68852-9

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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

In 1998, a rape occurred, detectives collected numerous pieces of evidence, and the suspect's unique DNA profile was identified. In 2003, the State destroyed all but one piece of evidence "on the belief that the statute of limitations had run." In 2011, the State claimed the statute of limitations had not run and prosecuted Michael McConnell for the crime using the one piece of evidence it had not destroyed, knowing Mr. McConnell never had access to the destroyed evidence and that his alibi witness had died in 2010.

The prosecution was barred by the 10-year statute of limitations and offends fundamental notions of justice guaranteed by the Due Process Clause. For each of these independent reasons, the conviction should be reversed and the charge dismissed.

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

As explained in the opening brief, the prosecution of this case was barred by the statute of limitations. The statute of limitations for rape is 10 years, beginning "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 State charged Mr. McConnell almost 13 years after the commission of

the crime and 12 ½ years after the State ascertained the unique DNA profile of the rapist. The prosecution was time-barred, and the charged should have been dismissed with prejudice. App. Br. at 5-10.

The State failed to file charges in a timely manner even though it conclusively established a unique DNA profile shortly after the crime. It was reduced to arguing that the statute of limitations did not begin to run until the profile was matched to a name in a database – even though the State regularly charges people by DNA profile rather than name. CP 292, 296, 303-05, 310, 313. The State claims that the word "conclusively" would be superfluous if it did not refer to a name match. Resp. Br. at 10. The State is wrong.

As explained in the opening brief, the identity of a suspect is *not* conclusively established by a name match, because unlike DNA profiles, names are not unique. There are hundreds of people in this country with the name "Michael McConnell," but only one person in the world with the unique profile identified by DNA testing. Thus, it is not the match to the name "Michael McConnell" that conclusively identified the suspect in this case, it was the discovery of the unique DNA profile in 1998. App. Br. at 8 (dictionary defines "identity" as "the state of having unique identifying characteristics held by no other person or thing").

Mr. McConnell agrees that the word "conclusively" is important, and that it means "putting an end to debate or question especially by reason of irrefutability." Resp. Br. at 10. For example, identity is sometimes *inconclusively* established by DNA testing where only a partial profile can be generated or where there is a mixture of sources. In such circumstances, numerous persons could be contributors and therefore the results are said to be "inconclusive". *See State v. Bander*, 150 Wn. App. 690, 697, 208 P.3d 1242 (2009). But where, as here, DNA testing produces a unique profile, the suspect's identity is conclusively established. *See id.* at 696.

If the legislature wanted to say that "conclusively established" meant a match in a database, it knew how to do so. CP 321 (legislature rejected proposed language that would have clarified the meaning of "conclusively" by stating "the statute of limitations is triggered when a DNA profile is matched with a DNA profile from any certified database"); *See State v. Slattum*, ___ Wn. App. ___, 295 P.3d 788, 796 (2013). "Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted." *Slattum*, 295 P.3d at 796. The legislature did not say the statute of limitations was triggered by a database match; it said it was triggered by the date on which the identity of the suspect is

conclusively established by DNA testing. The language is plain on its face, and to the extent it is not, the rule of lenity applies and requires a construction of the statute most favorable to Mr. McConnell. *Id.* at 797. Thus, the limitations period expired in 2009, and the 2011 prosecution was improper.[1]

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

Preaccusatorial delay violated Mr. McConnell's right to due process, constituting a second independent basis for reversal in this case. More than 12 years passed between the reporting of the crime and the charge, and the delay was caused by the State's negligence in failing to file an information after it tested the DNA, failing to retest the DNA using STR analysis until 10 years after the technology was available, and failing to compare the profile to the data bank between 1999 and 2011. Furthermore, the *State* destroyed *all* evidence except the DNA in 2003 – and did so on the basis that it thought the statute of limitations had run. It offends fundamental notions of justice for the State to turn around in 2011 and say the statute of limitations had not run and that Mr. McConnell

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[1]The opening brief erroneously said the limitations period expired in 2008. The misstatement does not affect the analysis or outcome. The suspect's identity was conclusively established by DNA testing in 1998, so the limitations period began running in 1999, and expired in 2009. RCW 9A.04.080(3). The 2011 prosecution was improper.

should be prosecuted and convicted based on the one piece of evidence it did not destroy. App. Br. at 10-15.

The State misunderstands the issue, claiming Mr. McConnell must show the State acted in bad faith rather than mere negligence. Resp. Br. at 13-14. This is the standard for a *Brady/Youngblood* claim, not for a violation of due process based on preaccusatorial delay. *See Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). As explained in the opening brief, preaccusatorial delay may violate due process where the State acts negligently. Indeed, our Supreme Court explicitly rejected a bad-faith requirement in *State v. Oppelt*, 172 Wn.2d 285, 292, 257 P.3d 653 (2011). *See* App. Br. at 11.

The State contradicts itself and unwittingly admits negligence. It says, "The reason charges were not filed prior to 2011 was that the suspect's identity was unknown." Resp. Br. at 15. Later on the same page, though, it acknowledges, "a DNA profile of the suspect was identified from a sample recovered from E's underwear on November 23, 1998." Resp. Br. at 15. Thus, the suspect was identified in 1998 and the State was negligent in delaying the filing of charges until 2011. *See* CP 292, 296, 303-05, 310, 313 (State regularly files charges using DNA profiles instead of names). The bulk of the State's ensuing argument is a

refusal to acknowledge that it could have filed charges using a DNA profile.

The cases cited in the response brief are distinguishable. Resp. Br. at 19-20. In *Gee*, the delay was less than a year, only one witness was missing, and that witness had left the jurisdiction just after the crime anyway. *State v. Gee*, 52 Wn. App. 357, 367, 760 P.2d 361 (1988). Here, the delay was 12 ½ years, the State destroyed all but one piece of evidence, and Mr. McConnell's potential alibi witness died shortly before the State filed charges.

Howard involved a delay of 10 years, but the State repeatedly investigated in the interim, and this Court emphasized that the delay was not prejudicial in light of the absence of a statute of limitations for murder, and in light of the fact that the State charged the defendant as soon as it had sufficient evidence to do so. *State v. Howard*, 52 Wn. App. 12, 13-16, 20, 756 P.2d 1324 (1988). In this case, the State did not occasionally compare the DNA profile to databases as it said it would, it did not file an information as soon as it had sufficient evidence to do so, and there is a 10-year statute of limitations for the crime.

Like *Gee*, *Bernson* was a murder case with a short delay (less than three years). *State v. Bernson*, 40 Wn. App. 729, 731, 700 P.2d 758 (1985). No evidence was lost or destroyed during this period; the

defendant merely claimed that some evidence was stored in a "haphazard manner" and that witnesses' memories had faded. *Id.* at 735. Thus, the level of prejudice did not rise to a due process violation. *Id.* Here, the delay was more than four times longer and all but one piece of evidence was destroyed. *Bernson* does not help the State.

Haga also involved a murder prosecution. *State v. Haga*, 13 Wn. App. 630, 536 P.2d 648 (1975). The delay was only five years, and, in evaluating the due process argument, the court applied a test later *rejected* by the Supreme Court in *Oppelt*. *See Oppelt*, 172 Wn.2d at 294-95 & n. 7 ("what are meant to be balanced are the reasons for the delay and the prejudice to the defendant caused by the delay"); *Haga*, 13 Wn. App. at 632 (rejecting defendant's argument that test later adopted in *Oppelt* is correct test, and instead balancing prejudice against State's interest in prosecuting murder, which lacks a statute of limitations).

In *Ansell*, the delay between the reporting of the crime and the filing of the information was less than a year, so it is not surprising that this Court held the prosecution did not violate the defendant's right to due process. *State v. Ansell*, 36 Wn. App. 492, 493, 675 P.2d 614 (1984). Furthermore, the defendant vaguely averred that witnesses were missing but did not specify which witnesses were unavailable, and the defendant

admitted that certain available witnesses could testify to the same information contained in missing documents. *Id.* at 498.

Platz similarly involved a short delay between discovery of the crime and filing of the charges. *State v. Platz*, 33 Wn. App. 345, 346-47, 655 P.2d 710 (1982). Less than three years passed between the crime and the prosecution, and less than one year passed between the time the defendant confessed the crime to undercover detectives and charges were filed. During this short period, detectives obtained judicial authorization to record another conversation to corroborate the confession. *Id.* The defendant claimed prejudice from one missing witness and the fading memory of another, but the latter witness's memory had not in fact faded, and instead was consistent with her original statements to police. Furthermore, this witness's testimony was redundant with that of the missing witness. *Id.* at 348.

In sum, *all* of the cases cited by the State involve shorter delays than the delay in this case, even though most of them were murder prosecutions for which there is no statute of limitations. In none of the cases cited in the response brief did the State destroy all but one piece of evidence during the delay. The State's citations demonstrate that what happened in this case is unusual, offends fundamental notions of justice, and violates due process.

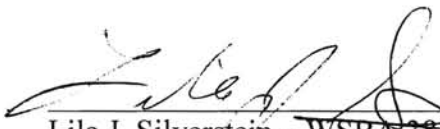
Finally, it is worth noting the State does not defend the trial court's basis for ruling there was no due process violation – and with good reason. The trial court curiously ruled that there was no delay at all. *See* CP 360 (late-filed findings); 12/20/11 RP 4. "Delay" refers to the time between the reporting of the crime and the filing of a charge. *See Oppelt*, 172 Wn.2d at 286-87; *Gee*, 52 Wn. App. at 366. The delay in this case was *twelve and a half years*. The State did not file charges earlier even though it gathered evidence and obtained a DNA profile shortly after the incident. It destroyed all but one piece of evidence because it thought the statute of limitations had run, but years later proceeded with the prosecution and dismissed Mr. McConnell's claims that the statute of limitations had run. The prosecution offends fundamental notions of justice, and the conviction should be reversed.

B. CONCLUSION

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

DATED this 31st day of March, 2013.

Respectfully submitted,



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DIVISION I

STATE OF WASHINGTON,	)	
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Respondent,	)	
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	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **REPLY 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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