

NO. 94111-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH CLARK

FILED

Feb 14, 2017

Court of Appeals

Division I

State of Washington

PETITION FOR REVIEW OF THE COURT OF APPEALS
JANUARY 17, 2017 DECISION IN STATE V. CLARK #76027-1-I

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A. IDENTITY OF MOVING PARTY

Appellant Kenneth Clark, through his attorney, Lise Ellner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Clark requests review of the Court of Appeals January 17, 2017 ruling that his due process rights violation due to the trial court's 96 plus day delay in obtaining restorative treatment did not warrant dismissal without prejudice. The Court also erroneously failed to remand for dismissal under CrR 8.3(b). A copy of the decision affirming the order is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred in ruling that it did not have adequate grounds to remand for dismissal of the charges against Clark.

2. The Court of Appeals erred in ruling that Clark's due process violations failed to warrant dismissal.

3. The Court of Appeals erred in determining that Clark was not prejudiced by the undue delay in obtaining restorative treatment.

4. The Court of Appeals erred in finding that dismissal was not warranted under CrR 8.3.(b).

5. The Court of Appeals erred in finding that dismissal was not warranted under CrR 3.3.

D. STATEMENT OF THE CASE

On September 3, 2014, the court ordered a 90 day restoration treatment for Clark. CP 27-29. Western State Hospital (WSH) did not have any available beds at the time restoration was ordered and did not admit Mr. Clark until December 8, 2014. CP 74-76. The mental health forensic report that was prepared on March 5, 2015, determined Clark to be competent to stand trial. CP 86-91.

The trial court denied Clark's motion to dismiss for the 96 day delay between the September 3, 2014, trial court hearing finding Clark incompetent and the December 8, 2015, admission to WSH for restoration. CP 33-35; 78-79, 135-137. The trial court denied the defense motion to dismiss for due process violations, and speedy trial violations under CrR 8.3(b). CP 135-47.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The trial court erred in ruling that the dismissal was not warranted in this case.

RAP 13.4(b) (4) provides for review as follows:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The issues in this case meet the criteria for acceptance of review under (b) (2) and (4).

Under RAP 13.4(b)(2), the decision in this case is in tacit conflict with *State v. Kidder*, ___ P.3d ___ (2016 WL 7468217), issued shortly before the decision in this case, but considered and authored by a different panel of judges from Division One.

This case also meets the criteria under RAP 13.4(b)(4), which provides for review of an issue of substantial public importance. This has been interpreted to mean an issue that “has the potential to affect a number of proceedings in the lower courts ... if review will avoid unnecessary litigation and confusion on a common issue.” *In re*

Personal Restrain of Petition of Flippo, 185 Wn.2d 1032, 380 P.3d 413 (2016).

The issues in this case meet this criteria because this Court has determined that warehousing mentally ill accused in jails pending competency evaluations is of serious public concern. *U.S. v. Trueblood* 73 F. Supp. 1311 (2014).

1. THE JUDICIARY HAS THE POWER TO ISSUE ORDERS TO PREVENT EGREGIOUS SUBSTANTIVE DUE PROCESS VIOLATIONS.

Division One agreed that Clark's due process rights were violated by the 96 day delay in obtaining restoration services but refused to dismiss without prejudice. (*Clark*, Slip Opinion at p.6-13). "Involuntary commitment for mental disorders constitutes a significant deprivation of liberty that requires due process protection." *Detention of C.W. v. State*, 105 Wn. App. 718, 729, 20 P.3d 1052 (2001) (*citing Addington v. Texas*, 441 U.S. 418, 425-26, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

It is a fundamental principle of state and federal law that incompetent defendants may not stand trial. This right is protected by the due process clause of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Medina v. California*, 505 U.S. 437, 439, 112 S.Ct. 2572,

120 L.Ed.2d 353 (1992). Washington law implements this due process protection by statute. *State v. Coley*, 180 Wn.2d 543, 551, 326 P.3d 702 (2014).

Chapter 10.77 RCW implements the procedures and standards trial courts use to judge the competency of defendants to stand trial and the timeliness of restorative treatment services. *State v. Wicklund*, 96 Wn.2d 798, 801, 638 P.2d 1241 (1982). RCW 10.77 is the procedural mechanism for due process compliance but not the substantive basis for due process violations. *State v. Hendrick*, 166 Wn.2d 898, 904, 215 P.3d 201 (2009) (quoting *State v. Flemming*, 142 Wn.2d 853, 863, 16 P.3d 601 (2001)); *Kidder*, ___ P.3d ___ (2016 WL 7468217).

On December 27, 2016, one month prior to issuing the opinion in this case opinion, a different Division One panel than in Clark's case, issued an opinion in *Kidder*, ___ P.3d ___ (2016 WL 7468217), upholding the trial court's dismissal of the charges against Kidder, without prejudice, based on due process violations stemming from delay in obtaining restorative treatment. (*Kidder*, Slip opinion at p. 8).

In *Kidder*, Division One reiterated that "Chapter 10.77 RCW provides a procedure for assessing due process violations and the

“[p]rocedures of the competency statute ... are mandatory and not merely directory.” (*Kidder*, Slip opinion at pp. 10-11); *Hendrick*, 166 Wn.2d at 904; *Flemming*, 142 Wn.2d at 863.

In support of her motion to dismiss, *Kidder*, cited to procedural and substantive due process, *Trueblood*, and CrR 8.3. (*Kidder*, Slip opinion at p. 7). Defense counsel also submitted a copy of the December 22, 2014, summary judgment order in *Trueblood*, 73 F. Supp. 1311. (*Kidder*, Slip opinion at p. 7). *Kidder* argued, and the state conceded, that “the failure of the State to provide competency restoration services in a reasonable time violated due process.” (*Kidder*, Slip opinion at p. 8).

Kidder also argued in response to the state’s appeal that the state was not entitled to relief under RCW 10.77.086.

... we’re asking for the serious relief of dismissal because we have specifically a significantly mentally ill woman with significant medical issues who has been incarcerated since August, who has been held waiting transport as of today. She was transported yesterday, which would have been 104 days so that 90-day period for restoration has expired.

(*Kidder*, Slip opinion at p. 8). The state argued against dismissal reasoning that the delay was beyond its control. *Id.* The trial court’s

order dismissing the charges against Kidder did not cite to RCW 10.77 or the constitution but rather delineated that Kidder was currently unable to stand trial due to mental incapacity. (*Kidder*, Slip opinion at p. 8).

After thoroughly discussing the state's failure to comply with RCW 10.77, Division One cited to *Hendrick*, 166 Wn.2d at 904, for the proposition that "failure to observe procedures adequate to protect this right [timely competency treatment] is a denial of due process." (*Kidder*, Slip opinion at p. 10).

In response to the state's request for dismissal at the appellate level, Kidder argued, and Division One agreed, that RCW 10.77.084 provides authority for a trial court to dismiss charges without prejudice based on the underlying violation of due process rights. (*Kidder*, Slip opinion at p. 12). The Court in *Kidder*, addressing a state's appeal seeking reversal of a decision to dismiss under RCW 10.77, did not retreat from the underlying grounds supporting the due process violations as grounds for dismissal.

In *Kidder*, to protect Kidder's due process rights, Division One dismissed the charges against the incompetent Kidder without prejudice. The Court of Appeals concluded in its opinion that the trial

court had the authority to dismiss the charges against Kidder, without prejudice for due process violations, protected under the procedures set forth in RCW 10.77.084(1)(c). (*Kidder*, Slip opinion at pp. 6-12).

Here Clark was not incompetent to stand trial after the long delayed restorative treatment. However, it is undisputed that Clark like Kidder suffered from the same due process violations. Clark like Kidder was not given timely restorative services before the expiration of the 90-day commitment period under RCW 10.77.084(1)(c). (*Kidder*, Slip opinion at p. 12). Here, the state did not seek review, rather Mr. Clark sought review. While counsel for Mr. Clark did not seek dismissal under RCW 10.77.084(1)(c), the record in *Kidder* indicates, that at the trial court level Kidder, like Clark sought dismissal after the trial court unsuccessfully ordered restorative services, based on due process violations and CrR 8.3. (*Kidder*, Slip Opinion at pp. 6-13).

Dismissal Is the Appropriate Remedy.

This Court has inherent authority to dismiss a case under appropriate circumstances. See, e.g., *State v. Chichester*, 141 Wn. App. 446, 457, 70 P.3d 583 (2007); *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986); *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956). Furthermore, an appellate court is not limited to

the trial court's rationale for a particular decision, but may affirm or reverse "on any ground established by the law and the record." *State v. Motter*, 139 Wn. App. 797, 802, n. 3, 162 P.3d 1190 (2007); see also RAP 2.5(a).

Here, there is no dispute that the trial court did not follow the requirements of RCW 10.77. In so failing, the trial court violated Clark's due process rights. This Court should accept review and remand for dismissal as a remedy, because the Court of Appeals was authorized to remand for dismissal of charges based on a due process violation, because "unlike some legal rules, [due process] is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334, 98 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803). Division One acknowledged the due process violation but failed to provide relief following recognition of a due process violation. (Slip opinion at pp. 5-6).

When a new trial is inadequate to protect a person's due

process rights that have been violated, dismissal is required. *State v. Wright*, 87 Wn.2d 783, 792-93, 557 P.2d 1 (1976) (reversed on other grounds by *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1982)).¹

For example, in *Wright*, without obvious motive, the state destroyed potentially useful evidence that required freezing for preservation. *Wright*, 87 Wn.2d at 791-992. The Supreme Court held that “a new trial would do nothing to mend the constitutional deficiency. Thus appellant’s conviction must be reversed and the charges dismissed.” *Wright*, 87 Wn.2d at 79-93. Accord *United States v. Cooper*, 983 F.3d 928, 933 (9th Cir. 1993) (due process violated by government failure to preserve evidence - remedy is dismissal); *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) and *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985).

Clark’s case is not a destruction of evidence case, but the due process violations here as in *Wright*, cannot be remedied short of

¹ The court engages in a test to determine due process violations where (1) the defendant must show actual prejudice from the delay; (2) if the defendant shows prejudice, the court must determine the reasons for the delay; (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution. See *State v. Warner*, 125 Wn.2d 876, 890, 889 P.2d 479 (1995) (“The ultimate issue in balancing the interests is ‘whether the action complained of ... violates those “fundamental conceptions of justice which lie at the base of our civil and political institutions.” (alteration in *296 original) (quoting *State v. Lidge*, 111 Wn.2d 845, 852, 765

dismissal. Clark provided constitutional and statutory grounds for dismissal under the due process clause and CrR 8.3. Accordingly, this Court should accept review to address the conflict with *Kidder, supra* and because the issue is of public importance and contrary to existing Washington State jurisprudence. *Trueblood, supra*.

Because the Court of Appeals has inherent authority to dismiss a case under appropriate circumstances, and failed to do so when presented with appropriate circumstances that raise an issue of significant public importance, this Court should accept review and hold that Mr. Clark's unconstitutional delay in obtaining restorative treatment can only be remedied by dismissal of the charges.

2. THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(4) BECAUSE THE COURT OF APPEALS REFUSAL TO DISMISS UNDER CRR 8.3, CrR 3.3 OR THE SIXTH AMENDMENT IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT THE SUPREME COURT SHOULD DECIDE.

a. Violation of Speedy Trial Rules
CrR 3.3

Clark timely objected to violation of his speedy trial rights and

timely filed motions to dismiss under CrR 3.3(d)(3)2. RP 4 (April 10, 2015); CP 56, 135-47. Both the United States Constitution and the Washington Constitution provide a criminal defendant with the right to a speedy public trial. U.S. Const. Amend. VI; Wash. Const. art. I § 22. Our state constitution “requires a method of analysis substantially the same as the federal Sixth Amendment.” *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009).

This Court reviews de novo speedy trial right violations under CrR 3.3. *State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013). A defendant who is in custody pending trial is entitled to be tried within 60 days of arraignment. CrR 3.3(b)(1)(i), (c)(1). Under CrR 3.3(h), “[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice.” CrR 3.3(h). The purpose of CrR 3.3 is to protect a defendant’s constitutional right to a speedy trial. *State v. Kenyon*, 167 Wn.2d 130, 216 P.3d 1024 (2009); *State v.*

2 a] party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

Kingen, 39 Wn. App. 124, 692 P.2d 215 (1984).

Generally, the time between when a competency examination is ordered and when a competency determination is made is excluded from this 60-day calculation. CrR 3.3(e)(1). The first clause of the rule, exempting all proceedings related to a defendant's competency, presumes that competency proceedings actually occur. Incarcerating the defendant while his case languishes due to state mismanagement is not a proceeding relating to his competence to stand trial.

Rather, here it was the result of the government's failure to protect Clark's due process rights. "We assume that the 96-day delay violated Clark's substantive due process rights". (Slip opinion at p. 5). Logically, the state should not be rewarded for mismanagement and violating speedy trial rights, but that is precisely what the Court of Appeals permitted in its opinion. (Slip opinion at pp. 6-7).

The Court of Appeals cited to *State v. Harris*, 122 Wn. App. 498, 505, 94 P.3d 379 (2004) in support of its determination that the 96 day delay in jail was tolled for speedy trial calculations. *Harris* is distinguishable on several grounds.

First, in *Harris*, unlike in Clark's case, Harris raised an insanity defense as well as a diminished capacity defense. *Harris*, 122 Wn.

App. at 501. Second, when Harris raised an insanity defense, the trial court was compelled to order a competency evaluation under RCW 10.77.060. *Harris*, 122 Wn. App. at 506. Third and finally, Harris, himself contributed to the delay in the trial proceedings by refusing to meet with the doctor for his evaluation. This restarted the speedy trial clock because it amounted to a failure to appear. *Harris*, 122 Wn. App. at 506-07 (citing former CrR 3.3(d)(2)(2001)).

Here, Clark did not raise an insanity defense, the court was not compelled to order a mental health evaluation, and importantly, Clark did not contribute to the delay in obtaining a competency evaluation.

If the state obtains an order for a competency evaluation but fails to take the steps necessary to effectuate the evaluation, it may not toll the resulting period of incarceration under CrR 3.3(e)(1). This reading of the rule is borne out by the language and purpose of CrR 3.3(e)(1), as well as the purpose of the Criminal Rules. Despite the trial court's order for a competency evaluation, the state did not commence an evaluation until 96 days after it was ordered and 68 days after the time for trial had passed. CP 27-29, 74-76. The broadly drafted tolling provision accounts for variation and unpredictability in the evaluation process, but it does not justify inordinate delay in

pursuing the case. *State v. Cox*, 106 Wn. App. 487, 492, 24 P.3d 1088 (2001) (evaluations can involve a protracted length of time and require review in the trial court before a final determination of competency can be entered).

To interpret this rule otherwise would contradict CrR 1.2 which requires the Court to construe the rules to secure “simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.” Accordingly, CrR 3.3(e)(1) must be interpreted to impose a duty on the State to diligently initiate the evaluation so that defendants are not incarcerated indefinitely without good cause.

b. This Court Should Accept Review and Remand for Dismissal Under CrR 8.3(b).

“Fairness to the defendant underlies the purpose of CrR 8.3(b)”. *City of Kent v. Sandhu*, 159 Wn. App. 836, 841, 247 P.3d 454 (2011) (*quoting*, *State v. Koerber*, 85 Wn. App. 1, 5, 931 P.2d 904 (1996)). Under CrR 8.3(b), a trial court has discretion to dismiss “any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the

accused which materially affect the accused's right to a fair trial.” CrR 8.3(b); *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

CrR 8.3(b) does not require evil or dishonest actions; simple mismanagement, coupled with resulting prejudice that affects the right to fair trial, will suffice. See *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003); *State v. Michelli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Due process requires that criminal proceedings comport with prevailing notions of fundamental fairness such that the accused is given a meaningful opportunity to present a complete defense. *State v. Greiff*, 141 Wn.2d 910, 920, 10 P.3d 390 (2000). State mismanagement of discovery may infringe an accused's constitutional right to due process. *Greiff*, 141 Wn.2d at 920.

Misconduct and prejudice need only be shown by a preponderance of the evidence. *State v. Stein*, 140 Wn. App. 43, 53, 165 P.3d 16 (2007).

8.3(b) provides in relevant part:

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set

forth its reasons in a written order.

Id. Accordingly, to obtain the extraordinary remedy of dismissal under CrR 8.3(b), a defendant must demonstrate (1) arbitrary action or governmental misconduct and (2) actual prejudice affecting his right to a fair trial. *State v. Rorich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *Michelli*, 132 Wn.2d at 241.

The trial court's decision, regarding a motion to dismiss based on governmental misconduct, is reviewed under the manifest abuse of discretion standard. *Rorich*, 149 Wn.2d at 654; *Michelli*, 132 Wn.2d at 24. The reviewing court will find an abuse of discretion “when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *Michelli*, 132 Wn.2d at 240.

The state commits mismanagement sufficient to warrant dismissal when it negligently incarcerates a defendant beyond the time permitted for trial because the defendant is necessarily prejudiced by being forced to choose between the right to speedy trial and adequate trial preparation. *Michelli*, 132 Wn.2d at 240.

Here, the Court of Appeals erroneously determined that Clark failed to show that he was prejudiced by the 96 day delay in obtaining restorative treatment, but the Court of Appeals also cited to *Wilson*, 149 Wn. App. at 12-13, a specific case delineating that a defendant is prejudiced by simple government mismanagement when he is forced to choose between speedy trial and adequate trial preparation.

Clark established prejudice because he was forced to choose between speedy trial and adequate trial preparation. And also like the class in *Trueblood, supra* and *Oregon Advocacy Ctr. V. Mink*, 322 F.3d 1101 (9th Cir. 2003), Clark did not timely receive the care he needed and was forced to languish in jail, a punitive setting that could not assist him in restoring competency and subjected Clark to the likely further erosion of his mental instability.

Prolonged incarceration awaiting competency evaluation or restoration undermines that goal because “[w]hile they are detained in jail, incapacitated criminal defendants do not receive care giving them a realistic opportunity of becoming competent to stand trial.” *Mink*, 322 F.3d at 1121. In other words, because jails are inherently punitive and not therapeutic institutions, the mental health of detainees further erodes with each additional day of wait time, especially when those detainees are held in solitary confinement. Because delays lengthen incarceration, worsening the mental health conditions of detainees, and because “continued commitment must be justified by progress toward [the]

goal” of restoration of competency so that the detainee is able to stand trial, Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), there is no legitimate independent interest in delays.

Trueblood, 722 F. Supp. 3d at 1316.

Because Mr. Clark’s was prejudiced by governmental misconduct and by a violation of his right to a speedy trial, this Court must remand for dismissal. Any lesser remedy will not achieve the goal of curbing future misconduct.

F. CONCLUSION

This Court should accept review based on the reasons stated herein and in the referenced opening brief and motion for reconsideration,

DATED THIS 14th day of February, 2017.

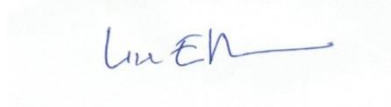
Respectfully submitted,

LAW OFFICES OF LISE ELLNER

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

LISE ELLNER, WSBA 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor pcpatcecf@co.pierce.wa.us and Kenneth Clark DOC #810996 Clallam Bay Corrections 1830 Eagle Crest Way Clallam Bay, WA 98326 a true copy of the document to which this certificate is affixed on February 14, 2017. Service was made electronically to the prosecutor and via U.S. Postal to Mr. Clark.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

APPENDIX

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

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January 17, 2017

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CASE #: 76027-1-I
State of Washington, Respondent v. Kenneth Allen Clark, Appellant
Pierce County, Cause No. 14-1-03081-1

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

“For these reasons, we affirm Clark's conviction. We find, however, that the trial court should have considered Clark's ability to pay the criminal filing fee and the DNA testing fee. WE remand the case, for consideration of Clark's ability to pay those LFO'S.”

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Kathryn Nelson

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ALLEN CLARK,

Appellant.

No. 76027-1-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 17, 2017

LEACH, J. — Kenneth Clark appeals his convictions and sentence for first degree assault, second degree assault, unlawful imprisonment, and felony harassment. He claims that a 96-day stay in jail while waiting for competency restoration treatment violated his substantive due process rights and requires that the court dismiss his charges. He also claims that CrR 3.3(h) and CrR 8.3(b) require dismissal because governmental mismanagement caused the delay. Alternatively, Clark claims, he is entitled to dismissal because he did not receive effective assistance of counsel. Clark cites no authority that would permit the court to vacate his conviction for the due process violation he alleges. Because Clark's other arguments lack merit, we affirm Clark's convictions.

Clark also challenges the imposition of certain mandatory legal financial obligations (LFOs) that the trial court found he could not pay. We agree that the trial court committed an error. A trial court must consider the defendant's ability

to pay even mandatory LFOs when, as in this case, the defendant suffers from a mental health condition.¹

We affirm in part and reverse in part. We remand to the trial court with direction to consider Clark's ability to pay the criminal filing fee and the deoxyribonucleic acid (DNA) testing fee.

BACKGROUND

This case arises out of an altercation between Clark and his live-in girlfriend, Marie Epps, that took place on August 3, 2014. According to Epps's trial testimony, she was upset about Clark's drug use and told him that she did not want to be with him anymore. Epps testified that she had "proof" of Clark's drug use and could tell by his behavior that he was using drugs. Clark and Epps got into an argument, which escalated into a physical fight. At one point, Clark pinned Epps to the ground, lying on top of her, and either bit or cut off her ear. Epps testified that after that, Clark looked like he was shocked and left.

On August 6, 2014, the State charged Clark with assault in the first degree, assault in the second degree, unlawful imprisonment, and felony harassment. On August 19, due to concerns about Clark's fitness to proceed, the court ordered a preliminary competency evaluation. On August 28, a mental health specialist determined that Clark was not competent to stand trial at that time but could likely regain competency after a restoration period at Western

¹ RCW 9.94A.777(1).

State Hospital (WSH). On September 3, the court ordered a 90-day commitment so Clark could undergo treatment to regain competency.

Because WSH had no available beds, Clark remained in the Pierce County Detention and Corrections Center until December 8, 2014. Clark moved to dismiss for the 96-day delay in admitting him to WSH for restoration under CrR 3.3 and for governmental misconduct under CrR 8.3(b). The trial court denied Clark's motion. On March 5, 2015, the trial court found Clark competent to stand trial. The trial court denied a second motion to dismiss for speedy trial violations and governmental misconduct. On July 20, 2015, the case proceeded as a bench trial.

During pretrial motions, the State moved to admit prior incidents of domestic violence between Clark and Epps. Defense counsel objected, suggesting that the court reserve ruling on the issue until it had heard Epps's testimony. The trial court reserved ruling as asked. At trial, defense counsel questioned Epps about an assault she reported to the police.

The court convicted Clark as charged and imposed \$800 in LFOs, including a \$500 crime victim penalty assessment, a \$100 DNA testing fee, and a \$200 criminal filing fee.

DISCUSSION

Substantive Due Process Violation

Clark claims that a 96-day delay in obtaining competency restoration services violated his substantive due process rights and that the remedy for this

violation is dismissal of charges. "The Supreme Court has long recognized that individuals have a fundamental liberty interest in being free from incarceration absent a criminal conviction, and that there are corresponding constitutional limits on pretrial detention."² A court decides whether the State has violated the substantive due process rights of incapacitated criminal defendants by balancing their liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the State.³ "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."⁴ The government has a legitimate regulatory interest in pretrial detention when it prevents danger to the community.⁵ "But once a court declares a defendant incompetent to stand trial, that interest is displaced by the State's interest in 'determin[ing] whether there is a substantial probability that he will attain [] capacity in the foreseeable future.'"⁶

To support his due process claim, Clark relies on the U.S. District Court's decision in Trueblood I.⁷ Trueblood I was a class action civil suit brought by

² Trueblood v. Wash. State Dep't of Soc. & Health Servs., 73 F. Supp. 3d 1311, 1314 (W.D. Wash. 2014) (Trueblood I).

³ Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1121 (9th Cir. 2003).

⁴ Jackson v. Indiana, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

⁵ United States v. Salerno, 481 U.S. 739, 748, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.").

⁶ Disability Law Ctr. v. Utah, 180 F. Supp. 3d 998, 1010 (D. Utah 2016) (alterations in original) (quoting Jackson, 406 U.S. at 738).

⁷ Trueblood v. Wash. State Dep't of Social & Health Servs., 73 F. Supp. 3d 1311 (W.D. Wash. 2014) (Trueblood I).

pretrial detainees suspected of being mentally incompetent who waited in jail for an average of 29 days before receiving a competency evaluation and 15 days for restoration at WSH, and 50 days for evaluation and 17 days for restoration at Eastern State Hospital.⁸ In Trueblood I, the court held that these delays violated the class members' due process rights.⁹ In Trueblood II,¹⁰ the court ordered the Department of Social and Health Services (DSHS) to provide competency evaluations to pretrial detainees within 7 days of an order calling for an evaluation (amended to 14 days on remand) and to provide restoration services within 7 days of an order calling for treatment. Similar to the class members in the Trueblood cases, Clark waited 9 days for a competency evaluation and an additional 96 days to receive restoration services. We assume that the 96-day delay violated Clark's substantive due process rights, but he does not show that the remedy of this violation is a dismissal of charges.

Clark mistakenly asserts that Trueblood I dismissed the charges against class members. In Trueblood II the court entered a permanent injunction, ordering DSHS to provide timely services, but the court made no ruling about the criminal charges of class members.¹¹ In fact, none of the Trueblood decisions

⁸ Trueblood I, 73 F. Supp. 3d at 1313.

⁹ Trueblood I, 73 F. Supp. 3d at 1317.

¹⁰ Trueblood v. Wash. State Dep't of Soc. & Health Servs., 101 F. Supp. 3d 1010, 1023-24. (W.D. Wash. 2015) (Trueblood II), was vacated and remanded by Trueblood v. Wash. State Dep't of Soc. & Health Servs., 822 F.3d 1037 (9th Cir. 2016). On remand, the court modified its injunction to 14 days. Trueblood v. Wash. State Dep't of Soc. & Health Servs., No. C14-1178-MJP, 2016 WL 4268933, at *1 (W.D. Wash. Aug. 15, 2016).

¹¹ Trueblood II, 101 F. Supp. 3d at 1023-24.

dismissed criminal charges or proposed that such a remedy would be appropriate. The delay criminal defendants face in gaining access to mental health treatment troubles this court. But Clark cites no authority to show that the remedy for this failure is dismissal of criminal charges. We decline to create this remedy for the substantive due process violation Clark alleges.

Speedy Trial

Clark also claims the trial court erred when it denied his two motions to dismiss for speedy trial violations under CrR 3.3.¹² An appellate court reviews the trial court's application of CrR 3.3 de novo.¹³ Generally, a defendant who is in custody must be brought to trial within 60 days of arraignment.¹⁴ "A charge not brought to trial within the time limit determined under [CrR 3.3] shall be dismissed with prejudice."¹⁵ However, CrR 3.3(e)(1) expressly excludes from the 60-day calculation "[a]ll proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent."

Clark contends that when governmental mismanagement delays a competency examination, the court should not exclude that delay because it is

¹² Clark also claims the delay violated his Sixth Amendment speedy trial rights. He cites to the federal and state constitutions but provides no argument or other authority to support his claim. We therefore consider only his CrR 3.3 argument.

¹³ State v. Kindsvogel, 149 Wn.2d 477, 480, 69 P.3d 870 (2003).

¹⁴ CrR 3.3(b)(1)(i), (c)(1).

¹⁵ CrR 3.3(h).

not a proceeding relating to his competency to stand trial. But CrR 3.3(e)(1) plainly excludes the time between the order for a competency examination and the order finding the defendant competent. Here, the excluded period began on August 19, 2014, when the trial court ordered a competency examination and ended when the court entered an order finding Clark was competent to stand trial on March 5, 2015. Thus, following CrR 3.3(e)(1), the trial court properly excluded this period from its time for trial calculation. Further, “[t]olling is necessary because neither side can go forward with trial preparation until the defendant is found competent to proceed. The court gives this particular tolling provision broad scope precisely because the evaluation process is unpredictable and beyond the court’s control.”¹⁶ Regardless of any alleged mismanagement, while competency proceedings were ongoing, the time for trial was properly tolled because neither party was able to prepare for trial. The trial court correctly denied Clark’s motions to dismiss for CrR 3.3 violations.

Governmental Misconduct

Clark also contends, relying on CrR 8.3(b), that the trial court should have dismissed his charges for governmental misconduct. An appellate court reviews a trial court’s CrR 8.3 decision for abuse of discretion.¹⁷

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the

¹⁶ State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004).

¹⁷ State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.^{18]}

A trial court may dismiss charges under CrR 8.3(b) only when the defendant shows, by a preponderance of the evidence, arbitrary action or governmental misconduct and actual prejudice affecting his right to a fair trial.¹⁹ The "governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient."²⁰ But "the requirement for a showing of prejudice under [CrR] 8.3(b) is not satisfied merely by expense, inconvenience, or additional delay within the speedy trial period; the misconduct must interfere with the defendant's ability to present his case."²¹

Clark asserts that he established mismanagement and prejudice under Trueblood I. But the conclusions Trueblood I draws do not show governmental misconduct prejudiced Clark's defense. Trueblood I lists a number of examples of how incarceration can prove harmful to people with serious mental illness.²² But Trueblood I focuses on the liberty interests of pretrial detainees and does not mention any prejudice to a similarly situated defendant's ability to present a defense.²³ Thus, Trueblood I does not help Clark establish prejudice. Clark does not independently explain how governmental misconduct prejudiced his right to a fair trial or explain how he meets the test for dismissal under CrR

¹⁸ CrR 8.3(b).

¹⁹ State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

²⁰ State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

²¹ City of Kent v. Sandhu, 159 Wn. App. 836, 841, 247 P.3d 454 (2011) (citing State v. Chichester, 141 Wn. App. 446, 457, 170 P.3d 583 (2007)).

²² Trueblood I, 73 F. Supp. 3d at 1316-17.

²³ Trueblood I, 73 F. Supp. 3d at 1316-17.

8.3(b). We conclude that the trial court did not abuse its discretion in denying dismissal of Clark's criminal charges based on CrR 8.3(b).

Ineffective Assistance of Counsel

Clark claims that trial counsel provided ineffective assistance in two ways: (1) by failing to pursue a diminished capacity defense and (2) by asking a witness about prior assaults.

Claims of ineffective assistance present mixed questions of law and fact, which we review de novo.²⁴ We examine the entire record to decide whether the appellant received effective representation and a fair trial.²⁵ To succeed on his ineffective assistance claim, Clark must show that his attorney's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced him.²⁶ We give defense counsel's performance a great deal of deference and employ a strong presumption of reasonableness.²⁷ The reasonableness inquiry requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.²⁸ Because, as explained below, Clark does not show his counsel's performance fell below an objective standard of reasonableness, his ineffective assistance claim fails.

²⁴ In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

²⁵ State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (quoting State v. Ciskie, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988)).

²⁶ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

²⁷ State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

²⁸ State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Diminished Capacity Defense

First, we address Clark's claim that his counsel was ineffective for failing to pursue a diminished capacity defense. Diminished capacity is a mental condition that impairs the defendant's ability to form the necessary mental state to satisfy the elements of the crime charged.²⁹ Either specific intent or knowledge are elements of each of Clark's charges.³⁰ Therefore, Clark claims, a successful diminished capacity defense would have negated the mental state elements of his charged crimes.

We must first decide whether the evidence entitled Clark to a diminished capacity instruction. In order to support a diminished capacity defense, the record must include substantial evidence of a mental condition and that evidence must "logically and reasonably connect[] the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged."³¹ "It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be capable of forensic application."³²

While the record shows that Clark had some history of mental illness and drug use, it does not show that he did not form the required mental state. No expert testified about Clark's mental state at the time of the crime. A

²⁹ Harris, 122 Wn. App. at 506.

³⁰ RCW 9A.36.011 (assault); RCW 9A.46.020 (felony harassment); RCW 9A.40.040 (unlawful imprisonment).

³¹ State v. Griffin, 100 Wn.2d 417, 419, 670 P.2d 265 (1983).

³² State v. Atsbeha, 142 Wn.2d 904, 921, 16 P.3d 626 (2001).

psychological report prepared in connection with his competency evaluation mentions a history of mental health problems and drug abuse. But this report does not draw any connection to Clark's mental state when he assaulted Epps. Similarly, Epps testified that Clark had likely been using drugs that day and had a "shocked" look on his face after the attack. But her testimony does not show that Clark did not intend to act or did not know what he was doing. The record does not contain substantial evidence that a mental condition prevented him from forming a culpable mental state. He is, therefore, not entitled to a diminished capacity instruction.

We distinguish the cases Clark relies on. In State v. Thomas³³ and State v. Tilton,³⁴ the defendants had introduced evidence that alcohol or drug use had caused them to black out when the crime had taken place. Clark, by contrast, presents no similar evidence to show how any mental illness or drug use affected his mind at the time of the crime.

While evidence exists to show that Clark suffered from some mental illness and used drugs, he does not present any evidence that illness or drug use prevented him from being able to form the required mental state. Therefore, Clark does not show he was entitled to a diminished capacity defense, he fails to

³³ 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

³⁴ 149 Wn.2d 775, 784-85, 72 P.3d 735 (2003). Tilton is also procedurally distinguishable. Due to an incomplete record, the court was unable to decide whether the defendant was entitled to the defense and, therefore, ordered a new trial. Tilton, 149 Wn.2d at 785.

meet the first prong of Strickland v. Washington,³⁵ and we conclude that his counsel was not ineffective for failing to pursue the diminished capacity defense.

Prior Assaults

Next, we consider Clark's claim that his attorney was ineffective for asking Epps about allegations of prior assaults. Clark claims that "no conceivable legitimate tactic" justified introducing testimony that he claims is highly prejudicial.³⁶ But as the record shows, defense counsel's questions about the prior incidents were part of a strategy to challenge the admissibility of the incident under ER 404(b).

Before trial, defense counsel and the trial court had the following exchange about the admissibility of the incidents:

[DEFENSE COUNSEL]: . . . I think that maybe you should hear her testimony and treat the testimony as an offer of proof simultaneous since we don't have a jury here, because the first thing you have to decide before admissibility is whether or not, by preponderance, the prior acts occurred, and then whether or not it's more probative than prejudicial. But—and the reason I'm raising that is because there was an incident in June of 2014 where the police got called but the reports that I've been given of the incident say that she told police at that time that nothing had happened, and so I'd prefer the Court wait on that ruling, allow her to testify, knowing I'm objecting, until you've heard the testimony, and then—

THE COURT: I'll continue to reserve.

[DEFENSE COUNSEL]: —essentially have an offer of proof.

THE COURT: I'll continue to reserve under that framework.

³⁵ 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

³⁶ Grier, 171 Wn.2d at 33.

At trial, defense counsel questioned Epps about her statement to the police regarding an alleged assault.

Q. Do you remember telling the police that nothing had happened?

A. I do.

Q. Is that true?

A. No.

Q. Wasn't true?

A. No.

The case proceeded as a bench trial, and the court heard Epps's testimony as substantive evidence and, at the same time, as an offer of proof. The court had agreed to consider Epps's testimony in this manner and could distinguish between the two purposes for which it was offered. As the record shows, defense counsel thought Epps's testimony about the prior assaults was likely to lead to a favorable ruling on their admissibility. Because defense counsel had a tactical reason for questioning the witness about prior assaults, he was not ineffective for doing so.

LFOs

Clark asserts that the trial court should not have imposed LFOs after determining that he could not pay. The State contends that Clark waived the issue on appeal when he failed to object to the imposition of LFOs by the trial

court. "Unpreserved LFO errors do not command review as a matter of right."³⁷ But under RAP 2.5(a), we exercise our discretion to consider the issue.³⁸

The trial court imposed only mandatory fees, the \$500 crime victim penalty assessment, the \$200 criminal filing fee, and the \$100 DNA testing fee.³⁹ Based on Clark's declaration of indigency, the court declined to impose additional, nonmandatory LFOs. In general, mandatory LFOs must be imposed regardless of the defendant's ability to pay.⁴⁰ However, "RCW 9.94A.777(1) requires that a trial court determine whether a defendant who suffers from a mental health condition has the ability to pay any LFOs, mandatory or discretionary."⁴¹ RCW 9.94A.777(1) states that "[b]efore imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant . . . has the means to pay such additional sums." (Emphasis added.)

The State concedes, and we agree, that remand is appropriate because the trial court did not consider Clark's current ability to pay mandatory fees. We remand for consideration only of Clark's ability to pay the criminal filing fee and the DNA testing fee.

³⁷ State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

³⁸ See Blazina, 182 Wn.2d at 834.

³⁹ RCW 7.68.035(1)(a) (victim assessment); RCW 36.18.020(2)(h) (filing fee); RCW 43.43.7541 (DNA testing fee); State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013).

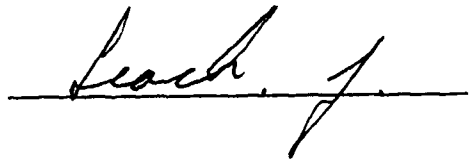
⁴⁰ Lundy, 176 Wn. App. at 102-03.

⁴¹ State v. Tedder, 194 Wn. App. 753, 756, 378 P.3d 246 (2016).

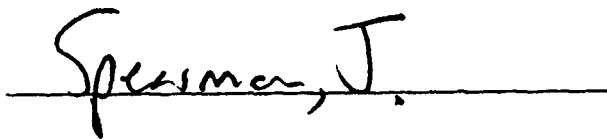
CONCLUSION


Clark does not show that dismissal of charges is the proper remedy for the substantive due process violation he alleges. We decline to vacate his convictions on that basis. As for his speedy trial claim, under the plain language of CrR 3.3, Clark was timely brought to trial. Clark's claim under CrR 8.3(b) also fails because he does not show that any governmental misconduct prejudiced his case. Finally, Clark fails to show that his counsel was not effective. For these reasons, we affirm Clark's conviction.

We find, however, that the trial court should have considered Clark's ability to pay the criminal filing fee and the DNA testing fee. We remand the case for consideration of Clark's ability to pay those LFOs.



WE CONCUR:





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STATE OF WASHINGTON
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