

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
OLUJIMI AWABH BLAKENEY)
(your name))
)
Appellant.)

No. 42427-4-11

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

FILED
COURT OF APPEALS
DIVISION II
2012 MAY 31 PM 1:31
STATE OF WASHINGTON
BY [Signature]
DEPUTY

I, Olujimi A. Blakeney, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

The trial court abused its discretion when it denied the defendant discovery material, and denied him the right to subpoena the materials himself. This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or basis its ruling on an erroneous view of the law.

Additional Ground 2

Trial court erred when they did not apply the same criminal conduct to the defendants sentence for count I and II, murder in the first degree - "extreme indifference to human life" and drive-by shooting. The finding is reviewed by the court of appeals for abuse of discretion standard, or misapplication of the law.

If there are additional grounds, a brief summary is attached to this statement.

Date: 5-29-2012

Signature: [Signature]

Assignment of Error 1

A. Abuse of Discretion: Trial court abused it's discretion when it denied defendant possibly exculpatory evidence in discovery.

1.) An appeals court reviews conclusions of law de novo.

(State v. Ford, 125 Wn.2d 919,923,891 P.2d 712 (1995)).

2.) Interpretation of an evidentiary rule is a conclusion of law.

(State v. Deventis, 150 Wn.2d 11,17,74 P.3d 2003).

3.) Findings of fact must support a trial courts conclusions of law.

(Brockob, 159 Wn.2d at 343).

B. Trial courts denial of discovery without first determining requested discoverable materials relevancy to defense is a manifest abuse of discretion:

1.) Requirements of CrR 4.7(h)(4)

2.) Court failed to determine Prosecutors use of the discoverable material

3.) Court erred by denying defense motion to subpoena the contested discovery.

A.) A trial court abuses it's discretion when it exercise of discretion is manifestly unreasonable or is based on untenable grounds or reasons. State v. McCormick, 166 Wn.2d 689,706,213 P.3d (2009).

1.) An appeals court reviews conclusions of law de novo:

State v. Ford, 125 Wn.2d 919,923,891 P.2d 712 (1995); Mckee v. AT&T Corp., 164 Wn.2d 372,191 P.3d 845 (2008); Smith 154 Wn.App at 699.

2.) Interpretation of an evidentiary rule is a conclusion of law.

State v. Deventis, 150 Wn.2d 11,17,74 P.3d 119 (2003). CrR 4.7 is an evidentiary rule.

3.) Findings of fact must support a trial courts conclusion of law.

Brockob, 159 Wn.2d at 343; State v. Heffner, 126 Wn.App 803,810-11, 110 P.3d 219 (2005). the court abused it's discretion by failing to correctly interpret CrR 4.7 **Discovery Obligations**, because it did not base it's decision to deny the defendant the discovery request without determining to do so, was not a violation of the defendant's constitutional right to present his defense consisting of relevant admissable evidence.

B.) Trial courts denial of discovery without first determining requested discoverable materials relevancy to defense is a manifest abuse of discretion. State v. Hudson, 150 Wn.App 646,652,208 P.3d 1236 (2009).

1.) The requirements of CrR 4.7(h)(4) demand full disclosure of evidence. State v. Norris, 157 Wn.App.50,236 P.3d 225(2010). But the court interpreted this rule to include it could also deny a motion by the defense to subpoena it. When the court had not properly ascertained the relevancy of the discoverable materials requested by the defense, it misinterpreted CrR 4.7(h)(4) import. Failure to adhere to the requirements of an evidentiary rule(see also ER 404 (b))by a court can be considered an abuse of discretion by that court. State v. Neal, 144 Wn.2d 600,609 30 P.3d 1255 (2001)(citing State v. Rivers, 129 Wn.2d 697,706,921 P.2d 495 (1996); State v. Foxhoven, 161 Wn.2d 168,176,163 P.3d 786(2007).

The court had the option to review the requested material in camera. Not doing so caused it to deny material without facts to support it's conclusion. Brockob, 159 Wn.2d at 343; and to deny defendant's right to demonstrate the materiality of the requested materials, and the materiality to the preparation of it's case, or if the relevant materials was or wasn't covered by §(a) [Prosecutors obligations] (c) [additional disclosures], upon request & specification and (d) [materials held by others]. State v. Boyd, 160 Wn.2d 424,158 P.3d 54 (2007). The state seems to view the rule as allowing the state to withhold information that in the state's judgement is not material. This cramped interpretation of the rule is incorrect. State v. Krenik, 156 Wn.App. 314,213 P.3d 252 (2010).

2.) The trial court failure to elicit CrR 4.7's relevant parts as they pertained to the evidence the defense sought. Because a violation of the rule in it's entirety, at CrR 4.7, the court did not determine if the Prosecutor had lodged a protective order as to the matters not subjected to disclosure. At CrR 4.7(e) the court did not make contingent it's decision to deny the phone call evidence upon a showing of materiality to the preparation of the defense. Because it did not require the Prosecutor to disclose if it intended to use the phone calls at trial or another hearing, which clearly CrR 4.7(e) required the court to ascertain before denying this evidence to the defense. See Boyd, 160 Wn.2d at 432.

3.) By not eliciting the Prosecutor's intent to use the requested telephone evidence, the defense was denied the impact of its show of reasonableness and materiality to its defense. When the defense had adequately demonstrated its reason for requesting the phone call recordings of his co-defendant's, revolved around supporting the defendant's general denial defense. It then became contingent that the materiality to the preparation of his defense required an inspection of his co-defendant's admitted phone calls, where they discussed the case, (see Archie, 148 Wn.App. 198, 199 P.3d 1005 (2009) to ascertain just what was said as to the degree of culpability the co-defendant's admitted or denied, so the defendant could best choose which defense to employ. But the court denied the defendant his constitutional right to present his defense, that would have consisted of this relevant admissible defense

Argument:

The Prosecutor mistakenly cited Blackwell, 120 Wn.2d 822 in the hearing to compel discovery. Blackwell involved a request to inspect a police officer file under CrR 4.7(d). The attempt to establish materiality for the grant of discovery failed there because defense counsel failed to substantiate the claim that the documents sought contained information material to the defense. The case at bar however is different than the facts found in Blackwell. When Craig Adams of the Pierce County Jail (see VRP 7-6-11 pg.3 lines 17-23) agreed to provide the phone call transcripts of the two co-defendants to the Prosecutor, the requested material ceased being materials held by others (CrR 4.7(d)). Where as in Blackwell the police refused to turn over the files. In fact precluding the Prosecutor the same claim in Blackwell, that the Prosecutor was not eligible to receive the requested discovery. Next the court in Blackwell permitted a motion for subpoena, while the judge in this case prevented such opportunity (see VRP 7-6-11 pg.9-10 lines 23-25, and 1).

The Prosecutor has stated in the hearing for motion to compel discovery, that he has complied with CrR 4.7(d). (see VRP 7-6-11 pg.6 lines 22-25). I do not believe that the Prosecutor has complied with the CrR 4.7(d), and has also interpreted this CrR 4.7(d) into something other than the actual provision of the CrR 4.7(d). (see VRP 7-6-11 pg.7 lines 1-7).

When the Prosecutor had stated that the request has been made to the entity that holds the records, (see VRP 7-6-11 pg.6 line 23) the material being sought by the defense should have been provided to the Prosecutor if this request was in fact made by the Prosecuting Attorney. Defense counsel was told by Craig Adams of the Pierce County Jail that if the Prosecutor request this information, that it then would be provided to him. (see VRP 7-6-11 pg.8 lines 13-14). Furthermore CrR 4.7(d) does not state anywhere in the provision that a Prosecutor can refuse to request material or information, which clearly the Prosecutor has done in this case. (see VRP 7-6-11 pg.7 lines 1-2). This is a clear indication that the Prosecutor was not in compliance with CrR 4.7(d).

A trial court abused it's discretion when it denied the defendant discovery material, and denied the defendant the right to subpoena it himself.

Trial court abuses it's discretion when it's order is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the courts relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or basis it's ruling on an erroneous view of the law. State v. Hudson, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

Under due process clause of the Fourteenth Amendment, it must be demonstrated that the state Prosecution...comported with prevailing notions of fundamental fairness such that [the defendant] was afforded a meaningful opportunity to present a complete defense. State v. Lord, 117 Wn.2d 829, 867, 822 P.2d 177(1991).

The state's disobedience to a discovery rule can constitute a violation of a defendant's right to due process. See State v. Bartholomew, 98 Wn.2d 173, 205, 654 P.2d 1170 (1982) rev'd on other grounds, 463 U.S. 1203 (1983).

It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are "to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process... State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).

The state may at its whim, listen to conversations with family, and friends, and employers and, if it finds the conversation useful, may use it against the inmate. State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008).

Yates: At this point, we momentarily pause to observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory considered somewhat in the nature of a two-way street, with the trial court regulating over the rough area's neither according to one party an unfair advantage nor placing the other at a disadvantage. State v. Boehme, 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967) cert. denied, 390 U.S. 1013 (1968). The United States Supreme Court expressed similar sentiments in United States v. Wixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 94 S. Ct. 3040 (1974).

A defendant is denied his Sixth Amendment right to counsel if the actions of the state deny the defendant's attorney the opportunity to prepare for trial "such preparation includes the right to make full investigation of the facts and law applicable to the case". State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976).

In the hearing to compel discovery the court clearly demonstrated it did not possess the facts for its conclusion to deny the defendant's motion. (see VRP 7-6-11 pg.9 lines 7-22). When the court doubted the existence of the jail phone calls with discussions about the plea agreement conducted by state's witness. after the witness admitted, when interviewed by defense counsel, he talked about the plea agreement with various family members. The court was supposed to have conclusively ascertained the requested discovery material did indeed exist before making its ruling, much less its

materiality to the defendant, which the court abregated when ruling against the motion to subpoena the requested material, effectively preventing the defendant his constitutional right to form his best defense possiable.

State and Federal constitutions guarantee a criminal defendant "a meaningful opportunity to present a complete defense". California v. Trombetta, 467 U.S. 479, 485, 104 S. ct. 2528 81 L. Ed. 413 (1984), U.S. Const. Amend VI, XIV Const Art. 1§22. Which in turns requires that the state provide the accused with exculpatory evidence. Featherstone, 948 F. 2d at 1504.

As a general rule state has a duty to disclose and preserve evidence whenever there is a reasonable possibility that evidence is material and favorable to defendant, and failure to do so denies accused his due proces process right to a fair trial. U.S.C.A. Const. Amends. 5,14. Further, while state must disclose all material evidence favorable to the defendant the evidence must be material before a defendant may claim prejudice from the state's failure to discolse it. CrR 4.7(e)(1); see Banks v. Dretke, 540 U.S. 668,691,124 S. ct. 1256,157 L.Ed. 2d 1166 (2004); see also Brady v. Maryland, 373 U.S. 83, 87 S. ct. 1194, 10 L. Ed. 2d 215 (1963). The standard for materiality requires that there be a reasonable probability of a different result had the evidence been discovered. Banks, 540 U.S. at 698-99.

A criminal defendant has a constitutional right to present a defense consisting of relevant admissable evidence. Taylor v. Illinois, 484 U.S. 400 408, 108 S. ct. 646 98 L. Ed. 2d 798 (1988).

A trial court has no discretion to exculde evidence relevant to a defense without first determing the relevancy of the evidence to the defense. State v. Lord, 161 Wn.2d 276, 165, 301 P.3d 1251 (2007).

Assignment of Error 2

The trial court erred when they did not apply the same criminal conduct to Blakeney's sentence for count 1 and count 2; murder in the first degree "extreme indifference to human life" and "drive-by shooting. The finding is reviewed by the court of appeals for abuse of discretion or misapplication of law. State v. Maxfield, 125 Wn.2d 378,402,886 P.2d 123 (1994). Review for abuse of discretion is a deferential standard; review for misapplication of law is not. State v. Garza-Villarreal, 123 Wn.2d 42,49,864 P.2d 1378 (1993). Review for abuse of discretion is appropriate when the facts in the record are sufficient to support a finding either way on the presence of any of the three statutory elements that, taken together constitute same criminal conduct. State v. Anderson, 92 Wn.App. 54,62,960 P.2d 975 (1998).

Argument:

At sentencing, the Prosecutor seemed to believe that Blakeney did not fall under the statute RCW 9A.589(1)(a) same criminal conduct. The Prosecutor raised two arguments against 2 out of the 3 prongs of requirements for same criminal conduct. The Prosecutor contested the "intent and same victim elements". I would disagree with the Prosecutor on the two issues of "intent" and "same victim" in the sentencing hearing on 8-3-2011 (see VPR vol 8 sentencing pg. 744-45 lines 14-25 and pg 744 lines 1-3 pg 745).

1.) **Same Objective Intent;** The murder and the drive-by shooting also involved the same intent. The standard is the extent to which the criminal intent, objectively, changed from one crime to the next. State v. Vike, 125 Wn.2d 407,411,885 P.2d 824 (1994). In this context "intent is not the mens rea element of the particular crimes, but rather the offender's objective criminal purpose in committing the crime. State v. Adams 56, Wn.App, 803,811,785 P.2d 1144, review denied, 114 Wn.2d 1030(1990). Factors include whether one crime furthered the other, whether one remained on progress when the other occurs, and whether the offense were part of the same scheme or plan. State v. Calvert, 79 Wn. App 569,578,903 P.2d 1003 (1995). review denied, 129 Wn.2d 1005 (1996); State v. Edwards; 45 Wn. App, 378,382,725 P.2d 442 (1986), overruled in parts on other grounds, State v. Dunaway, 109 Wn. 207,215,743 P.2d 1237 (1987). State v. Wilson

136 Wn. App 596,615,150 P.3d 144(2007). The evidence shows that the drive-by shooting was still in progress while the murder occurred, and therefore Blakeney could have not had the time or the intent to change his criminal intent. The prosecutor had stated that "indifference to human life," and the drive-by shooting have a different mens rea. That a drive-by shooting requires a mere recklessness and that the "indifference to human life has more than mere recklessness.

Several cases demonstrate what is meant by "same intent" in this context in State v. Taylor, the two defendants assaulted the driver of a car as he stepped out to buy gasoline. The defendants climbed into the car and with a rifle pointing at the passenger's head ordered the driver to take them to the park. When they arrived at the park, the defendants robbed the passenger, left the car and crossed the street. 90 Wn.app 312,315,950 P.2d (1998).

At issue was whether the charges of second degree assault and first degree kidnapping against the passenger arose from the same criminal conduct. More specifically, the question was whether Taylor's objective intent was the same when committing the two offenses. Taylor, 90 Wn.App at 321. The court found it was: The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and Nicholson entered the car. It ended when the kidnappers exited the car and the abduction was over.

Taylor, 90 Wn. App at 321. Notably, the court found that where two crimes are committed continuously and simultaneously, "it is not possible to find a new intent to commit a second crime after the completion of the first crime". At 321-322. This analysis accommodates Blakeney's situation with the drive-by shooting and the murder. The murder did not happen first, the drive-by shooting is what produce the murder. Therefore the drive-by shooting was committed simultaneously and also was continuously in progress.

As the Prosecutor has pointed out, that the mens rea is a different intent for murder "extreme indifference to human life" than "drive-by shooting". When we take a look at the actual context of the language used in the provisions of "indifference to human life" and "drive-by shooting, we can see how they in fact can be consistent with having the same intent.

When we are looking at the four degrees of culpability and come across the word recklessness, we see what it's meaning is. Recklessness: A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk a gross deviation from conduct that a reasonable person would exercise.

Under the Black's Law Dictionary reckless is as follows; characterized by the creation of substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate disregard) for or INDIFFERENCE to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do. "Intention cannot exist without foresight, but foresight can exist without intention. For a man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur; none the less if he persists on his course he knowingly runs the risk of bringing about the unwished result.

When reading the definition of reckless we see the word disregard, which is used in the WPIC 26.06 "Murder-First Degree-Indifference To Human Life-Elements as well as risk. When we read the to convict instructions of First Degree Murder "Indifference to Human Life at number(2) it reads, that the defendant knew of and disregarded the grave risk of death; which is found in the meaning of reckless. We can see how closely this relates to the definition of recklessness, which is the intent for a drive-by shooting. The words "indifference, disregard, and reckless" all coincide with another leading us to see how they are all equal to the means of intent. There is not one word out of these three words that will lead us to a higher or lower standard of the intent in their meanings, therefore the Prosecutor's argument on the "same intent" has no value and merit on it's face. See State v. Price, 103 Wn.App 845, 857, 14 P.3d 841 (2000)

In addition there was no temporal break between the drive-by shooting and the murder where Blakeney paused and had time to form a new criminal intent to commit the second offense, which would be the murder. Wilson 136 Wn.App (2007), which would determine the intent of the accused in each successive offense and whether one offense was in furtherance of another. The lesser offense merges into the greater offense. Vladovic, 99 Wn.2d at 420. If the defendant's criminal purpose did not change from one offense to another then the offense encompass the same criminal conduct and the sentence cannot be enhanced by an offender score. State v. Dunaway 109, Wn.2d 707, 743 P.2d 1237, 749 P.2d 160 (1987).

In deciding if crimes encompassed the same criminal conduct trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next...[P]art of this analysis will often include the related issue of whether one crime furthered the other and if the time and place of the two crimes remained the same. State v. Freeman, 118 Wn.App 365,377,76 P.3d 732(2003).(Aff'd) 153 Wn.2d 765,108 P.3d 753 (2005).

Additionally, the court noted that a criminal event which is intimately related or connected to another criminal event, is held to arise out of the same criminal conduct. Adock at 706. (See also State v. Erickson, 22 Wn.App 38,587 P.2d 613 (1978)).

2.) Same Victim: The issue at hand here is whether or not that the drive-by shooting involved the same victim. Drive-by shooting by its very term doesn't require a victim; it is the act of recklessly putting someone in danger. When the courts look at drug crimes under the same criminal conduct analysis the public at large is deemed the victim. Courts have allowed this to be consolidated under the same criminal conduct where individuals possess two different types of drugs at the same time, and have two separate crimes, they're the same criminal conduct, because the public at large is the victim. State v. Williams, 135 Wn.2d 365,368-69,957 P.2d 216 (1998), State v. Porter, Wn.2d 177,183,186,942 P.2d 974 (1997), State v. Rodriguez, 61 Wn.App 812,812 P.2d 868 (1991).

When we consider how courts have applied the "same criminal conduct" to crimes dealing with drugs, and how the statute of these crimes do not require a "victim prong", we can see how this can also comport with "drive-by shooting". The public should be considered the victim of a drive-by shooting, and a person is deemed as being part of the public. Not applying this "same victim" prong with the drive-by shooting but courts allowing this to be acceptable in drug crimes that do not have a victim in the statute, can and should be held to be ambiguous.

If a statute does not clearly and unambiguously identify the unit of Prosecution then we resolve any ambiguity under the rule of lenity to avoid "turning a single transaction into multiple offenses." Adel, 136 Wn.2d at 634-35 (quoting Bell v. United States, 349 U.S. 81,84 75 S. Ct. 620,99 L. Ed. 905 (1955)), State v. Westling, 145 Wn.2d 607,610,40 P.3d 669 (2002), State v. Sutherby, 165 Wn.2d 870,204 P.3d 916 (2009). We construe statutes to effect their purpose and avoid unlikely or absurd results. State v. Neher, 112 Wn.2d 347,351,771 P.2d 330 (1989).

For these reasons Blakeney's actions did in fact encompass the same criminal conduct for sentencing purposes.

Conclusion:

Based on the foregoing facts and authorities, appellant Blakeney respectfully urges this Court to reverse his murder conviction and remand for new trial or dismiss the charges, and or remand for resentencing.

Date: 5-29-2012

Signature: 