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

NO. 35011-4-II

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

JAVIER GARCIA CRUZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 06-1-00025-0

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

For the purposes of this appeal, the State agrees with the recitation of facts set forth in the defendant's brief.

II. ARGUMENT

A. The Court Did Not Error When It Denied The Defendant's Motion To Dismiss And The Defendant Did Receive A Fair Trial.

Trial courts have wide latitude in imposing sanctions for discovery violations. *State v. Dunivin*, 65 Wn.App. 728, 829 P.2d 799 (1992).

A trial court's denial of a motion to dismiss for discovery violations will not be disturbed unless the denial constitutes a manifest abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001). A trial court abuses its discretion when it acts in a manifestly unreasonable manner. *Woods*, @ 579.

Dismissal is an extraordinary remedy, and is available only when there has been prejudice to the accused that materially affected his right to a fair trial. *Woods*, @ 582.

Before a trial court should exercise its discretion to dismiss a criminal prosecution, a defendant must prove that it is more probably true than not true that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial state in the litigation process, which essentially

compelled the defendant to choose between two distinct rights. *Woods*, @ 583.

Here, the court did not act in a manifestly unreasonable manner and the defendant has not met the test.

Although he complains of some pre-trial discovery issues, the defendant never argues how it was manifestly unreasonable for the court not to have dismissed the case. According to the test in *Woods*, the burden is on the defendant to make this showing. *Woods*, @ 583.

The two discovery issues raised by the defendant are (1) that the government did not provide the defense with information that the informant had had some electronic home monitoring fees reduced or excused by the Forks Police Department, and (2) that the Forks evidence officer testified regarding chain of custody, relying in part upon "documentation on the back of a form" that defense counsel had not received prior to trial.

With regard to the issue of defense counsel not having been provided a copy "some documentation" on the back of an evidence sheet that was alluded to by the evidence officer when she testified, the defendant has not set forth any argument addressing how it was manifestly unreasonable for the trial court to have denied his motion to dismiss. As indicated by the trial court, "although the evidentiary chain of custody was not properly followed and is a mess", the defense counsel had done "an extraordinary job in siphoning out and getting the materials that he needs, and interpreting what he does have." RP 6/6/06 @ 92-93.

Apparently the trial court, after listening to the testimony and argument of counsel, felt that the defense had not been denied "material facts" until "shortly before a crucial stage in the proceeding." Again, here the burden is on the defendant to prove this on a "more likely that not" standard. *Woods*, @ 583. The defendant has not made such a showing, nor has he argued how it was an abuse of discretion; i.e., manifestly unreasonable for the trial court to have not dismissed the case based upon the discovery violation.

With regard to the issue of the electronic home monitoring (EHM) fees, the defendant again does not argue how the trial court abused its discretion when it did not dismiss the case when it came out during the trial that the informant had received reduced EHM fees. As indicated previously, the burden is on the defendant to show how it was more probably true than not that the (1) prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until a crucial stage in the proceedings. *Woods*, @ 583. The defendant does not make such a showing, nor does he explain how it was an abuse of discretion for the trial court not to have dismissed the case.

The defendant does, however, argue that the information regarding the EHM fees was exculpatory evidence and should have been provided to the defense. The State agrees that it was information that should have been provided to the defense. The State, however, does not believe that a reversal of the conviction is required.

During cross-examination, Sergeant Munger of the Forks Police Department was asked if, in addition to what was in the contract, was there any other benefit that the informant would get. RP 6/5/06 @ 105. Sergeant Munger responded that she hadn't offered her anything, but that there was "something" worked out between the chief of police and the jail sergeant regarding the informant's EHM. RP 6/5/06 @ 111. When this issue arose, defense counsel immediately asked that the jury be removed. RP 6/5/06 @ 105. At this point, it was unclear exactly what had transpired between the chief and the informant, so before making any decision, the court wanted the attorneys to find out what was going on. RP 6/5/06 @ 109-110. In addressing the court on this issue, defense counsel did say that "the travails involved in getting discovery" have been "ridiculous", but that he had been able to piece together that there's probably some sort of arrangement. RP 6/5/06 @ 107-108.

The next day, after the lawyers had the chance to speak to Chief Powell, they told the court that the informant had been in some type of arrangement "that Chief Powell made for this informant to subsidize her EHM". RP 6/6/06 @ 6-9. Defense counsel then made a motion to dismiss, which was denied. RP 6/6/06 @ 11. While arguing his motion, defense counsel told the court that he had been able to state during his opening that the informant's EHM fees had been paid, because he had figured it out based upon some other documentation he had received and interviews that he had conducted. RP 6/6/06 @ 7-9. The court responded that it agreed that defense counsel should not have had to

figure it out and that the defense should have been told, but that the defense did in fact "figure it out". RP 6/6/06 @ 11-12. As the court said, "I don't think that this is any new revelation that Mr. Gasnick hadn't already determined." RP 6/6/06 @ 12.

Again, the State agrees that this is evidence that should have been given to the defense under *Brady v. Maryland*[1], however, the State does not believe that reversal is required.

Evidence is considered suppressed for *Brady* purposes if (1) the prosecution failed to disclose the evidence before it was too late for the defendant to make use of it[2], and (2) the evidence was not otherwise available to the defendant through exercise of reasonable diligence. *Boss v. Pierce*, 263 F.3d 734 @ 740 (7th Cir. 2001).

Here, although it certainly wasn't his job to ferret out this information, defense counsel did learn of the information and used it to some degree in his opening. RP 6/6/06.

Clearly, this was not information that was disclosed too late for the defendant to make use of it, and it was not information that was not available to the defendant through the exercise of reasonable diligence.

Even if the defendant did meet the test set forth in *Boss*, reversal is still not required. Evidence is material and reversal is required whenever there is a reasonable probability that disclosure would have led to a different result. "The question is not whether the defendant would

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[1] 373 U.S. 83 @ 87, 83 S.Ct. 1194, 10 L.Ed 2nd 215 (1963).
[2] The prosecutor was not aware of this information

more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419 @ 434, 131 L.Ed.2d 490 115 S.Ct. 1555 (1995), quoting *United States v. Bagley*, 473 U..S. 667 @ 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Here, even though the defendant was entitled to and should have received this information at the beginning of the case, he did finally get the information. The defendant was able to vigorously cross-examine two witnesses on this issue, argue the exculpatory nature of the evidence in his closing, and apparently was even alluded to during the defense's opening statement.

More importantly, the evidence was sufficiently tested within the meaning of the Sixth Amendment of the United States Constitution, and the defendant did receive a fair trial. *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The defendant herein has ample reason to complain about how the discovery process worked in this case, however, despite all of the problems, the defendant did receive a fair trial.

B. The Court's Knowledge Instruction Did Not Create A Mandatory Presumption And Violate Due Process.

The defendant argues that the jury instruction defining "Knowledge" improperly added language that said "acting knowingly or with knowledge also is established if a person acts intentionally."

In *State v. Goble*[3], an assault in the third degree case, the court found that this additional language was improper because it allowed the jury to presume that the defendant knew the victim's status as a law enforcement officer if the jury found that the defendant had intentionally assaulted the victim. *Goble*, @ 203. The court said that "this conflated the intent and the knowledge elements required under the to-convict instruction into a single element, and relieved the State of its burden of proving that the defendant knew the victim's status. *Goble*, @ 203.

This two-fold mens rea is not present in this case. Here, the defendant was convicted of delivery of a controlled substance. In order to be convicted of such an offense, the person must know that the substance being delivered is a controlled substance.

Likewise, if a person intentionally delivers a controlled substance, he is also guilty. Contrary to the defendant's argument, it does not mean that the person is guilty if he did any intentional act – he must intentionally deliver a controlled substance; not simply intentionally deliver a package containing a controlled substance. So unlike the analogy set forth in *State v. Boyer*[4], the postal carrier who innocently but intentionally delivered a package that contained a forbidden narcotic, would not be guilty of delivery. In *Boyer*, the court had instructed the jury that the "willful nature of the delivery could be presumed from the act itself." *Boyer*, @ 343. With that kind of

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[3] 131 Wn.App. 194, 126 P.3d 821 (2005)
[4] 91 Wn.2d 342, 588 P.2d 1151 (1979)

instruction, the innocent postal carrier could be convicted. That is not what occurred here.

The jury was instructed that in order to convict the defendant, the defendant must have known that he was delivering methamphetamine – but also that if he intentionally delivered methamphetamine, he had knowledge that he was delivering methamphetamine.

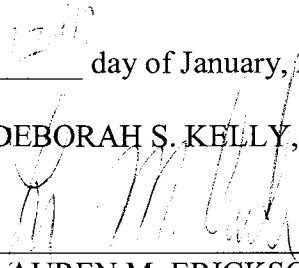
Moreover, even if the instruction was improper, it's use was harmless error. Here, there was not an innocent person delivering a package unaware of its contents. The outcome of the trial would not have been materially affected.

III. CONCLUSION

The defendant received a fair trial and his conviction should be affirmed.

DATED this _____ day of January, 2007.

DEBORAH S. KELLY, Prosecuting Attorney



_____
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STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 17th day of January, 2007, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 17th day of January, 2007.

Elaine L Sundt
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Residing at Port Angeles, Washington
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