No. 48235-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Appellant

vs.

RICKO FERNANDEZ EASTERLING

Respondent

ON APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY
The Honorable William Houser
Superior Court No. 15-1-00127-1

RESPONDENT'S BRIEF

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I. ISSUES RAISED BY APPELLANT'S BRIEF

1. Did the trial court abuse its discretion by concluding that governmental mismanagement had occurred when neither the prosecutor nor police investigators inquired before the commencement of the trial about the existence of a SANE exam of the complaining witnesses despite requests by the defense about such an exam?

2. Did the trial court abuse its discretion when concluding that the late disclosure of the SANE exam results caused prejudice to Mr. Easterling's right to a fair trial, when the late disclosure would cause him either to chose a trial with unprepared defense counsel, or waive his right to a speedy trial after nearly seven months of incarceration?

3. Did the trial court abuse its discretion in determining that the appropriate remedy for the late disclosure of the SANE exam results was dismissal of the information?

II. COUNTER–STATEMENT OF THE CASE

Mr. Easterling was arrested on the charges in the original information on March 23, 2015. Supp. CP 114-116. He was detained up until the date of the court's oral decision to dismiss the information. Supp. CP 117; RP (10/5) 69.

Several times during the course of this prosecution, defense counsel had requested copies of any SANE (sexual assault nurse exam) results that had been conducted on either of the two complaining witnesses in this case. RP (10/5) 54, 63; CP 14, 52 (FOF 4). Despite making no direct inquiry of his own, the prosecutor assured defense counsel and the court that there was no SANE exam for this case. RP (10/5) 54; CP 14, 52, 54 (FOF 5, 15). The investigating officer had told the prosecutor that there was no SANE exam, again apparently without making any inquiry of Harrison Hospital to determine whether or not there had been a SANE

report. RP (10/5) 8-9, 16-17; CP 54 (FOF 16). The officer was asked by the prosecutor if the exam had been done. This was several weeks before the date of the hearing, (Oct. 5) on Mr. Easterling's case. RP (10/5) 9, 17. The officer indicated that Harrison Hospital was the only place in Kitsap County that conducted SANE exams and it was a normal part of the investigation protocol to receive reports from such examinations. RP (10/5) 11, 13; CP 54, (FOF 17). The SANE nurses do the exams to assist law enforcement with their investigation. RP (10/5) 19. CP 54, (FOF 21).

The SANE nurse, Jolene Culbertson, testified that for one of the two girls she did both a physical exam and genital exam. She testified that even in a non–acute exam, i.e. one that does not take place shortly after a reported injury, a nurse can sometimes see scarring, but there was no scarring present in this exam. RP (10/5) 32. The condition of the hymen was normal for the girl's age. RP (10/5) 32. Her perineal area had no lesions. Her anal exam showed no tags, lacerations or fissures. Her findings were all perfectly normal. RP (10/5) 32. The nurse concluded there was no sign of acute injury, and no scarring.

The second girl refused to cooperate with a genital exam, so the nurse could draw no conclusions about any alleged injury. RP 10/5 27-28.

The trial judge characterized the results of the exam as "exculpatory."[1] CP 56; RP (10/5) 64. After considering suggestions from

[1] "The report of E[KK] and the inferences from that report are exculpatory. They are exculpatory as to the allegations of Rape of a Child in the First Degree in Counts I, II and III and also exculpatory to the inferences to be drawn from them as to the truthfulness of the reports of communication with a minor for immoral purposes. They are also

both parties concerning a remedy for the governmental mismanagement, the court orally dismissed the information. RP (10/5) 54-56, 61, 69. A written order was entered on October 26, 2015. CP 51-60.

III. ARGUMENT

A. The trial court did not abuse its discretion by ordering the dismissal of the information due to government misconduct/mismanagement pursuant to CrR 8.3 (b) based upon the late disclosure of the SANE reports.

1. Standard of review of a dismissal under CrR 8.3(b)

A decision by a trial court to dismiss under CrR 8.3 (b)[2] due to government misconduct or mismanagement is reviewed by this court under the abuse of discretion standard. *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009); *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its decision on untenable grounds, or when it makes its decision for untenable reasons. *Blackwell*, 120 Wn.2d at 830, 845 P.2d 1017.)). A decision is based on untenable grounds "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990) Even if there is an abuse of discretion, the trial

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exculpatory in that the jury could determine that there is a reason to doubt the allegation of E[KK] and, therefore, doubt all of the allegations pending against Mr. Easterling."

[2] CrR 8.3 (b) provides as follows:

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.

court's CrR 8.3(b) dismissal of the charges should be affirmed if the reviewing court finds that the defendant proved sufficient grounds. *State v Lewis, supra, State v. Michielli*, 132 Wn.2d 229, 239-242, 937 P.2d 587 (1997).

The state concedes here that the trial court applied the correct legal standard for a dismissal under CrR 8.3 (b). It correctly notes that the trial court found that Mr. Easterling had to show two things: (1) government misconduct or mismanagement and (2) prejudice that affected his right to a fair trial. Appellant's brief at 9.The state claims, however, that no reasonable judge would have dismissed the information against Mr. Easterling. For the reasons that follow, this argument should be rejected, and the trial court's order of dismissal affirmed by this court.

2. The trial court did not abuse its discretion in finding that the late provision of the SANE reports constituted government misconduct or mismanagement.

The state has not assigned error to any of the findings of fact by the trial court. RAP 10.3(g). They should thus be considered verities on appeal. *State v. Link*, 136 Wn. App. 685,150 P.3d 610 (2006); *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). The court found that Harrison Hospital was the only provider of SANE exams in Kitsap County. The court found that neither law enforcement nor the prosecutor had made any inquiry to determine whether a SANE exam had taken place until the trial had actually begun. The court found that defense counsel had inquired several times, including in open court, about whether the

complaining witnesses had undergone SANE exams. The prosecutor had always indicated, again without any inquiry, that there was no SANE exam. It was against this factual backdrop that the trial court drew the legal conclusion that government misconduct or mismanagement had occurred. CP 57.

To support a finding of governmental misconduct or mismanagement, Mr. Easterling does not have to show any evil intent on the part of the prosecution. Simple mismanagement by the prosecution is sufficient. *State v. Sulgrove*, 19 Wn. App 860, 863, 578 P.2d 74 (1978); *State v. Dailey,* 93 Wn. 2d 454, 457, 610 P.2d 357 (1980). The prosecution team's failure to discover and disclose the routine SANE report was clearly governmental mismanagement.

The trial court correctly concluded that the prosecutor had the obligation to search for exculpatory evidence in the hands of others who are working on the government's behalf, including the police. *Kyles v. Whitely*, 514 U.S. 419, 437 , 115 S. Ct. 1555, 131 L.Ed. 2d 490 (1995). The duty discussed by *Kyles v. Whitely* derives from the state's duty to disclose exculpatory evidence in its hands to the defense, which helps safeguard a defendant's due process right to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963). The prosecutor also has a duty to attempt to obtain material held by others which would be discoverable if it were directly in the hands of the prosecutor. CrR 4.7 (d). The trial court also correctly concluded that

Harrison Hospital was working on the government's behalf when conducting SANE exams under the existing investigation protocols. CP 54. Since the defense had been asking for the results of any SANE exams, and it was well known to the prosecutor that such exams were routinely conducted by Harrison Hospital, it was not unreasonable for the court to conclude that the prosecutor had an obligation to independently and accurately determine whether or not an exam had taken place. It was governmental mismanagement for the prosecutor to wait until the trial began to directly inquire of the hospital about the examinations. Consequently, it was not an abuse of discretion for the trial court to arrive at this conclusion.

The prosecutor argues that since Harrison Hospital was not a state agency, nor an arm of the prosecutor's office, there was no duty on the part of the prosecutor to determine whether a SANE exam had taken place. The prosecutor attempts to foist responsibility for the non-disclosure of the exam results on the lead detective, who apparently but erroneously assured him that there had been no SANE exam. However, neither the prosecutor nor the police detective actually inquired about the tests until the trial had begun, despite repeated requests by defense counsel to check into this issue. Given the fact that Harrison Hospital was the only agency in Kitsap County to do such exams, and the fact that Harrison Hospital regularly and routinely provided such test results, it was governmental mismanagement for the prosecutor or his agents to fail to

make inquiry into this matter. Simple mismanagement is sufficient to support a dismissal order under CrR 8.3 (b). *State v. Sulgrove, supra*; *State v. Dailey, supra.*

3. The trial court did not abuse its discretion in concluding that the late provision of the SANE reports prejudiced Mr. Easterling's right to a fair trial.

The trial court concluded that the late provision of the SANE reports after the trial had begun prejudiced Mr. Easterling's right to a fair trial. As the trial court correctly noted, CP 56, such prejudice includes the right to a speedy trial, and the right to be represented by counsel who has an adequate opportunity to prepare the defense. *State v. Michielli*, 132 Wn.2d at 240, 937 P.2d 587 ; see also *State v. Price*, 94 Wn. 2d 810, 814, 620 P.2d 994 (1980).

The trial court noted that Mr. Easterling was in custody at the time of the trial in October of 2015, and had been in custody since his arrest in March of 2015. The speedy trial deadline under CrR 3.3 was October 8, 2015. Because of the government's mismanagement of its discovery obligations, Mr. Easterling faced a serious dilemma. He could either give up his right to have a speedy trial, or give up his right to have counsel who was adequately prepared to exploit the newfound weaknesses of the state's evidence. The trial court's conclusion that Mr. Easterling had been prejudiced by the state's mismanagement was supported by the record, and was not an abuse of its discretion.

The state argues that the trial court abused its discretion in finding that Mr. Easterling was prejudiced by its mismanagement of the case. Appellant's brief at pp. 15-20. The state correctly concedes that a defendant demonstrates actual prejudice when either his right to speedy trial or his right to an adequately prepared lawyer is jeopardized by the state's mismanagement, citing *Michielli, supra.* Appellant's brief at 15. As noted above, both were jeopardized here by the state's mismanagement of the case.

At its root, the state's argument hinges on the premise that the late provision of the SANE exams would not have affected defense counsel's preparation or presentation of the defense case. This argument should be rejected.

The trial judge characterized the results of the exam as "exculpatory." CP 56. This conclusion is well justified. A reasonable doubt can be based on evidence or lack of evidence. WPIC 4.01. The exam results provided evidence which strongly suggested no anal intercourse had taken place, and would cast doubt on the credibility of the complaining witness whose exam it was. But in addition, defense counsel would need time to prepare the cross–examination of the SANE nurse, both by consulting with an expert of his own, and by obtaining transcripts of previous testimony of the SANE nurse, which he believed were available. His opening statement, which was skeletal at best, would have undoubtedly featured some discussion of the physical exam. Due to the

late provision of this crucial piece of evidence, defense counsel would not have been prepared for trial without the opportunity to further investigate and effectively utilize the exculpatory evidence of the SANE exam. Mr. Easterling's only alternative to having prepared counsel would be to sacrifice the right to a speedy trial, and to spend additional weeks or months in custody. The trial court's conclusion that prejudice had been shown as a result of the government's mismanagement is amply justified by the record. There was no abuse of discretion in dismissing the case.

A comparison with similar cases in Washington involving dismissals under CrR 8.3 (b) is instructive.

In *State v Michielli, supra*, the prosecutor added four new charges just five days before the case was scheduled to go to trial. These new charges were added three and a half months after the filing of the original information, and forced Michielli to choose between his right to a speedy trial, or his right to prepared defense counsel. As the Supreme Court noted, "being forced to waive [the] speedy trial right is not a trivial event." *Michielli* at 245. The court upheld the dismissal of charges based on the state's mismanagement of the case, and the resulting prejudice to the defendant's right to a fair trial.

In *State v. Teems*, 89 Wn.App. 385, 948 P.2d 1336 (1997), the defendant's first trial resulted in a mistrial, and Teem's appointed lawyer withdrew from the case. After waiting 40 days from the mistrial to refile the information, the prosecutor provided notice solely to the lawyer who

had withdrawn. That lawyer did not notify Teems. As a result, Teems had no knowledge of the State's decision to re-try him until August 29, 1996. The court could not reappoint the first lawyer, and had to assign an attorney who was unfamiliar with the case. Teems was unwilling to waive his speedy trial rights, and his newly appointed lawyer shared his belief that 12 days to prepare for a felony defense was inadequate for the lawyer to familiarize himself with the entire case. The Court of Appeals affirmed the decision to dismiss based on government mismanagement, and the prejudice that resulted from the choice of either waiving speedy trial or having an unprepared lawyer.

In *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009), both defendants (husband and wife) were accused of burglary, and were in custody while the case was pending. The state was late several times in complying with the court's orders to provide discovery. The court granted continuances of the trial to allow both defense counsel to acquire the discovery and do more investigation based upon it. Ultimately, both defendants moved to dismiss under CrR 8.3 (b) and the court granted the motions. The Court of Appeals upheld the dismissals, based upon the showing of government mismanagement in the provision of discovery, and the prejudice that resulted between the choice of speedy trial for two incarcerated defendants versus having fully prepared defense counsel.[3]

[3]The court also rejected the state's argument that the trial court should have considered other alternatives to dismissal, noting that the state only proposed alternatives other than a continuance after the trial court had determined to dismiss the two cases.

In *State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990), the defendant was originally charged with one count of theft. The state filed an amended information eight days before trial which subdivided the one count into five counts covering the same time period. By the time of the trial, the state had not provided discovery which it had been ordered to produce and also attempted to expand its witness list. The defense moved to dismiss and the trial court granted the motion. The Court of Appeals upheld the dismissal, holding that the late provision of discovery constituted government mismanagement under CrR 8.3 (b) and that prejudice had been shown because the defendant, like Mr. Easterling, would have to choose between the right to speedy trial, and the right to have counsel prepared for a trial. The court quoted from *State v. Price supra*:

> We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.
>
> *In circumstances such as these, we do not believe a defendant should be asked to choose between two constitutional rights in order to accommodate the State's lack of diligence.* (Emphasis added.)
>
> *Sherman, supra,* 59 Wn. App. 770 quoting *Price* at 94 Wn. 2d at 814.

In *State v. Stephans*, 47 Wn.App. 600, 736 P.2d 302 (1987), the defendant charged with several sex offenses, and was in custody from

October until his case was dismissed in April. The basis of the dismissal was the state's failure to provide interviews with the complaining witnesses and interference with that process by what the court characterized as "egregiously bad" advice to the parents of the witnesses. The trial court ultimately granted a motion to dismiss under CrR 8.3 (b) based on the government's mismanagement of the case, and the resultant prejudice to the defendant, who was, like Mr. Easterling and the other defendants in the cases noted above, essentially forced to choose between the right to a speedy trial, and the right to a trial with prepared counsel. The Court of Appeals upheld the dismissal of the charges, finding no abuse of the trial court's discretion.

The collected cases outlined above demonstrate that the trial judge here was well within the reasonable limits of his discretion in dismissing the information here based on the misconduct/mismanagement by the government in this case, which clearly prejudiced Mr. Easterling's right to a fair trial.

4. The trial court correctly considered other remedies when deciding what action to take based upon the government's misconduct/mismanagement.

The trial court's oral decision and written order reflect that it considered other remedies before determining to dismiss the information. The court considered the idea of a recess of the trial, but rejected it as impractical because of the need to keep the jury's lives on hold, and because the recess would necessarily have to be long enough for the

defense to do further investigation on the government's witness and consult with an expert witness of its own.[4] The court also noted that the defense opening statement had already been affected by not having the information about the SANE exam. The court also considered and rejected declaring a mistrial. While this would alleviate the problem of having a trial with unprepared counsel, it would require Mr. Easterling to remain in custody and forfeit his right to a speedy trial.[5] Finally, the court considered and rejected the possibility of dismissing only the counts which related to the girl with the normal SANE exam. As the court's order noted, the interplay of the two sets of charges made this an impractical choice as well. CP 59.

The State relies on *State v. Oppelt*, 172 Wn. 2d 285, 257 P. 2d 653 (2011) to support its argument that the trial court abused its discretion in its choice of remedy. This reliance is misplaced. *Oppelt* involved an issue of a significant delay in the filing of a criminal case, a very different issue from the one presented here because it involves a far different due process balancing test not applicable to the facts of this case. See *State v. Calderon,* 102 Wn.2d 348, 352–53, 684 P.2d 1293 (1984). Review of that issue is *de novo*, rather than the abuse of discretion test. *Oppelt* at 657.

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[4] Defense counsel told the court:
"I can tell you that it's going to take me a lot longer than October 8th to get a transcript of that testimony, to seek out an expert and have some meaningful ability to talk to them about this case. So we either violate his speedy trial or we have an unprepared counsel." RP (10/05) 50.

[5] The state never suggested that Mr. Easterling be released from custody until a new trial date.

Also, the procedural posture of the case was the mirror image of the one here. The trial court in Oppelt *denied* a motion to dismiss under CrR 8.3 (b), with the allegation of government misconduct based on the delay in filing of the charges. The *Oppelt* court reviewed the denial of that motion under the abuse of discretion standard and determined the trial judge had not abused its discretion by finding that there was no substantial effect on Oppelt's ability to have a fair trial due to the delay in filing. Unlike the present case, Oppelt was not put to the choice of waiving speedy trial in order to have prepared counsel. Since *Oppelt* involved the *denial* of a motion to dismiss, it provides no authority for evaluating whether a court abused its discretion in its choice of remedy where the motion was *granted*. Clearly, as outlined in the section above, other Washington courts have upheld dismissal orders under CrR 8.3 (b) made under similar circumstances to the ones present in this case, where an in–custody defendant is faced with waiving speedy trial or having unprepared counsel. *Oppelt* is not such a case and the state has provided the court with no authority reversing a trial court's dismissal order under circumstances similar to Mr. Easterling's situation.

III. CONCLUSION

A trial court is vested with discretionary authority to dismiss a criminal case under CrR 8.3 (b) when governmental misconduct or mismanagement materially affects an accused person's right to a fair trial. This discretionary ruling can only be overturned when the trial court

abuses its discretion. In the present case, the state mismanaged its case by failing to discover and disclose to the defense the type of report which is routinely used by the government in the prosecution of sexual abuse cases. Since the defense had repeatedly inquired into the existence of the SANE report for this case, the prosecutor was on notice that he had the obligation to discern for himself whether such an exam had taken place. He sought to delegate that duty to the police, who in turn made no inquiry of their own before reporting, falsely, that there was no report. Even if the prosecutor and police were not trying to be intentionally misleading to the court and to the defense, their collective failure to discover the existence of the SANE report and turn it over, in a case that had been pending for seven months, was governmental mismanagement. The trial court's conclusion that this course of conduct was governmental mismanagement was well supported by the record.

The late discovery and provision of the SANE report after trial had started caused prejudice to Mr. Easterling's right to a fair trial. He could either proceed without adequately prepared defense counsel, or waive his right to a speedy trial, and spend additional time in jail before a new trial. He should not be put to that choice, as the trial court and other Washington courts have recognized. The trial court did not abuse its discretion in finding there was prejudice to Mr. Easterling as a result of the state's failure to disclose the SANE report until after the start of the trial.

The trial court considered options other than dismissal in this case. None of them would cure the prejudice which flowed from the state's mismanagement of the case. The choice to dismiss was supported by the facts before the trial court, and by other appellate court decisions in similar circumstances. This court should affirm the trial court's decision to dismiss the information in this case, since no abuse of discretion took place.

Dated this 10th day of MAY, 2016

LAW OFFICE OF MARK W. MUENSTER

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Respondent's Brief on Ricko Easterling at the address shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 10th day of May, 2015 with postage fully prepaid.

DATED this 10th day of May, 2015

Mark W. Muenster

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