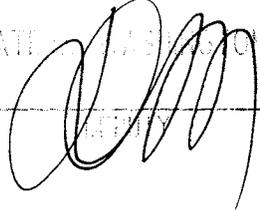


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COURT OF APPEALS
TACOMA, WA

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STATE OF WASHINGTON

BY 

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

NO. 40279-3-II

STATE OF WASHINGTON,

Appellant,

vs.

JOSHUA MICHAEL WILSON

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00490-0

BRIEF OF APPELLANT

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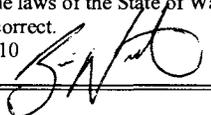
<p>SERVICE</p>	<p>Ms. Jodi Backlund Backlund and Mistry 203 E. Fourth Ave., Suite 404 Olympia, WA 98501</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: May 27, 2010 at Port Angeles, WA </p>
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I. INTRODUCTION:

This appeal challenges the Clallam County Superior Court's order that dismissed the prosecution against the Defendant, Mr. Joshua Michael Wilson, with prejudice. The underlying criminal prosecution involves two counts: (1) Assault in the Second Degree, and (2) Harassment.

The parties represented to the Hon. George Wood that they were experiencing difficulties coordinating a defense interview with the complaining victim, Ms. Catherine Hall. At a subsequent hearing, before the Hon. S. Brooke Taylor, defense counsel apprised the court that Judge Wood had previously instructed the State to make the victim available for an interview. The State responded that it had made several efforts to contact the victim, but without success. The defense moved to dismiss the case with prejudice. The State opposed the motion and asked that the trial court pursue intermediate remedial steps: (1) a material witness warrant, or (2) dismiss the matter without prejudice.

The trial court dismissed the matter with prejudice. However, the trial court and defense counsel both recognized that the deputy prosecutor made a good faith effort to locate and produce the witness. Additionally, the trial court never found any prejudice to Mr. Wilson's right to a fair trial.

The State appealed.

II. ASSIGNMENT OF ERROR:¹

1. The trial court erred when it dismissed the prosecution with prejudice.

III. STATEMENT OF THE ISSUE:

1. Did the trial court abuse its discretion when it dismissed the prosecution with prejudice without (1) evidence of government misconduct, (2) a showing of prejudice to the defendant's right to a fair trial, and (3) considering intermediate and less drastic remedial steps?

IV. STATEMENT OF THE CASE:

On November 10, 2009, the State charged Mr. Joshua Wilson with (1) Assault in the Second Degree, and (2) Harassment under cause number 09-1-00490-0. RP (11/10/2009) at 2-3, 8-9.

At arraignment, before the Hon. George Wood, Mr. Wilson's attorney informed the court that he was having difficulty locating certain witnesses that he anticipated the State would call to testify against his client in an unrelated cause, 09-1-00135-8. RP (11/20/2009) at 5. Thus, he asked the State to assist him in locating the witnesses. RP (11/20/2009) at 5.

¹ The trial court did not enter written findings of fact or conclusions of law in the present case.

On December 18, 2009, defense counsel informed the trial court that his client intended to plead guilty to charges under cause 09-1-00135-8. RP (12/28/2009) at 2-4. With respect to the present cause, 09-1-00490-0, Mr. Wilson's attorney advised the court that he filed a compliance memorandum that asked the State to arrange an interview with the alleged victim, Ms. Catherin Hall. CP 17-18; RP (12/18/2009) at 4. Additionally, the defense signaled that it might not be ready for trial on January 11, 2010, due to Mr. Wilson's mental health. RP (12/18/200) at 4-5.

On December 29, 2009, the parties attended a status conference. RP (12/29/2009) at 2. Mr. Wilson pleaded guilty to the charges under 09-1-000135-8. RP (12/29/2009) at 2-7. Mr. Wilson agreed to postpone his sentence until the resolution of 09-1-00490-0. RP (12/29/2009) at 7.

Mr. Wilson stated that he wanted to keep the 09-1-00490-0 trial set for January 11, 2010, despite his attorney's belief that the date was unrealistic. RP (12/29/2009) at 7. In addition, the defense advised the court that it had not received all discoverable materials: medical reports regarding the victim's treatment, and photographs of the alleged injuries. RP (12/29/2009) at 8. The State responded that it had provided everything in its possession, but expected that it would obtain and furnish the outstanding discovery in the near future. RP (12/29/2009) at 8.

Mr. Wilson's attorney reminded the court that he filed a compliance memorandum, requesting that the State "assist [him] in availing the victim for an interview prior to trial so [he] could evaluate her testimony." RP (12/29/2009) at 8. *See also* CP 18. However, defense counsel recognized that "the prosecutor's office and the police [had] not been able to find the victim[.] ..." RP (12/29/2009) at 8.

With respect to the requested interview, the State informed the court that it was making diligent efforts to locate the victim:

We've been in touch with her family and her family passed on to our victim witness coordinator a new phone number which apparently wasn't working and they gave another location, apparently she's in transit. We are making our best efforts to locate her.

RP (12/29/2009) at 9. Judge Wood then expressed the following:

Okay. Well, what I don't want to do is to have this come down to the last second where either we're going to get a material witness warrant or the victim is unavailable or something, you know, we're going to have to deal with it here. So I think what we need to do is probably take a look at this prior to trial then on whether that witness is -- has she been made available, whether she's going to be made available, whether we need a material witness warrant out for her so we can be ready for trial on the [January] 11th.

RP (12/29/2009) at 9-10. The trial court set a status conference for January 5, 2010. RP (12/29/2009) at 10.

Before the parties adjourned, Mr. Wilson's attorney stated he needed additional time to research his client's "unusual defense,"² advising the court that this would not be completed "before the trial date and my client understands that." RP (12/29/2009) at 11. The State also acknowledged that it still had not provided certain medical reports because it needed the victim's consent to obtain said records. RP (12/29/2009) at 13. The trial court reaffirmed the need for a status conference "[to] make sure our ducks are in order." RP (12/29/2009) at 14.

On January 5, 2010, six days before trial, the Hon. S. Brooke Taylor presided over the scheduled status conference. RP (01/05/2010) at

4. Mr. Wilson's attorney addressed the court as follows:

[Judge Wood] insisted the State should make available to me for an interview the alleged victim in this case, along with producing some additional discover and I haven't heard a word.

RP (01/05/2010) at 5. The defense then made an oral motion to dismiss the case. RP (01/05/2010) at 5.

The State appraised the court of its efforts to locate the witness and facilitate the interview:

Your Honor, we have actually made more attempts to try and find the victim. The last information we have from her is she is not even in the county any more. We've left

² Apparently, Mr. Wilson's defense was that the alleged violence was part of a consensual, sexual act with the victim.

messages with various family members, the most recent one just a few days ago.

Um, they said -- we'd let her know that this case was in danger of not being able to go forward without her at least contacting us and making herself available. We haven't received anything. We thought there was still a strong possibility of her being in this county.

I ask for a material witness warrant and get law enforcement to start shaking the trees to see if we can ascertain her[.] ...

RP (01/05/2010) at 5-6. The State then went an additional step further, requesting that the trial court dismiss the case without prejudice. RP (01/05/2010) at 6.

Mr. Wilson's attorney argued that the trial court should dismiss with prejudice:

My client now faces -- who knows how long this would take. My client now faces a sentencing on the other cause that you have which if the Court follows the direction -- or the recommendation [of the deputy prosecutor], that will put him in prison for 12 months and a day. So we need to schedule that. Off he goes to prison and sits there in prison without an opportunity really to assist me in an defense. If the State re-files it I think he's prejudiced by having had to go to sentencing on the other case while this one is still pending.

RP (01/05/2010) at 6-7. The trial court summarily granted Mr. Wilson's request and dismissed the case with prejudice. RP (01/05/2010) at 7.

When the State contested the ruling, the trial court provided the following justification:

[W]e had a motion to dismiss for [the defense] based upon his inability to prepare for trial, indicating that he was in all other respects prepared to go to trial on Monday with Mr. Wilson. The State's indicating it's not ready and does not think it can be ready. That's the basis for my dismissal.

RP (01/05/2010) at 7. When the State reminded the court that it had worked diligently to locate the witness, the trial court explained:

I understand that, no fault on yours Ms. Lundwall [the deputy prosecutor]. The fault is on the victim who has made herself deliberately unavailable.

RP (01/05/2010) at 7. Defense counsel echoed the trial court's sentiment, stating that the State was not at fault when it was unable to furnish the witness. RP (01/05/2010) at 10.

The trial court then signed a written order dismissing the case with prejudice, which expressly stated that the State made "good faith" efforts to locate and make the witness available for an interview.³ RP (01/05/2010) at 9-10; CP 06. The written order never referenced any prejudice to Mr. Wilson's right to a fair trial. *See* CP 06.

The State appealed.

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³ The trial court's written order reads:

Upon the Defendant's motion, the State being unprepared for trial, it is hereby directed that the matter is dismissed with prejudice. State is unable to locate complaining witness after good faith effort to do so.

CP 06.

V. **ARGUMENT:**

A criminal defendant’s “right to compulsory process includes the right to interview a witness in advance of trial.” *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003) (quoting *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). When a defendant must choose between the right to a speedy trial and the right to adequately prepared counsel because an interview has not occurred by the speedy trial expiration, the defendant’s right to a fair trial may be prejudiced. *See Wilson*, 149 Wn.2d at 13 (citing *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587; *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

CrR 8.3(b) reads:

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.

(Emphasis added). To support CrR 8.3(b) dismissal, a defendant must show both (1) arbitrary action or governmental misconduct,” and (2) “prejudice affecting [his or her] right to a fair trial.” *Wilson*, 149 Wn.2d at 9 (citing *State v. Michielli*, 132 Wn.2d at 239-40; *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). A trial court’s decision to dismiss under CrR 8.3(b) can be reversed only when a trial court abused its discretion by making a decision that is manifestly unreasonable or based

on untenable grounds. *Wilson*, 149 Wn.2d at 9 (citing *Michielli*, 132 Wn.2d at 240; *Blackwell*, 120 Wn.2d at 830).

A. THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN SHE FAILED TO PRODUCE THE WITNESS FOR PRETRIAL INTERVIEW.

Government misconduct “ ‘need not be of an evil or dishonest nature; simple mismanagement is sufficient.’ ” *Wilson*, 149 Wn.2d at 9 (quoting *Michielli*, 132 Wn.2d at 239; *Blackwell*, 120 Wn.2d at 831). However, Washington case law clearly states, “dismissal is an extraordinary remedy to which the court should resort only in ‘truly egregious cases of mismanagement or misconduct.’” *Wilson*, 149 Wn.2d at 9 (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, aff’d, 121 Wn.2d 524, 852 P.2d 294 (1993)). *See also Blackwell*, 120 Wn.2d at 830.

The present case presents the same issue that Washington Supreme Court resolved in *State v. Wilson*, 149 Wn.2d 1, 65 P.3d 657 (2003). In *State v. Wilson*, the Supreme Court reviewed two cases where the trial courts ordered the prosecutors to produce key witnesses for a pretrial interview. 149 Wn.2d at 3-4. Despite the prosecutors’ best efforts, neither

was able to do so before the imposed deadlines. *Id.* at 4-8. As a result, the trial judge dismissed each case pursuant to CrR 8.3(b). *Id.* at 4.

The Supreme Court found that the prosecutors did not engage in unfair gamesmanship, nor did they egregiously neglect their obligations. 149 Wn.2d at 11. As such, the high court held that the trial courts abused their discretion when they dismissed the cases with prejudice because (1) in the first case, the prosecutor had only two days to satisfy the imposed deadline and did not ignore his obligation to arrange the interview; and (2) in the second case, the prosecutor attempted to contact the witness everyday she was in the office, the witness was consumed with college exams, and the witness left a message with the defense without receiving a response. *Id.* at 11. Under these facts, the Supreme Court held that the prosecutors acted reasonably and their conduct did not amount to misconduct. *Id.* at 12.

Here, the deputy prosecutor did not engage in any gamesmanship, and she made every effort to facilitate the witness interview. As in *Wilson*, where the prosecutors conceded that the discovery was incomplete and made repeat efforts to coordinate the key witness interviews, *see* 149 Wn.2d at 4-6, 7-8, the State was candid about the discovery that remained outstanding and kept counsel and the trial court apprised of its efforts to locate the victim and facilitate a defense interview. RP (12/29/2009) at 8-

9, 13; RP (01/05/2010) at 5-6. As in *Wilson*, where the prosecutors had “done nothing wrong” and where it was the victims that frustrated the discovery process, *see* 149 Wn.2d at 5-6, 8, in the present case both the defense and the trial court recognized that the State had made a “good faith” effort to ascertain the victim’s whereabouts and coordinate the requisite interview. CP 06; RP (01/05/2010) at 7, 9-10.

Because the deputy prosecutor did not engage in “game playing,” mismanagement, or other misconduct that adversely affected the Defendant’s right to a fair trial, this Court should hold that the judge abused its discretion when it dismissed the case with prejudice.⁴

**B. THE TRIAL COURT ABUSED ITS DISCRETION
BECAUSE THE DEFENDANT DID NOT SHOW AND
THE JUDGE DID NOT FIND ANY PREJUDICE
AFFECTING THE RIGHT TO A FAIR TRIAL.**

To support CrR 8.3(b) dismissal, a defendant must show “prejudice affecting [his or her] right to a fair trial.” *Wilson*, 149 Wn.2d at 9 (citing *State v. Michielli*, 132 Wn.2d at 239-40; *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). Absent a finding of prejudice to the defendant, dismissal of a criminal case is not warranted. *State v.*

⁴ Because no prosecutorial misconduct occurred, this Court need not reach the issue of whether the defendant suffered prejudice affecting his right to a fair trial. *See Wilson*, 149 Wn.2d at 12.

Koerber, 85 Wn. App. 1, 5, 931 P.2d 904 (1996) (citing *City of Seattle v. Orwick*, 113 Wn.2d 823, 832, 784 P.2d 161 (1989)).

In *State v. Koerber*, the night before trial was to begin, the State learned that one of its witnesses was sick and would not be able to testify. 85 Wn. App. at 3. The trial judge dismissed the prosecution because the witness was critical to the State’s case, was not presently available, and the State was unable to advise the court when the witness would be available. *Id.* The record did not establish that the State’s conduct leading to trial actually prejudiced the defendant. *Id.* at 5. The only mention of prejudice came from the defendant’s attorney, “who told the court that [the defendant] would be prejudiced by a continuance because of his schedule of working nights and attending court in the day.” *Id.* The Court of Appeals reversed the dismissal order, finding that the trial court abused its discretion when it dismissed without finding any prejudice to the defendant. *Id.*

Here, the trial court did not make the requisite findings to support its dismissal with prejudice. As in *Koerber*, where the trial court dismissed the case with prejudice without finding that the defendant’s right to a fair trial was adversely affected, *see* 85 Wn. App. at 5, Judge Taylor summarily dismissed the prosecution, six days in advance of trial, without finding that Mr. Wilson was actually prejudiced by the State’s remedial

requests or management of the case. CP 06; RP (01/05/2010) at 7-10. While the trial court did state that Mr. Wilson's attorney filed a motion to dismiss "based upon his inability to prepare for trial, indicating that he was in all other respects prepared to go to trial on Monday[,]" Judge Taylor grounded his dismissal on the "State's indicating that its not ready and does not think it can be ready [for trial]." RP (01/05/2010) at 7. *See also* CP 06. Thus, the trial court abused its discretion because it dismissed the case without finding that Mr. Wilson's right to a fair trial would actually be prejudiced. *See Koerber*, 85 Wn. App. at 5.

In fact, as in *Koerber*, the only mention of prejudice came from Mr. Wilson's attorney. Mr. Wilson attorney argued:

My client now faces a sentencing on the other case that you have which if the Court follows the direction – or the recommendations of [the deputy prosecutor], that will put him in prison for 12 months and a day. So we need to schedule that. Off he goes to prison and sits there in prison without an opportunity really to assist me in a defense. If the State re-files it I think he's prejudiced by having had to go to sentencing on the other case while this one's still pending.

RP (01/05/2010) at 6-7. Mr. Wilson never argued that the State's requests or management of the case prejudiced his right to a fair trial.

Mr. Wilson agreed to waive a "speedy" sentencing under cause 09-1-00135-8 until the conclusion of 09-1-00490-0. RP (12/29/2009) at 7. If the State obtained a conviction in the present cause, after it located the

victim with a material witness warrant, postponing the sentence actually served Mr. Wilson's interest because his offender score would be lower at the ultimate sentencing hearing. Because the parties agreed to stay the sentencing, there was no risk that Mr. Wilson would be unavailable to assist his attorney in the interim.

Additionally, the trial court dismissed the mater six days prior to the scheduled trial. RP (01/05/2010) at 4. The potential to locate the witness, conduct the interview, and evaluate her testimony before trial still existed. However, the trial court and defense summarily concluded, without explanation, that a material witness warrant would fail to produce the victim in advance of the trial date. *See* RP (01/05/2010) at 6-7. The presiding judge and defense counsel reached this conclusion despite Judge Wood's decision to schedule a status conference a week before trial to determine whether a material witness warrant would be necessary. *See* RP (12/29/2009) at 9-10. Mr. Wilson never explained why an additional six days, as previously scheduled, would adversely affect his right to a fair trial.

Because the defense failed to establish, and the trial court failed to find, that Mr. Wilson's right to a fair trial was prejudice, the trial court abused its discretion when it entered the contested order. This Court should so hold.

**C. THE TRIAL COURT ABUSED ITS DISCRETION
BECAUSE IT FAILED TO CONSIDER
INTERMEDIATE REMEDIAL STEPS.**

A dismissal under CrR 8.3 is an extraordinary remedy, one that a trial court should impose only as a last resort. *Wilson*, 149 Wn.2d at 12. A trial court should consider “intermediate remedial steps” before dismissing a case. *See id.* (citing *Koerber*, 85 Wn. App. at 4).

In *State v. Wilson*, the Supreme Court faulted the trial courts for failing to consider remedial steps short of dismissal. In the first consolidated case, the prosecutor conceded that the key interview had not occurred but proposed that the trial court (1) issue a material witness warrant, or (2) release the defendant from custody, which would afford the State additional time to convince the victim to consent to the interview. 149 Wn.2d at 5. The Supreme Court recognized that while such steps “may not be ideal,” the trial courts should have considered less extreme alternates rather than dismiss the case altogether. *Id.* at 12.

Here, the State requested that the trial court issue a material witness warrant in order “to get law enforcement to start shaking the trees[.]” RP (01/05/2010) at 6. This was one step the *Wilson* Court said trial courts should consider before they dismiss a criminal case. *See* 149 Wn.2d at 12. In fact, Judge Wood recognized that this was a possible and

appropriate course of action six days prior to trial. RP (12/29/2009) at 9-10. This Court should find that the trial court erred when it refused to consider the State's initial request for a material witness warrant.

Additionally, the trial court should have considered other available remedies. As in *Wilson*, where one of the defendants was in custody until his scheduled trial date, *see* 149 Wn.2d at 5, Mr. Wilson was also detained prior to trial. While release from custody may not have been ideal, it was a step the trial court should have evaluated because it would have afforded the State and law enforcement additional time to locate the key witness, Ms. Hall.⁵ *See Wilson*, 149 Wn.2d at 12.

The State also requested that the case be dismissed without prejudice. RP (01/05/2010) at 6-7. The trial court's summary refusal to consider this alternative underscores the fact that it failed to consider less severe alternatives to a dismissal with prejudice.

This Court should hold that the trial court abused its discretion when it failed to consider intermediate and appropriate alternatives before resorting to the extraordinary remedy of dismissal with prejudice.

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⁵ The extra time would also have afforded Mr. Wilson's attorney with the time necessary to research any "unusual" and appropriate defense strategies. *See* RP (12/29/2009) at 11.

VI. CONCLUSION:

For the reasons argued above, the State respectfully requests that this Court hold that the trial judge abused his discretion when he dismissed the prosecution with prejudice. The State asks that this court reverse and vacate the trial court's dismissal order and remand for further proceedings.

DATED this May 27, 2010

DEBORAH S. KELLY, Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian Patrick Wendt", written over a horizontal line.

Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney