance due process was not violated. *Id.* at 296.

Here, in contrast, more than twelve years passed between the crime and the charge, not just six years. Furthermore, unlike in *Oppelt*, there

was not simply one witness whose memory was compromised. Instead, the State destroyed all evidence except the one piece it ended up using against Mr. McConnell. And while the relative at issue in *Oppelt* lost her memory during the delay, Mr. McConnell's mother, with whom he lived at the time of the alleged crime, lost her life during the delay. She died in 2010, and would have been available for this case had the State prosecuted it in a timely manner.

As Mr. McConnell's attorneys explained below, the negligent delay and destruction of all but one piece of evidence additionally prejudiced Mr. McConnell by preventing his attorneys from being able to provide effective assistance of counsel. CP 346; *See State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010) (describing counsel's duty to investigate evidence). Mr. McConnell could not hire his own expert to examine the destroyed evidence or extract an independent biological sample from the victim's clothing. CP 293, 346-47. Nor could the defense analyze the destroyed piece of clothing worn by the alleged perpetrator, the plaster casts taken from bicycle tracks left by the alleged perpetrator, or the photographs of the crime scene and victim's injuries. CP 347. The delay in charging prevented the defense from being able to interview Mr. McConnell's mother, with whom he lived at the time of the incident because he was still a child. CP 293. His mother was a potential

alibi or fact witness. CP 348. In sum, the prejudice here, where 12 years passed and almost all of the evidence was destroyed, is much greater than that in *Oppelt*, where only six years passed and only one witness's memory was compromised.

The reason for the delay was the State's multiple instances of negligence. First, it was negligent in not filing an information when it identified a unique genetic profile in 1998. Second, it was negligent when it failed to follow through with its own promise to "occasionally compare [the profile] to the data bank to see if it matches any of the new entries." CP 287. Third, it was negligent in failing to retest the DNA using STR analysis until 2010, given the State started using that technique in 2000. CP 268, 345. And fourth, it was negligent in destroying all of the other evidence in 2003, before the statute of limitations had run and before the DNA was retested.

The State presented no excuses for most of this negligence. It did argue that the failure to perform STR testing earlier was justified by limited resources, but this argument should be rejected just as the court in *Howell* rejected a similar argument. 11/28/11 RP 78; *see Howell*, 904 F.2d 889. In *Howell*, one county delayed filing charges for two and a half years while proceedings against the defendant in another county were pending. *Id.* at 891. The State justified the delay as a practice followed "in order to

avoid the inconvenience and expense of transporting the wanted person back and forth between the two counties for hearings and trials." *Id.* The Fourth Circuit, like the Washington Supreme Court in *Oppelt*, rejected the State's proposed rule that only bad-faith delay violates due process. *Id.* at 895. The Court held the State was negligent and there was "no valid justification in this case for the preindictment delay." *Id.*

Similarly here, the inconvenience and expense of STR testing does not justify delaying it for ten years. Furthermore, the State did not even attempt to justify the failure to charge the DNA profile in 1998 or the destruction of the evidence in 2003. It would be ironic for State to get away with destroying almost all of the evidence based on its misunderstanding of the statute of limitations, but then arguing that neither the statute of limitations nor due process prohibited it from prosecuting Mr. McConnell eight years later with the one piece of evidence it hadn't destroyed. What happened in this case violates fundamental notions of justice, requiring reversal under the Fourteenth Amendment. *See Oppelt*, 172 Wn.2d at 287.

c. <u>The remedy is reversal and dismissal of the charge with prejudice</u>.

As with a statute of limitations violation, a violation of due process caused by preaccusatorial delay requires dismissal of the charge. *United*

States v. Marion, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). This Court should reverse and remand with instructions to dismiss the charge with prejudice.

E. CONCLUSION

For the reasons set forth above Mr. McConnell asks this Court to reverse the conviction and remand for dismissal of the charge with prejudice.

DATED this 15th day of November, 2012.

Respectfully submitted,

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Washington Appellate Project
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, MICHAEL MCCONNELL, Appellant.	)))))))))	NO. 68852-9-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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