

NO. 67752-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

DANNY WICKLANDER,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by dismissing Wicklander's case under LJuCR 7.14(b).

2. The trial court erred by dismissing the case without a finding of actual prejudice.

3. The trial court erred by dismissing the case when any alleged prejudice was speculative or unrelated to Wicklander's ability to defend his case.

B. ISSUE PRESENTED

1. A trial court may dismiss a prosecution under LJuCR 7.14(b) if there has been an unreasonable delay in referring the case to the prosecutor *and* if the defendant's ability to defend his case is prejudiced. The trial court dismissed Wicklander's case based on claims that he would have reduced access to juvenile services and that some witnesses may no longer be available. Did the trial court err when Wicklander's ability to defend his case was not prejudiced and any witness issues were purely speculative?

C. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

On July 20, 2010, Darren Dyer reported that his house had been burglarized. CP 7. Dyer noted that several items were missing, including some electronics and two guns. CP 7. He also discovered a package of sunflower seeds left in his house and did not know how the package wound up in his house. CP 7.

Enumclaw Police Officer Tony Ryan responded to Dyer's call. CP 7. Ryan learned that Dyer's teenage neighbor, Chris Waddell, had a party on the night that Dyer's house was burglarized. CP 7. Waddell agreed to talk to Ryan in his bedroom. CP 7. Waddell's friends, Daniel Wicklander and Allen Torti, were in Waddell's room and appeared nervous as Ryan was talking to Waddell. CP 7.

Waddell allowed Ryan to search his room. CP 7. Ryan found a few white plastic bags on the shelf in the closet, which Waddell claimed were left over from when his family moved into the house. CP 7. Ryan left without discovering anything of evidentiary value. CP 7.

Several hours later, Waddell and his roommate, Rachel Parker, contacted Enumclaw police regarding the contents of the

white plastic bags. CP 7. Waddell explained that he became suspicious when Wicklander and Torti were talking about stealing shot glasses from Dyer's porch. CP 7. Waddell found Dyer's missing firearms and other property in the plastic bags. CP 7. Ryan submitted several of the items to be processed for fingerprints. CP 8.

Torti admitted to burglarizing Dyer's house and provided a full written statement. CP 8. Torti explained that Wicklander also participated in the burglary and that he had been eating sunflower seeds at the time. CP 8.

Wicklander initially denied any involvement in the burglary, but when confronted with the evidence against him, Wicklander put his head down and mumbled, "God Damn it, Okay." CP 8. After being advised of his rights, Wicklander confessed to breaking into Dyer's house and stealing two firearms. CP 8. Wicklander also provided a full written statement. CP 8.

On August 2, 2010, Enumclaw Detective Grant McCall, the property officer, submitted the evidence to the Washington State Patrol ("WSP") for fingerprint analysis. CP 57. The case was officially assigned to McCall for follow-up investigation on August 16, 2010. CP 57.

McCall was on paid administrative leave from January 11, 2011, to March 28, 2011. CP 57. Unfortunately, he was on leave on January 24, 2011, when WSP's fingerprint report was returned to the Enumclaw Police Department. CP 57. When McCall returned from leave on March 29, 2011, he spent the next month reviewing the backlog of cases and phone calls that had accumulated while he was on leave. CP 57. On April 20, 2011, he referred Wicklander's case to the King County Prosecuting Attorney's Office. CP 57. On June 7, 2011, the State charged Wicklander and Torti with Residential Burglary, Unlawful Possession of a Firearm, and Theft of a Firearm. CP 5-6, 9-10. Torti pleaded guilty to Residential Burglary and Theft of a Firearm on July 27, 2011. CP 47.

Over the State's objection, Wicklander was granted three continuances; each continuance occurred before September 13, 2011, Wicklander's 18th birthday. CP 5, 22-23, 25, 39. Wicklander eventually set a fact-finding hearing for October 24, 2011.¹ CP 26.

¹ At arraignment, the court extended juvenile court jurisdiction beyond Wicklander's 18th birthday to April 1, 2012. CP 19.

2. MOTION TO DISMISS.

On September 9, 2011, Wicklander moved to dismiss his case under LJuCR 7.14(b) and CrR 8.3. Wicklander argued that he was prejudiced by the referral delay because a number of witnesses were now "unavailable" or "had their credibility compromised by the passage of time." CP 28-29. In support of this argument, counsel asserted that she had attempted to call Christopher Waddell, Rachel Parker, and Robert Dyer, the son of the victim.² CP 35. For each witness, counsel dialed a single phone number one time. CP 35. In the case of Waddell and Parker, who lived together at the time of the burglary, the phone number had been disconnected; Robert Dyer's phone simply rang without any answer or voicemail. CP 35. Counsel also called Darren Dyer, the victim, who indicated that he did not want to answer any of defense counsel's questions.³ CP 35. Based on these limited attempts to contact witnesses, counsel concluded that they were "no longer available" and that defense counsel had no "reasonable means to get a hold of" the witnesses. CP 29.

² According to defense counsel, Robert Dyer was the first person to discover the burglary. CP 32.

³ It does not appear that counsel asked Darren Dyer how to contact his son, Robert. CP 35.

Counsel also contacted Allen Torti and Officer Ryan. CP 34-35. Despite the fact that he had recently pleaded guilty in his case, Torti told counsel that he did not remember anything from that night. CP 34. Officer Ryan remembered some basic facts about the burglary, but confused one detail.⁴ CP 35-36.

In addition to the alleged witness issues, Wicklander argued that he had rehabilitated himself and the purposes of the Juvenile Justice Act would not be served because his juvenile probation counselor ("JPC") had indicated that he would receive fewer services because he was now 18 years old. RP⁵ 6; CP 29-31.

The State conceded that, although the delay in referring the charges was not deliberate, under LJuCR 7.14(b), the four-month delay was unreasonable.⁶ CP 41-42. The State disputed

⁴ Ryan mistakenly told counsel that Waddell had told him that he knew Torti and Wicklander had gone to the Dyer home.

⁵ The verbatim report of proceedings consists of one volume, which will be referred to as RP.

⁶ The State objected to Wicklander's assertion that the delay was over 11 months. CP 41. Although Wicklander argued that it was unnecessary to submit evidence for fingerprint analysis, trial courts should not substitute their judgment for that of the police in terms of how long it takes to investigate a crime. State v. Cantrell, 111 Wn.2d 385, 388, 758 P.2d 1 (1988). For the purposes of LJuCR 7.14(b), the investigation was completed on January 24, 2011, when the Enumclaw Police Department received the fingerprint report. Therefore, the delay was actually 4.5 months, not 11.5 months.

Wicklander's claim that he had been prejudiced by the delay.

CP 42-51.

Although the court dismissed the charges under LJuCR 7.14(b), the court made no specific findings of actual prejudice.⁷

RP 19-23; CP 62. According to the court's oral findings, the dismissal was based on the claim that Wicklander might have reduced access to juvenile services:

My reason--and maybe it will help in the future to make, if the State wishes to appeal, to really define what the real bases can be for a dismissal of a criminal charge. And my, I will put my reasoning completely on the fact that at this point, Mr. Wicklander would no longer be able to utilize the, any benefit that the juvenile justice system would have for a person who commits a crime that would have been available, not just available but would have been available for a significant amount of time, if the case had been submitted to the prosecutor's office for a filing decision in a timely manner....

RP 19-20.

When the prosecutor reminded the court that the case could have been resolved before Wicklander's birthday had he not continued the case three times, the court responded:

⁷ Indeed, it appears that a proposed draft of the dismissal order included a finding of prejudice, but the trial court crossed that language out and replaced it with a reference to the court's oral ruling. CP 62.

But now having said that, now you do bring in the damage and the prejudice that could be done by waiting. Because now, in order to prepare the case, the defense has a harder job to go back and find out who people are, to contact them and to prepare their defense. So again, I'm not really considering that too much because I think it was a relatively strong case. But if the State wishes to make that point, it cuts against your argument as well because now the defense would have to defend against the case and these witnesses are certainly less available than they would have been if this case had been submitted to the prosecutor's office in a timely manner.

RP 20.

The order dismissing the charge states that the court dismissed the case "pursuant to local Juvenile Rule 7.14(b)... because there was unreasonable delay and for further reasons stated by the court on the record." CP 62.

D. ARGUMENT

A dismissal under LJuCR 7.14(b) requires both an unreasonable delay and a finding of actual prejudice. The trial court did not make a finding of actual prejudice, nor would the record support such a finding. Because Wicklander did not demonstrate that his case was prejudiced by the delayed referral, the trial court erred when it dismissed his case.

1. WICKLANDER WAS NOT PREJUDICED BY THE DELAYED REFERRAL OF HIS CASE.

A trial court's decision to dismiss a criminal prosecution is reviewed for abuse of discretion. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). An abuse of discretion occurs when a trial court's decision is based on untenable grounds and for untenable reasons, or is manifestly unreasonable. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). "A decision is based on 'untenable grounds' or 'untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

LJuCR 7.14(b) provides that:

The court may dismiss an information if it is established that there has been an unreasonable delay in referral of the offense by the police to the prosecutor *and the respondent has been prejudiced*. For purposes of this rule, a delay of more than two weeks from the date of completion of the police investigation of the offense to the time of receipt of the referral by the prosecutor shall be deemed prima facie evidence of an unreasonable delay.

LJuCR 7.14(b) (emphasis added). Although LJuCR 7.14(b) gives the trial court discretion in determining whether to dismiss a criminal charge, dismissal of charges remains an extraordinary remedy that is appropriate "only if the defendant's right to a fair trial

has been prejudiced." State v. Chavez, 111 Wn.2d 548, 562, 761 P.2d 607 (1988).

Consistent with this high threshold, LJuCR 7.14(b) expressly requires both that the delay be unreasonable and that the delay prejudice the juvenile respondent. To warrant dismissal, the defendant must prove actual prejudice by a preponderance of the evidence. Rohrich, 149 Wn.2d at 653-54. Speculative or slight prejudice is not sufficient. Id. at 657; Chavez, 111 Wn.2d at 562. Moreover, "the mere *possibility* of prejudice is not sufficient to meet the burden of showing actual prejudice," and the mere allegation that witnesses are unavailable or that memories have dimmed is insufficient to establish actual prejudice. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993) (emphasis in original).

a. The Trial Court Erred In Dismissing The Case Based On Reduced Access To Juvenile Services.

The trial court apparently dismissed the case because Wicklander "would no longer be able to utilize...any benefit" the juvenile justice system had to offer. RP 19. This finding appears to be based on counsel's assertion that Wicklander's JPC said that, if

convicted, he would receive fewer services because he was now 18 years old. RP 6.

The trial court did not find that Wicklander's ability to access juvenile court services would prejudice his right to a fair trial and such a finding would be unreasonable. Under Chavez, dismissal is appropriate only if the delay affects Wicklander's right to a fair trial. 111 Wn.2d at 562. Thus, the trial court's reliance on reduced access to probationary services was improper.

Even if reduced access to juvenile court services fell under the umbrella of prejudice contemplated by LJuCR 7.14(b), defense counsel's vague assertion that Wicklander would receive fewer services was speculative and does not satisfy his burden. Indeed, any speculation as to the impacts of the delay on Wicklander's potential sentence put the cart before the horse, as Wicklander had not even been convicted yet. To warrant dismissal, actual prejudice must be proved by a preponderance of the evidence; speculative prejudice is not sufficient. Rohrich, 149 Wn.2d at 653-54, 657.

b. The Court Did Not Find Actual Prejudice Due To Alleged Witness Issues.

In addition to the issue of reduced access to services, Wicklander argued that his ability to receive a fair trial was prejudiced because a few witnesses were "unavailable" and that those who were available "had their credibility compromised by the passage of time." Although the trial court had expressed skepticism towards this argument, RP 9, when the prosecutor reminded the trial court that Wicklander's multiple continuances compounded the delay and extended the case beyond his 18th birthday, the court added that Wicklander's case *could* have been prejudiced by the referral delay. RP 20. The court then undermined that statement by saying, "I'm not really considering that too much because I think it was a relatively strong case." Id.

It does not appear that the dismissal was based on any of the alleged witness issues raised by Wicklander. However, even if the trial court did rely on the potential witness issues, Wicklander did not show that his ability to defend his case was prejudiced and any prejudice was speculative, at best.

Wicklander did not establish that Christopher Waddell, Rachel Parker, or Robert Dyer were unavailable. Rather, he simply identified a challenge that is common in preparing for trial: witnesses' contact information changes. Counsel did not try to contact the witnesses in person or via mail. Likewise, she did not attempt to find new phone numbers or seek the State's assistance in contacting the witnesses. She made a single phone call to each witness. Wicklander's conclusion that these witnesses were unavailable was premature.

Likewise, Wicklander did not establish that Darren Dyer, Allen Torti, or Officer Ryan had "their credibility compromised by the passage of time." Darren Dyer indicated that he did not wish to speak to defense counsel. Victims are often reluctant to speak with defense attorneys and often request that interviews be arranged through the prosecutor's office. Dyer's initial hesitance to talk to defense counsel is not surprising and it does not indicate that Dyer's credibility was "compromised" or that Wicklander's case would be prejudiced. Indeed, one would think that Wicklander would *benefit* if the complaining witness's credibility was compromised or if his memory had faded.

Co-respondent Torti apparently claimed to have no memory of the night that the burglary occurred. His claim is suspect, given that he remembered enough about the night to enter a guilty plea to the crimes of Residential Burglary and Theft of a Firearm on July 27, 2011, just weeks before he was contacted by defense counsel. It is hardly surprising that a friend and accomplice would make such a claim to avoid causing his friend further trouble. Even if Torti's memory lapse continued at trial, his written confession and plea statement may be admissible, should either party decide to call him as a witness. See ER 803(a)(5).

Wicklander also argued that Ryan's credibility was compromised because he did not fully remember the details of the case. Again, it is common for witnesses--especially police officers, who investigate many cases each week--to need their memory refreshed at trial. In fact, the evidence rules recognize this common issue and sanction refreshing a witness's memory. See ER 612.

Wicklander did not establish that any of the potential issues were connected to the delay in the referral. Rather, all of the issues raised by Wicklander are common in criminal trials. Furthermore,

the mere allegation that witnesses are unavailable or that memories have dimmed is insufficient to establish actual prejudice. Norby, 122 Wn.2d at 264. Finally, Wicklander has not demonstrated how any of these potential witness issues would prejudice his ability to defend himself. It appears that each witness would testify in the State's case-in-chief, and that any memory issues would prejudice the State's case, rather than Wicklander's. See State v. McConville, 122 Wn. App. 640, 646-47, 94 P.3d 401 (2004) (where potential defense witness died during the preaccusatorial delay, defendant did not demonstrate actual prejudice when the deceased witness's testimony would be irrelevant).

As the trial court noted, the State's case was strong because it included Wicklander's confession. RP 9. Even if some of the State's witnesses were no longer available, Wicklander did not show how that would prejudice his ability to defend himself. Consequently, the trial court erred when it dismissed Wicklander's case.

E. CONCLUSION

For the foregoing reasons, the State requests that the charges against Wicklander be reinstated.

DATED this 24 day of January, 2012.

Respectfully submitted,

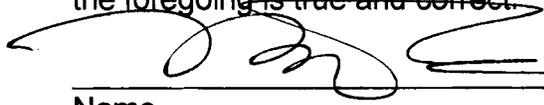
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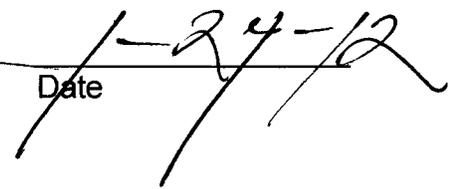
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to the attorney for the respondent, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. DANNY WICKLANDER, Cause No. 67752-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date