

No. 49749-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

v.

MORGAN B. WILLIAMS, Appellant

THE HONORABLE JUDGE DANIEL STAHNKE

APPEAL FROM THE SUPERIOR COURT

OF CLARK COUNTY

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I. ASSIGNMENT OF ERRORS 1

II. STATEMENT OF FACTS..... 1

III. ARGUMENT..... 6

 A. The Trial Court Erred When It Did Not Dismiss The Charges
 Against Mr. Williams Under CrR 8.3..... 6

 B. Under RAP 15.2(f) This Court Should Not Award Appellate
 Costs If The State Substantially Prevails On Appeal And
 Submits A Cost Bill. 14

IV. CONCLUSION 15

TABLE OF AUTHORITIES

Washington State Cases

State v. Calderon, 102 Wn.2d 348, 684 P.2d 1293 (1994) 9

State v. Garza, 99 Wn.App. 291, 994 P.2d 868 (2000)..... 7

State v. Maynard, 183 Wn.2d 253, 351 P.3d 159 (2015) 8

State v. Michielli, 132 Wn.2d 229, 937, P.2d 587 (1997) 7

State v. Oppelt, 172 Wn.2d 285, 257 P.3d 653 (2011) 7

State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995) 7

Statutes

RCW 13.40.300(1)(a) 9

Rules

CrR 8.3 6

RAP 14.2 13

RAP 15.2(f)..... 14

I. ASSIGNMENT OF ERRORS

- A. The Trial Court Erred When It Did Not Dismiss The Charges Against Mr. Williams Under CrR 8.3(b).
- B. This Court Should Not Award Appellate Costs If The State Substantially Prevails On Appeal And Submits A Cost B

ISSUES RELATING TO ASSIGNMENTS OF ERROR

- 1. Did the negligent pre-accusatorial delay violate Mr. Williams' right to due process, justifying dismissal of the charges against him under CrR 8.3(b)?
- 2. Mr. Williams was found indigent for his appeal. Under RAP 15.2(f), should this Court presume the indigency continues and decline to award appellate costs if the State substantially prevails on appeal?

II. STATEMENT OF FACTS

Between September 17, 2013 and February 14, 2014, someone robbed three banks in Clark County, Washington, and six in Oregon. CP 63-64. Each robbery was carried out in the same manner by an individual who presented a demand note to a teller and each time he wore the same color baggy clothing. (11/3/16 RP 17). No weapon was ever displayed. Federal agents investigating

the Oregon bank robberies dubbed the robber the “Short Stack Bandit”. (11/3/16 RP 10;20).

Detectives Knoeppel and Zapata of the Vancouver Police Department investigated the Washington state robberies: Detective Knoeppel investigated the robbery of the IQ Credit Union and Zapata investigated the robbery of the U.S. Bank in Vancouver¹. (11/3/16 RP 15-16).

Witnesses from the IQ Bank made a positive identification of Williams as the robber. (11/3/16 RP 19). Knoeppel obtained a nationwide arrest warrant for Mr. Williams. (11/3/16 RP 29). In her probable cause statement, Detective Knoeppel included information that Mr. Williams was the suspect in the two other robberies that occurred in Clark County in the fall of 2013. CP 45. The prosecutor and defense counsel each had a copy of the probable cause statement. CP 45.

After his apprehension, Mr. Williams entered guilty pleas to the IQ Bank robbery on December 19, 2014, and the Oregon robberies in the U.S. District Court of Oregon on December 11, 2015. CP 63. In a global resolution, state and federal prosecutors

¹ The third Washington bank robbery was investigated by Clark County Detective Hawkinson. (11/3/16 RP 16-17).

and defense counsel agreed to recommend the sentences should be served concurrently. CP 45. The remaining 2 Washington bank robberies were not named in the plea agreement. CP 45-46.

In the meanwhile, Detective Zapata did not follow up on the U.S. Bank robbery investigation. (11/3/16 RP 31-32). He determined that he could go no further with his investigation unless he interviewed Mr. Williams. (11/3/16 RP 29).

Even after Williams was arrested for the Oregon and IQ Bank robberies, Zapata did not interview him. He did not seek a search warrant for Mr. Williams's fingerprints to compare them to prints taken from the demand note left by the robber. (11/3/16 RP 30). Between Spring of 2014 and December 2015, Detective Zapata said he did not investigate the case because he was transitioning into another unit. (11/3/16 RP 34).

In November or December of 2015 Zapata handed the investigation file over to Detective Topaum, who secured a search warrant for the fingerprints. (11/3/16 RP 33). Shortly thereafter, Zapata and Topaum met with Mr. Williams after he had already begun serving his sentence and secured a confession from him for the last of the bank robberies. (11/3/16 RP 33-34).

On March 7, 2016, Clark County prosecutors charged Mr. Williams with two counts of robbery in the first degree. CP 1. Mr. Williams moved for dismissal. CP 6-16. He argued the State should have joined the last two counts in the earlier plea agreement because Detective Zapata's report specifically stated:

In January 2014, Detective Knoepfel and I coordinated with Detective Hawkinson and released information on the Short Stack Bandit to the media. ***As a result, a number of tips came in which allowed us to identify the Bandit as Morgan Brice Williams.***²

CP 8.

Mr. Williams contended the State (law enforcement and the prosecutor) was aware he was the only suspect. He had been identified by a friend as the suspect, and there was a positive identification of him in the other cases. Defense counsel argued on that basis, the language in his earlier plea agreement took on particular significance, as it demonstrated that charges had been withheld:

“If the defendant fails to appear for sentencingor otherwise breaches this agreement....the defendant understands and agrees that the State will be free to make any recommendations it deems appropriate or to refile any dismissed or withheld counts....”

CP 28.

² Reports filed by Detective Zapata and Knoepfel were not entered into evidence but were relied on by the court.

Both trial attorneys filed affidavits stating that they were not aware of the other possible charges when the plea agreement was negotiated. CP 15-16; CP 25-26. However, the court found that both the state and defense counsel *should* have known of the information as it was included in the probable cause statement on file with the court. CP 45. The court specifically quoted the from the probable cause statement:

For Judge Lewis's consideration, ***additional robberies in Clark County were committed by the same suspect using the same modus operandi. He continued to rob banks over the next couple of months*** in both Portland and Gresham, Oregon....

(11/3/16 RP 48-49).

However, the court concluded that because neither party attempted to include the uncharged bank robberies in the plea bargain, there was no agreement not to charge him for them. CP 45-46.

The court also found:

Detective Zapata believed the defendant was the prime suspect for these crimes but did not believe there was sufficient evidence at that time to arrest the defendant or forward the case to the Prosecuting Attorney for charging. The Court agrees with this conclusion, as at the time there was insufficient evidence to warrant arresting or charging the defendant for these offenses.

CP 46.

Mr. Williams contended all potential charges should have been joined under the permissive joinder rule. Failing to join the remaining two robberies with the global resolution was prejudicial to Mr. Williams as it added ten years or more to any sentence.

(11/3/16 RP 12;45).

The court denied the motion to dismiss, concluding, “There is ***no basis to dismiss the charges under CrR 4.3.1, CrR 8.3 or any other applicable law.***” CP 45. (Emphasis added). The matter proceeded to a stipulated facts trial. CP 32-36. The court found Mr. Williams guilty and imposed a 129-month sentence, to run concurrent with the previous sentences. CP 39; 51. Mr. Williams makes this timely appeal. CP 66.

III. ARGUMENT

A. The Trial Court Erred When It Did Not Dismiss The Charges Against Mr. Williams Under CrR 8.3.

Criminal Rule 8.3(b) provides:

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.

The rule authorizes the trial court, on its own motion³, to dismiss a criminal prosecution where a defendant has established either arbitrary action or governmental misconduct, which results in actual prejudice to the defendant. *State v. Michielli*, 132 Wn.2d 229, 240, 937, P.2d 587 (1997). Under CrR 8.3, showing "evil or dishonest conduct" by the State is unnecessary, as case law allows that simple mismanagement can justify dismissal of the charges. *State v. Garza*, 99 Wn.App. 291, 295, 994 P.2d 868 (2000). Pre-accusatorial delay under CrR 8.3(b) is a "subcategory of governmental misconduct under CrR 8.3(b)." *State v. Oppelt*, 172 Wn.2d 285, 297, 257 P.3d 653 (2011).

Unexcused intentional or negligent pre-accusatorial delay, which cause actual prejudice to a criminal defendant violates due process rights, guaranteed under the Washington State Constitution Article 1, s. 3, and the United States Constitution, Amend. 14. *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995).

³ At the superior court trial counsel did not specifically state CrR 8.3(b) as the basis for dismissal. However, the trial Judge must have considered it as a basis for dismissal because he made a specific finding there was no basis for dismissal under CrR 8.3.

Violating the “fundamental conceptions of justice which lie at the base of our civil and political institutions” entitles the defendant to a dismissal of the charges. *Oppelt*, 172 Wn.2d. at 288-89;292.

Whether due process rights are violated by a pre-accusatorial delay is a question reviewed *de novo*. *State v. Maynard*, 183 Wn.2d 253, 259, 351 P.3d 159 (2015).

The analysis for a due process violation is set out in *Oppelt*:

(1) the defendant must show actual prejudice from the delay;

(2) if the defendant shows prejudice, the court must examine the reasons for the delay; and

(3) the court must weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution. *Oppelt*, 172 Wn.2d at 295-96.

The Court examines the entire record to determine prejudice and to balance the delay against the prejudice. *Id.* at 290.

Here, the actual prejudice to Mr. Williams is significant. Mr. Williams entered a guilty plea for the IQ bank robbery in December 2014. If he had been timely charged and the two outstanding robberies had been included in the global resolution with the U.S.

District Court attorney, his offender score would have been “5”⁴.

The standard range sentence would have been 57-75 months, and likely served concurrently with the federal sentence. However, because of the late filing of charges, his offender score at the time of this matter was over 9, resulting in a standard range of 129-171 months, over twice that of what would have been the original sentence. CP 28; 54. There were no intervening crimes.

In *Maynard*, the Court noted that a defendant had no constitutional right to be tried as a juvenile, but recognized that juvenile court offered some important benefits to a youthful offender, including more lenient penalties. *Maynard*, 183 Wn.2d at 259; *State v. Calderon*, 102 Wn.2d 348, 352, 684 P.2d 1293 (1994). If a juvenile court does not extend jurisdiction beyond the youth’s 18th birthday, those benefits are lost. RCW 13.40.300(1)(a). Where a youth can show pre-accusatorial delay caused the loss of the juvenile court jurisdiction, the burden to show actual prejudice is met. *Maynard*, 183 Wn.2d at 259-60.

⁴ Mr. Williams had no prior criminal history. Two of the convictions would have been multiplied by two (under other current convictions) and one conviction added to attain a score of ‘5’. RCW 9.94A.525(8).

Even if it were unlikely a juvenile court would have retained jurisdiction, the delay resulting in the juvenile's **lost opportunity to argue** against declination and prevention of the court from making the jurisdictional decision met the minimal prerequisite of prejudice. *Calderon*, 102 Wn.2d 352-53.

Similarly, here, the State's delay in filing charges on all three counts arguably resulted in a lost opportunity for Mr. Williams to negotiate to have them included in the global resolution and the full time served concurrently. While the court here ordered the latest convictions to be served concurrently with the earlier resolved convictions, Mr. Williams not only has a longer sentence, but the concurrent time did not begin until after the latest sentencing. Mr. Williams has established the minimal prerequisite of prejudice.

To find a due process violation, the Court must next consider the State's reasons for the delay. *Calderon*, 102 Wn.2d at 353. The State's reason for a delay in charging rested on Zapata's testimony he had no positive identification of Williams by witnesses at the bank and he could not interview Mr. Williams after his arrest because he heard through a third party he had invoked his right to silence.

The third prong of the analysis directs the Court to examine the entire record and weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution. *Oppelt*, 172 Wn.2d at 295-96.

Here, Mr. Williams was the prime, and apparently only suspect. Zapata's police report indicated that in 2014, through tips from the public, Mr. Williams was identified as the Short Stack Bandit. Zapata had a positive identification from Mr. Williams' friend that he was the individual who robbed the banks. Zapata had the demand note with the suspect's fingerprints on it, but did not bother to obtain a search warrant even after Mr. Williams had been arrested for the other robbery. He let the case sit idle for over a year and a half because he was busy with other duties. When he eventually handed off the case to another detective, a search warrant was immediately granted and the finger prints matched Mr. Williams.

The explanation for why law enforcement did not follow up on the investigation, and the prosecutor's failure to bring charges when he should have known Mr. Williams was the only suspect in a string of bank robberies amounts to negligence.

Here, the trial court entered Finding of Fact 2:

Detective Barbara Knoepfel determined that she had probable cause to believe the defendant had committed one of the robberies that had occurred on October 29, 2013. Det. Knoepfel completed a probable cause statement and referred the case to the Clark County Prosecuting Attorney for charging. The Clark County Superior Court later issued an arrest warrant for the defendant in Cause No. 14-1-00384-6. The defendant was eventually arrested on that warrant and lodged in the Clark County jail. ***The prosecuting attorney that issued the affidavit for the warrant was the same attorney that was assigned to the case after the defendant was arrested.***

CP 45.(Emphasis added).

And Finding of Fact 3:

Det. Knoepfel's probable cause statement contained information that the defendant was also a suspect in two other bank robberies that had occurred in Clark County in the fall of 2013. ***The State and the defendant's trial counsel should have known of this information as it was included in the probable cause statement on file with the court.***

CP 45 (Emphasis added).

The court specifically quoted from the probable cause statement:

For Judge Lewis's consideration, ***additional robberies in Clark County were committed by the same suspect using the same modus operandi.*** He continued to rob banks over the next couple of months in both Portland and Gresham.

(11/3/16 RP 48-49).

Simply put, the first probable cause statement identified Mr. Williams as the person who should be arrested because he had

committed the robberies. In Zapata's police report he stated that through tips he and Detective Knoedell received from the public, they identified the Short Stack Bandit as Mr. Williams. CP 8. The prosecutor who issued the affidavit for the first warrant also prosecuted the case. Although both the State and defense counsel denied awareness that Mr. Williams was the prime and only suspect in the robberies, the court notably found that all parties ***should have known*** the information. "Should have known" is the language of liability and standard for negligence.

The reasons presented by the State for the pre-accusatorial delay do not outweigh the prejudice to Mr. Williams' opportunity to negotiate for a global resolution of all the charges. Such a resolution would have allowed him to serve his sentence with a much lower offender score range. His sentence would have been served concurrently starting at a much earlier date, rather than almost two years with no overlap.

The trial court should have dismissed these charges under CrR 8.3. Violating the "fundamental conceptions of justice which lie at the base of our civil and political institutions" entitles the defendant to a dismissal of the charges. *Oppelt*, 172 Wn.2d. at 288-89;292.

B. Under RAP 15.2(f) This Court Should Not Award Appellate Costs If The State Substantially Prevails On Appeal And Submits A Cost Bill.

Under Rule of Appellate Procedure (RAP) 14.2, a commissioner or clerk of the appellate court will award costs to the party that substantially prevails on appeal, unless the appellate court directs otherwise in its decision terminating review, or the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

Where the trial court has entered an order that a criminal defendant is indigent for purposes of appeal, the finding of indigency remains in effect, under RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved.

Under RAP 15.2(f), "the appellate court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent."

Here, the trial court found Mr. Williams qualified for an indigent defense on appeal. CO 82. At sentencing, the court

imposed only the mandatory legal financial obligations. CP 57.
Under the rules of appellate procedure, this Court presumes continued indigency. Even if the State were to substantially prevail on appeal, this Court should continue to give Mr. Williams the benefits of the order of indigency and deny any cost bill submitted by the State.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Williams respectfully asks this Court to reverse the trial court and remand with instructions to dismiss the charges with prejudice.

Respectfully submitted June 30, 2017

Marie Trombley
Marie Trombley/WSBA 41410
Attorney for Morgan Williams
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Morgan B. Williams do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on June 30, 2017

Morgan B. Williams/DOC#379599
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

And I electronically served the same, by prior agreement between the parties, Clark County Prosecuting Attorney (at prosecutor@clark.wa.gov).

Marie Trombley
Marie Trombley, WSBA 41410
P.O. Box 829
Graham, WA 98338
marietrombley@comcast.net
253-445-7920

MARIE TROMBLEY

June 30, 2017 - 4:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49749-2
Appellate Court Case Title: State of Washington, Respondent v Morgan Brice Williams, Appellant
Superior Court Case Number: 16-1-00559-4

The following documents have been uploaded:

- 5-497492_Briefs_20170630160507D2498622_7503.pdf
This File Contains:
Briefs - Appellants
The Original File Name was WILLIAMS AOB 497492.pdf

A copy of the uploaded files will be sent to:

- Anne.cruser@Clark.wa.gov
- CntyPA.GeneralDelivery@clark.wa.gov
- prosecutor@clark.wa.gov

Comments:

Sender Name: Marie Trombley - Email: marietrombley@comcast.net
Address:
PO BOX 829
GRAHAM, WA, 98338-0829
Phone: 253-445-7920

Note: The Filing Id is 20170630160507D2498622