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Supreme Court No. 99110-3
Court of Appeals No. 36419-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

IZAAC JERMEL INNES,

Petitioner.

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

The Honorable Julie M. McKay, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Izaak Jermel Innes, by and through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Mr. Innes seeks review, in part, of the September 10, 2020, unpublished opinion of Division Three of the Court of Appeals attached hereto as Appendix.

Mr. Innes asks this court to accept for review the errors argued in his pro se statement of additional grounds for review. Mr. Innes strenuously argues the trial court erred in denying trial counsel's pretrial motion to dismiss the charges as a remedy for the state's untimely discovery production or, alternatively, to reverse his conviction and remand for a new trial with all of the late discovery suppressed.

C. ISSUE PRESENTED FOR REVIEW

Whether the court of appeals erred in failing to reverse Mr. Innes' conviction for second degree murder when, pretrial, the state repeatedly failed to provide timely disclosure of all required discovery?

D. STATEMENT OF THE CASE

Innes faced charges of murder in the second degree in Spokane County Superior Court. CP 143-44, 202. Now convicted, Innes is incarcerated for the remainder of his life as a second conviction for a most serious offense. CP 252, 256.

Due in part to missteps and delays in the State providing required discovery, Mr. Innes awaited trial for nearly two years.¹

The court arraigned Mr. Innes on December 13, 2016. RP 12/13/16 at 3. On August 24, 2018, Mr. Innes and his counsel were back in court. RP 8/24/18 at 7-26. Defense counsel outlined issues regarding late issuance of discovery by the state – an ongoing problem – and asked all charges be dismissed. RP 8/24/18 at 7-26; CP 157-163.

The court denied the dismissal motion noting several prior extensions. RP 8/24/18 at 25. The court also felt it could not rule in Innes' favor without having something like a discovery log to rely on. RP 8/24/18 at 25.

¹ The court arraigned Mr. Innes on December 13, 2016. Mr. Innes trial commenced on November 4, 2018.

The trial proceeded as scheduled on November 4, 2018. RP Trial, Vol. 1.² A jury found Innes guilty of murder in the second degree with a firearm enhancement. CP 202-03. The court sentenced Innes as a persistent offender to life in prison without any opportunity for release. CP 252.

Innes appealed. CP 249-51. After counsel filed her opening brief, Mr. Innes filed a RAP 10.10 statement of additional grounds for review. The remaining issue on appeal is the issue raised by Innes in his August 29, 2019, RAP 10.10 pro se Statement of Additional Grounds for Review.

In his additional grounds, Innes argues the trial court abused its discretion in refusing to grant defense counsel a reasonable extension, or, alternatively, dismissal of the charges, given the late disclosure of many additional pages of discovery. Innes herein argues for a dismissal of the charges with prejudice or suppression of the late discovery and remand for retrial.

The court of appeals, Division Three, denied Innes' pro se issue finding the trial court did not abuse its discretion in denying defense counsel an extension of time to adequately prepare to defend Mr. Innes,

² Volume 1 of trial reported by Terri Rosadovelazquez

only 30 years old, on this most serious charge with a consequent result of life in prison. Opinion at 2, 5-8.

Division Three's unpublished opinion issued September 10, 2020 is attached as Appendix.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The State's failure to provide timely access to all discovery when trying Innes for murder in the second degree with a life sentence consequence requires review and reversal.

Under CrR 8.3(b), the trial court "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." "A defendant must make two showings to justify dismissal under CrR 8.3(b): (1) arbitrary action or government misconduct and (2) prejudice affecting the defendant's right to a fair trial." *State v. Barry*, 184 Wn. App. 790, 797, 339 P.3d 200 (2014). Governmental misconduct does not need to be evil or dishonest in nature, simple mismanagement is sufficient. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). "Prejudice under CrR 8.3(b) includes the right to a speedy trial and the right to adequately prepared counsel." *Barry*, 184 Wn. App. at 797.

Dismissal is an extraordinary remedy, one that the trial court should use only as a last resort. *State v. Krenik*, 156 Wn. App. 314, 320, 231 P.3d 252 (2010). A trial court's decision on whether to dismiss an action under CrR 4.7 and CrR 8.3 is reviewed for an abuse of discretion. *Michielli*, 132 Wn.2d at 240. "Discretion is abused 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).

Contrary to the appeal court's opinion, Mr. Innes demonstrated an abuse of discretion. At defense counsel's request, trial court continued Mr. Innes' trial for one month, authorized 120 hours of investigative support for defense counsel, and set a hearing two-and-a-half weeks out in order to assess whether the defendant had been able to respond to any prejudice and prepare for trial. Opinion at 4.

It is not possible that defense counsel, on behalf of Mr. Innes, could be adequately prepared in such a short time. The 120 hours of additional investigation time left no time for defense counsel to act on the defense investigator's information. It left defense counsel no time to do the many things defense counsel has to do to adequately prepare for trial. Contrary to court of appeals decision, the trial court abused its

discretion and defendant was denied a fair trial because the late discovery did not permit defense counsel to adequately prepare a defense on this most serious case. Adequate preparation includes conducting a thorough investigation, following up with witnesses, conducting legal research, reviewing a large body of evidence, consulting with and receiving feedback from client, developing or changing defense strategy, consulting with experts, and looking for additional witnesses. In addition, defense counsel likely has multiple other clients with pending cases.

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. RAP 13.4. All of these conditions are met in Mr. Innes' case.

F. CONCLUSION

This court should accept review of Mr. Innes' petition and reverse his murder conviction.

Respectfully submitted October 11, 2020.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

LISA E. TABBUT/WSBA 21344
Attorney for Izaak Jermel Innes

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Petition for Review to (1) Spokane County Prosecutor's Office, at SCPAAppeals@spokanecounty.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Izaak Innes/DOC#852077, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

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

Signed October 11, 2020 in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Izaak Innes, Petitioner

APPENDIX

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

STATE OF WASHINGTON,)	
)	No. 36419-4-III
Respondent,)	
)	
v.)	
)	
IZAAC JERMEL INNES,)	UNPUBLISHED OPINION
)	
Appellant.)	

SIDDOWAY, J. — Following the jury’s return of a verdict finding Izaak Innes guilty of second degree murder—his third “most serious offense” for purposes of the Persistent Offender Accountability Act (POAA)¹—the trial court sentenced him to life without the

¹ RCW 9.94A.030(38)(a), .570.

possibility of parole. On appeal, Mr. Innes initially challenged the constitutionality of applying the POAA to offenders who committed a predicate offense while a young adult. After the Washington Supreme Court held that application of the POAA in such circumstances is constitutional, however,² Mr. Innes filed an amended opening brief. He now makes only one assignment of error: he points out that his judgment and sentence imposes interest on nonrestitution financial obligations in violation of RCW 10.82.090. The State concedes error. We accept the State's concession and remand with directions to make the necessary ministerial correction.

In a pro se statement of additional grounds (SAG), Mr. Innes contends the trial court erred when it denied his trial lawyer's pretrial motion to dismiss the charges against him as a remedy for State discovery violations. The trial court did not abuse its discretion in denying the motion and addressing the State's untimely discovery production in other ways. The conviction is affirmed.

FACTS AND PROCEDURAL BACKGROUND

Izaak Innes was convicted of second degree murder, for shooting and killing Jeremy Ayers outside a home on Maxwell Avenue. The evidence at trial was that Mr. Innes shot Mr. Ayers with a high-powered rifle from a slow moving vehicle that was being driven by Darren Bercier.

² See *State v. Moretti*, 193 Wn.2d 809, 813, 446 P.3d 609 (2019).

The shooting took place in the early morning hours of July 30, 2016, during which police responded to reports of three shootings in the same general area of Spokane. The shootings occurred within a span of about two-and-a-half hours. The first report was of the shooting at Maxwell Avenue. The second report was of the nonfatal shooting of two men at a home on Sharp Avenue. Mr. Bercier was charged with that shooting, and allegedly used the same rifle Mr. Innes had used to shoot Mr. Ayers. The third report turned out to be a false report.

Charges against Mr. Innes proceeded to trial two years later. On the morning of what was supposed to have been his August 6, 2018 trial date, Mr. Innes filed a motion to dismiss the case, relying on CrR 4.7 and 8.3. He accused the State of unreasonable delay in producing potentially exculpatory evidence about the Sharp Avenue shootings. He argued that at the pretrial conference conducted on July 27, all parties indicated they were ready to proceed to trial on Monday, August 6. Despite that representation, the State produced approximately 75 pages of new discovery on Wednesday, August 1. Mr. Innes's motion said he did not move for a continuance or dismissal at that time because there was sufficient time to deal with those materials. But Mr. Innes complained that thereafter, at approximately 4:45 p.m. on Friday, August 3, the State produced another 421 pages of new discovery.

We have no transcript of the limited proceedings that apparently took place on August 6. We can infer that the need to continue trial was agreed. The State evidently

anticipated Mr. Innes's motion and simultaneously filed its response, admitting its delayed production, offering an explanation, and stressing that roughly 30 days remained for trial under CrR 3.3. It appears the trial court continued the trial date to September 4, 2018, granted Mr. Innes's request that it authorize 120 hours of investigative services, and set the dismissal motion for August 24 with a view to assessing any prejudice to Mr. Innes at that time.

At the August 24 hearing, the trial court asked if the defense was still on track for the September 4 trial. Defense counsel informed the court that it had been able to hire an investigator on August 7 and provide him with the new information. He described some additional delays he and his investigator encountered in getting access to the county's new CaseGuard system. He described a CAD³ report received that he characterized as raising some "pretty significant information" he needed to investigate. Report of Proceedings (RP)⁴ at 10-11. He stated, however, that "[w]e will continue to try to be prepared for trial." RP at 11.

The prosecutor responded that the State had originally focused on providing information about the Maxwell Avenue shooting, not the shooting at the home on Sharp Avenue. But he said he believed they had now provided everything related to the

³ Computer-aided dispatch.

⁴ All report of proceedings references are to the volume that includes proceedings taking place on March 17, 2017 and August 24, 2018.

shooting on Sharp. He said some records in the last batch of production had probably also been provided earlier, but he had no way of knowing for sure. He said the CAD report that concerned defense counsel related to the third report of a shooting received on the morning of July 30 and appeared to be “totally unrelated.” RP at 18. But he told the court he had asked a detective to look into it further, because if there was additional information they could provide to the defense, they would.

The trial court denied the motion to dismiss, observing that “without some type of discovery log, it is very difficult for the Court to find any type of violation.” RP at 25. In denying the motion, the trial court told defense counsel to inform the trial court if there were any more items that needed to be explored before moving ahead with trial. The case proceeded to trial on September 4, 2018.

STATEMENT OF ADDITIONAL GROUNDS

Mr. Innes’s SAG argues that the State’s untimely disclosure of the materials produced in August 2018 was prejudicial “because the defense argued that Mr. Bercier is blaming the homicide that occurred on Maxwell on Mr. Innes (Appellant) in order to escape responsibility for both crimes he committed using the same firearm.” SAG at 15-16. He asks us to dismiss the charges against him with prejudice or suppress all of the late discovery and remand for a new trial.

CrR 4.7. “CrR 4.7 is a reciprocal discovery rule that separately lists the prosecutor’s and defendant’s obligations when engaging in discovery.” *State v.*

Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). Under CrR 4.7, prosecutors have “a duty to disclose and to preserve evidence that is material and favorable to the defendant.” *Id.* “If the State fails to disclose such evidence or comply with a discovery order, a defendant’s constitutional right to a fair trial may be violated; as a remedy, a trial court can grant a continuance, dismiss the action, or enter another appropriate order.” *State v. Barry*, 184 Wn. App. 790, 796, 339 P.3d 200 (2014). To support a motion to dismiss based on a discovery violation, a defendant must show not only that the State failed to act with due diligence and withheld material facts, but also that the discovery violation “‘essentially compelled the defendant to choose between two distinct rights’: the right to a speedy trial and the right to adequately prepared counsel.” *Id.* at 797 (quoting *State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001)).

CrR 8.3(b). Under CrR 8.3(b), the trial court “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.” “A defendant must make two showings to justify dismissal under CrR 8.3(b): (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant’s right to a fair trial.” *Barry*, 184 Wn. App. at 797. Governmental misconduct does not need to be evil or dishonest in nature, simple mismanagement is sufficient. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). “Prejudice under CrR 8.3(b)

includes the right to a speedy trial and the right to adequately prepared counsel.” *Barry*, 184 Wn. App. at 797.

“Dismissal is an extraordinary remedy, one that the trial court should use only as a last resort.” *State v. Krenik*, 156 Wn. App. 314, 320, 231 P.3d 252 (2010). A trial court’s decision on whether to dismiss an action under CrR 4.7 and CrR 8.3 is reviewed for an abuse of discretion. *Michielli*, 132 Wn.2d at 240. “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *Blackwell*, 120 Wn.2d at 830.

Mr. Innes fails to demonstrate an abuse of discretion. The trial court continued trial for a month, authorized 120 hours of investigative support for defense counsel, and set a hearing two-and-a-half weeks out in order to assess whether the defense had been able to respond to any prejudice and prepare for trial. At the August 24 hearing, Mr. Innes did not identify anything preventing him from going to trial on September 4.

Mr. Innes was not forced to choose between his right to a speedy trial and his right to adequately prepared counsel. Trial began within the time for trial period provided by the criminal rules.


No. 36419-4-III
State v. Innes

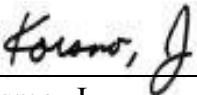
We affirm the conviction. We remand with directions to the trial court to correct section 4.3 of the judgment and sentence to provide that only restitution obligations shall bear interest.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, J.

WE CONCUR:


Pennell, C.J.


Korsmo, J.

LAW OFFICE OF LISA E TABBUT

October 11, 2020 - 4:41 PM

Transmittal Information

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