

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 38821-9-11

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

STATE OF WASHINGTON,
RESPONDENT,

V.

JESSE RYAN McMILLAN,
APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR COWITZ COUNTY
THE HONORABLE JAMES STONIER, JUDGE

STATEMENT OF ADDITIONAL GROUNDS

Jesse R. McMillan
Appellant
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, Washington 99362.

CERTIFICATE OF SERVICE

I certify that I mailed

1 copies of SAG
to C. Blenski
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A. ASSIGNMENT OF ERROR

1). The prejudicial question that the Court allowed the state to ask was unfairly prejudicial and left the jury to speculate on the accusation and denied the appellant the right to cross examine the accusation.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The state alleged that a witness was being threatened and intimidated out of testifying and was allowed to ask the appellant if he called the witness a "rat" or a "snitch". The witness who allegedly conveyed the accusatory statement had already been called to testify and the question was not even attempted to be asked to the accuser. The Court allowed the state to ask the appellant if he had called the witness a "rat" or a "snitch" as that would be an admission of guilt. Where the question was an accusation and not subject to cross examination, did the states question prejudice the defendant and deny him a fair trial?

ASSIGNMENT OF ERROR

2). The state failed to bring charges for two (2) years, and failed to meet the guidelines set forth in CrR 3.3 and in the Constitution for speedy trial showed a lack of due diligence and denied Appellant a fair trial.

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ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The state did not bring charges against appellant for twenty (20) months and did not try the appellant for twenty-two (22) and a half months. the reason for the delay was allegedly to acquire a DNA sample. The first analysis was found to have no match while the second one was further clarified and found to match the appellant. The trial was beyond the speedy trial time as set forth in CrR 3.3 for the weather. Where there is no justifiable reason for the delay, did the lack of due diligence cause bad memories and prejudice the defendant from preparing his defense?

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B. ARGUMENT

THE STATE DID ERROR AND THE COURT ABUSED ITS DISCRETION BY ALLOWING A PREJUDICIAL QUESTION WITHOUT FACTUAL BASIS AND WITHOUT GIVING THE DEFENSE THE OPPORTUNITY TO CROSS EXAMINE THE ACCUSATORY QUESTION.

Both the state and the federal constitution guarantee a criminal defendant the right to be confronted with witnesses against him. U.S.A.C.: Amendment VI and XIV; and the Washington State Constitution: Article I §22. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him." The confrontation clause applies to the states -via- the fourteenth Amendment. Pointer v. Texas, 380 U.S. 400.

The Washington Courts have often cited to federal cases as controlling. Ohio v. Roberts, ; Coy v. Iowa, ; Crawford v. Washington, bars all use of testimonial hearsay against a criminal defendant except when the state produces the out of Court declarant for cross examination at trial. State v. St.Pierre, 111 Wn.2d 105.

(Verbatim Report of Proceedings, page 274)

"The state: Your Honor I would just like to ask the defendant about whether or not he made attempts to discourage witnesses from testifying against him.

Defense Counsel: Your Honor I think the question is absolutely more prejudicial than probative of anything. There hasn't been anything indicating anything like that at any point in time. And,

to just throw it out there sheds a whole different light on everything. I would ask that they not be allowed to ask that question.

The Court: I - - I need to hear the basis. The factual basis for asking the question.

The State: It's been related to me, your Honor, by Mr. Repperger that the defendant directed various threats or other acts against him while they were both incarcerated.

The Court: I need more detail. Specifically?

The State: That they were together basically in holding or other areas, and the defendant made certain gestures, made certain statements to him regarding him being a rat, snitch, etc., Your Honor.

Defense Counsel: I'd - - Your Honor, it is unsubstantiated."

(Report of Proceedings, page 275)

(defense Continued) "I would think that the place to have started would been to have asked Mr. Repperger if he had ever been threatened. Not to just now come up with it and just start throwing it out there. There's no basis. I just - - I can't see how that is possibly allowed.

The Court: I'm not going to allow you to ask the broader question. The more narrow question, "Rat" or "Snitch," I will allow you to ask. All Right?

The State: All right.

Defense: I hate to do this, but I couldn't quite hear that.

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Judge Stonier: I'm going to allow him to ask the "Rat" and "Snitch", which to me does - is somewhat probative of somebody who expresses that indicating that they feel that the person is - - relaying something that they did. But, certain - - there is an amount of consciousness of guilt or expression of guilty in the mere allegation. He's entitled to testify but - - to say whatever regarding that and he can explain that. I don't think it's fair - unfairly prejudicial. I think it can either be explained or denied or admitted. But, whatever happens, you know, if it was said it does reflect a consciousness of guilt and I don't think that would be unfairly prejudicial. All right. So. let's bring the jury back in.

(Jury escorted back into the Courtroom)

The Court: All right counsel. You may proceed.

(Report of Proceedings, page 276)

The State: Mr. McMillan have you recently called Mr. Repperger a rat or a snitch or anything like that?

Mr. McMillan: No, Sir. I have not.

The State: You deny that?

Mr. McMillan: Yes I do.

The State All right nothing else, your Honor.

The Court: Okay."

The Court allowed the question of whether Mr. McMillan called the witness Mr. Repperger a "rat" or a "Snitch" because it would show a consciousness of guilt. The state failed to ask the

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question to the accuser when he was on the stand. Defense Counsel rightfully objected stating that "The question is more prejudicial than probative" and that "the place to have started would have been to ask Mr. Repperger on the stand." Defense counsel asserted the right to cross examine the accuser. There was no factual basis but yet the Court allowed the question to be asked. This left the jury to speculate. The State asked the question and added that, "so you deny that?" indicating that there was some evidence that he did say the Mr. Repperger was a rat or a snitch. The State asked the question and indicated they knew the answer to the question.

ER.403 "Relevant Evidence is inadmissible when the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury." IN RE WINSHIP, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

"In sum, when a hearsay declarant is not present for cross examination at trial the confrontation clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted exception. In other cases the evidence must be excluded, at least absent a showing of particularized guaranteed of trustworthiness. Ohio v. Roberts, at 66; see also State v. Parris, 98 Wn.2d 140.

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The Court abused it's discretion by allowing the state to ask a question without a factual basis. A prosecutor who ask's a question that implies the existence of a prejudicial fact, must be prepared to prove that fact or face reversal. State v. Miles, 139 Wn.App. 879. The question defense counsel stated was more prejudicial than probative ER.403. There was no option of getting the witness or the State on the stand for cross examination. Questions and statements made in court must be available for cross examination. Crawford v. Washington, 541 U.S. 36.

The appellants 6th and 14th amendment rights were violated denying him a fair trial. Davis v. Washington,; Crawford v. Washington,; State v. Halverson, 82 Wn.2d 752.

B. ARGUMENT

THE STATE FAILED TO SHOW DUE DILIGENCE IN TAKING TWENTY MONTHS TO CHARGE APPELLANT AND TWENTY-TWO AND A HALF MONTHS TO TRY APPELLANT FAILING TO MEET CrR 3.3 AND THE DEFENDANTS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF THE APPELLANTS DUE PROCESS RIGHTS GUARANTEED UNDER THE VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I §3 AND §22 OF THE WASHINGTON STATE CONSTITUTION.

(report of proceedings, page 94)

Witness:

"Ms. Crimmins: I believe. Well, I want to say it was up but I'm not positive at the time, it has been so long ago, to try and remember all of that.

The State: And this is almost two years ago right?

Ms. Crimmins: Yes"

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(Report of proceedings, page 116)

"Ms. Crimmins: Like I said, I looked at so many photo's that I dont know if these were also in there or not. I - - it's been two years ago. it's been a while."

Witness:

"The State: Okay. Now do you remember the 29th of January 2007.

Mr. Repperger: vaguely, yes"

(Report of Proceedings, page 139)

"Mr. Pastorino: I - - This is two years ago. I don't really recall sir."

(Report of Proceedings, page 271)

"The State: Okay. Do you remember what you were doing on the 29th of January, two years ago?

Mr. McMillan: No, to be honest I can't say for sure."

These are the testimonies of the Appellant and witnesses. The appellants rights of due process under the 6th and 14th Amendments were violated. U.S. v. Wahrer, 319 F.Supp. 585; Barker v. Wingo, 407 U.S. 514. Furthermore, the state conceded that the DNA sample was acquired "some years ago." RP.12 So there was no justifiable reason for the delay. The defendant could not remember, therefore he could not properly aid his defense or remember where he was to establish an alibi. Even if the state was within the statutory guidelines, the defendant was still prejudiced by the delay. Stuart v. Craven, 456 F.2d 913.

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"The greater the period between the date of the alleged criminal offense and arrest or indictment, the more difficult it will be for the defendant to put forth his defense. U.S. v. Wahrer, 319 F.Supp. at 585. with the passage of time he will be less able to remember the circumstances and happenings on the day of the alleged crime. Witnesses may disappear and evidence might be lost." citing Wahrer, All of these things prejudiced Appellant tying the hands of the defense.

(Report of Proceedings, page 234)

"Ms. Winter-Sermeno: The case file had been reviewed by the other Supervisor in the section and he was concerned that the conclusion that was originally stated in the report was not as strong or definitive as it could have been. He brought the case to my attention. We both reviewed the data along with experienced analyst and revised the in initial conclusions of Ms. Eustis."

This is the testimony of DNA expert Stephanie Winter-Sermeno. The initial DNA was found with no match. So two years later, by no fault of the appellant. DNA was linked to him. "In light of clear evidence of prosecutors negligence, delay which was neither of great length nor result of obvious government abuse of it's perogatives could not be sanctioned absent full judicial scrutiny. West's Ann. Cal. Pen. Code, §1387, U.S. Const. Amend. 6. In Stuart v. Craven, 456 F.2d 913, it was held that: "in light of clear evidence of prosecutors negligence,

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delay which was neither of great length nor result of obvious government abuse of it's perogatives could not be sanctioned absent full judicial scrutiny." ID.

In the case at hand, the DNA technicians caused this delay and clearly, as the transcripts have illustrated, the defense was stifled by this delay. U.S. v. Marion, 404 U.S. 307. Although Marion, has been cited for the proposition that due process will require dismissal only when a pre-indictment delay or both actually prejudicial intentionally caused by the prosecutors. The more prevelant view would dismiss a criminal prosecution when actual prejudice is shown. see also, Stuart v. Craven, 456 F.Supp. 913 (1972). The delay in charging Appellant caused bad memories and hearsay that plagued this case from the beginning and deprived the appellant of his 6th and 14th Amendment due process rights. Haga, Supra.; State v. Howard, 52 Wn.App. 12; Dicky v. Florida, 398 U.S. 30; U.S. v. Wahrer, 319 F.Supp. 585.

(Report of Proceedings, page 21)

"defense counsel: I have a real problem with that especially when I have a client who is adamant that he have his trial in a speedy fashion. - My client was pretty adamant, when he was brought in for arraignment, that he wanted this matter heard within his speedy trial time, which I believe runs on the 29th."

(report of Proceedings, page 30)

"Defense counsel: wea are opposed. There is nothing new here

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that shouldn't of been taken care of well before readiness hearing ... And the travel conditions, I myself went up to port Townshend Wednesday. I came back Sunday, went to Vancouver and came back here. The weather is supposed to be better. I don't find that good cause personally.

The Court: Well I think the weather is a factor. I mean Amtrak is not even running.

Defense counsel: It will be. It's going to clear on thursday"

(Report of Proceeding,pg 31)

"The Court:We don't know that. It's not running today. All right it's still a factor. You know I'm going to grant it this one time. it's slightly outside of speedy trial."

This is the unjustifiable reason to grant the continuance. The state failed to show due diligence and it further failed to show due diligence in meeting the speedy trial CrR 3.3 and therefore violated Appellants Constitutional right to a speedy trial. Barker v. Wingo, 407 U.S. 531; State v. Iniguez, 143 Wn.App. 845. In Barker, when determining whether delay is unconstitutional, the Court considered the length of the delay, the reason for delay, whether the defendant asserted his right, the prejudice to defendant and other such circumstances. in this case the delay to charge is prejudicial, the reason for the delay was the weather and was unjustified, the defendant adamantly asserted his right, and the length in charging and trying the appellant greatly prejudiced the defendant.

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Lack of due diligence in charging and trying appellant caused bad memories and stifled the defense. The Cumulative effect of lack of due diligence in charging and exceeding the speedy trial time, deprived appellant of his 6th and 14th Amendment rights to due process of a fair and speedy trial guaranteed by the Constitution. State v. Williams, 93 Wn.App. 34; Barker v. Wingo, 407 U.S. 531; State v. Iniguez, 143 Wn.App. 845; U.S. v. Wahrer, 319 F.Supp. 585.

See Attorneys Opening "brief of Appellant," at page 16. "The States case was far from overwhelming." Given the weight and depth of the foregoing and the weakness of the states case, the three errors, including the appellant Attorney's, the Court errors cannot be considered harmless. Each error in and of itself warrants reversal, certainly the accumulation of them warrants reversal. The states errors cannot be considered harmless. The prejudicial question, the lack of due diligence in charging and failure to try appellant within speedy trial time denied Mr. McMillan due process of a fair and speedy trial and his convictions must be reversed.

CONCLUSION

The states delay of two years in charging, combined with being outside the speedy trial time warrants reversal. The prejudicial question requires reversal of Mr. McMillans conviction and dismissal of the charges. Mr. McMillan asks that

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his conviction be reversed and charges dismissed.

Respectfully Submitted

Dated this 7 day of September, 2009.

COURT OF APPEALS
DIVISION II
09 SEP 23 PM 12:59
STATE OF WASHINGTON
BY _____
DEPUTY



Jesse R. McMillan/Appellant