

NO. 49749-2-II

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

STATE OF WASHINGTON, Respondent

v.

MORGAN BRICE WILLIAMS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00559-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not abuse its discretion in denying Williams' motion to dismiss pursuant to CrR 8.3(b).**
- II. Williams' due process rights were not violated by any preaccusatorial delays by the State.**
- III. The State does not intend to seek a cost bill.**

STATEMENT OF THE CASE

The State charged Morgan B. Williams (hereafter "Williams") with two counts of robbery in the first degree for incidents occurring at two separate banks in Clark County on September 17, 2013 and November 5, 2013. CP 1-2. The State filed its original information on March 7, 2016. CP 1-2. The September 17, 2013 robbery was investigated by Vancouver Police Department (hereafter "VPD") Detective Lawrence Zapata. RP 15. The November 5, 2013 robbery was investigated by the Clark County Sheriff's Department. RP 16.

Williams committed another robbery at a Clark County bank on October 29, 2013 that was investigated by VPD Detective Barbara Knoeppel. RP 16, 20. Between November 25, 2013 and February 24, 2013 Williams also committed six bank robberies in Oregon. CP 63; RP 17. The Oregon bank robberies were investigated by the Portland Police Bureau and the FBI. RP 17.

Detective Zapata's initial investigation of the September 17, 2013 robbery included reviewing surveillance footage and obtaining a demand note used by the suspect. RP 15-16. Detective Zapata believed the best method for identifying the suspect was through the video surveillance. RP 18. However, the surveillance footage was not clear and did not allow Detective Zapata to identify the suspect. RP 18. He also wanted to see if the bank employees could identify the suspect. RP 18. Detective Zapata presented a photo lay-down that included a photo of Williams to the employees of the bank, but the employees were unable to identify the suspect from the lay-down. RP 19-20. If a suspect had been identified then he wanted a confession from the identified person. RP 18. There was also an identifiable impression on the demand note, but the lab was unable to make a fingerprint comparison without fingertip prints and side of handprints. RP 24

During Detective Zapata's investigation, information was shared between himself and the other law enforcement officers and agencies that were investigating Williams' eight other bank robberies. RP 18-19. There were similarities between the robberies, including the suspect wearing similarly colored baggy clothing and using a demand note. RP 17. However, nothing was distinctive about the suspect(s) and using a demand note was not an uncommon method of bank robberies. RP 17. Detective

Zapata, Knoppel, the Clark County Sheriff's Office, and the FBI released information asking for tips in apprehending the suspect in these robberies, who they nicknamed "the short stack bandit." RP 27. In response to this request, a tip came in identifying Williams as the robber. RP 20, 29.

Detective Zapata suspected Williams was the robber in his case, because of the similarities with the other robberies and based on what he could see on the surveillance video. RP 20-21. However, Detective Zapata did not have enough information to say with certainty that Williams was the robber in his case. RP 21. Even with the tip and the information from the other cases, Detective Zapata felt he could go no further in his investigation without interviewing Williams, who was currently at-large. RP 29. Detective Zapata never referred charges to the Clark County Prosecuting Attorney's Office, nor contacted any Deputy Prosecutors. RP 21-22. He never referred charges against Williams because he did not believe he had sufficient evidence for an arrest warrant, let alone for a successful prosecution. RP 22.

During the investigation of the October 29, 2013 robbery, Detective Knoppel was ultimately able to identify Williams as the suspect. RP 19, 20. She presented a photo lay-down to several employees of that bank, and they were able to identify Williams as the robber. RP 19-20. Detective Knoppel received an arrest warrant for Williams, and he was

ultimately arrested and charged for the October 29, 2013 bank robbery. RP 22. Williams was extradited to Oregon after being arrested on the warrant for the October 29, 2013 robbery, and an attempt was made to interview him about all of the robberies he was a suspect in. RP 22-23. However, Williams invoked his right to remain silent, and Detective Zapata did not question Williams about the September 17, 2013 and November 5, 2013 Clark County bank robberies. RP 23.

Detective Knoppel wrote a probable cause declaration for the October 29, 2013 robbery that contained information that Williams was a suspect in the two other Clark County bank robberies. CP 45. Williams ultimately pleaded guilty to the October 29, 2013 bank robbery on December 19, 2014 as part of a global resolution that included guilty pleas to the six Oregon bank robberies. CP 45, 63. The Oregon guilty pleas took place on December, 11 2014. CP 63.

Between the spring of 2014 and late 2015 Detective Zapata was transitioning roles in VPD, and was assigned to investigate homicides and officer-involved shootings. RP 23. In late 2015, Detective Zapata transferred the investigation of the September 17, 2013 robbery to VPD Detective Tom Topaum. RP 24. Detective Topaum took over the lead in the investigation. RP 25, 33. Detective Topaum secured a search warrant for Williams' fingerprints near this time. RP 33. Detectives Topaum and

Zapata interviewed Williams in February of 2016 while he was in prison serving his sentences on the October 29, 2013 Clark County robbery and the six Oregon robberies. RP 25, 33, 51. Williams admitted to the September 17, 2013 and November 5, 2013 bank robberies during this interview. RP 34. After the interview, Detective Topaum referred robbery in the first degree charges for the September 17, 2013 and November 5, 2013 bank robberies to the Clark County Prosecuting Attorney's Office. RP 25.

Williams filed a motion to dismiss the charges in this case pursuant to CrR 8.3 and CrR 4.3. CP 6-14. Williams argued that the State failed to join these charges with the earlier Washington and Federal robbery charges he previously pleaded guilty to, and that failing to timely charge these two robberies breached the 2014 global plea agreement. CP 10-11. He also argued that this failure prejudiced his rights to due process. CP 11. As part of the motion to dismiss, Williams' attorney for the case involving the October 29, 2013 robbery filed an affidavit indicating he was unaware of the other two Clark County robberies Williams was a suspect in. CP 16. The assigned prosecutor to the October 29, 2013 case also filed an affidavit indicating he was unaware of any other prosecutable bank robberies at the time the pretrial offer was negotiated and accepted. CP 25.

The trial court denied Williams' motion to dismiss and found that there was insufficient evidence to charge Williams' with the two other Clark County robberies at the time the October 29, 2013 robbery was charged. CP 46-47. The trial court also found that the defense attorney and prosecutor of the October 29, 2013 robbery case should have known Williams was a suspect in the other two Clark County robberies, because both attorneys had access to Detective Knoppel's probable cause declaration indicating Williams was a suspect in the other robberies. RP 48-49; CP 45. Furthermore, the trial court found that at the time the October 29, 2013 robbery was charged, there had not been a positive identification of Williams in the other two robberies (although he was a prime suspect), there was no physical evidence, and the surveillance photos were not effective. RP 50, 51. The trial court also noted that the information needed for law enforcement to charge Williams with the two other robberies was not known until after the interview in February of 2016. RP 51.

Williams proceeded to a stipulated facts bench trial on November 22, 2016. RP 52, 61. Williams stipulated to his involvement in both the September 17, 2013 and November 5, 2013 bank robberies. CP 33-36. The trial court found the defendant guilty on both counts. RP 69-71; CP 37-40. The defendant was sentenced to the low end of his sentencing range, 129

months, and the sentence was run concurrently with his prior robbery convictions. CP 54-55. This timely appeal follows.

ARGUMENT

I. The trial court did not abuse its discretion in denying Williams' motion to dismiss pursuant to CrR 8.3(b).

Williams claims that the trial court erred when it denied his motion to dismiss under CrR 8.3(b). Williams claims that he was prejudiced when the September 17, 2013 and November 5, 2013 robberies were not included in the global resolution that he pleaded guilty to for the October 29, 2013 and six Oregon robberies. However, the trial court did not err in denying the motion to dismiss, because there was no governmental misconduct by the State, nor actual prejudice to Williams. His claim fails.

A trial court's decision to grant or deny a motion to dismiss under CrR 8.3(b) is reviewed for abuse of discretion. *City of Seattle v. Clewis*, 159 Wn.App. 842, 849, 247 P.3d 449 (2011)¹. In general, a trial court's power to dismiss is discretionary and is reviewable only for manifest abuse of discretion. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993) (citing *State v. Dailey*, 93 Wn.2d 454, 456, 601 P.2d 357 (1980)). A trial court abuses its discretion when its exercise of discretion

¹ *Clewis* reviewed a District Court case dealing with CrRLJ 8.3(b), however the language of CrR 8.3(b) and CrRLJ 8.3(b) are identical. Because of that, cases analyzing CrRLJ 8.3(b) are applicable to this case.

is manifestly unreasonable or based on untenable grounds or for untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615, 624 (1995) (quoting *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984)). The abuse of discretion standard was further laid out by the Supreme Court of Washington in *State v. Lamb*:

A court's decision “is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). “A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *Id.* The “untenable grounds” basis applies “if the factual findings are unsupported by the record.” *Id.*

State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27, 30-31 (2012).

A trial court’s power to dismiss a criminal case with prejudice is set forth in CrR 8.3(b). Under CrR 8.3(b), a court “has discretion to dismiss a criminal prosecution that is tarnished by governmental misconduct if the misconduct prejudice[s] the Defendant’s right to a fair trial.” *City of Seattle v. Holifield*, 170 Wn.2d 230, 236, 240 P.3d 1162 (2010). CrR 8.3(b) states that:

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.

When a trial court considers whether or not to dismiss a case with prejudice under CrR 8.3(b), the court must determine “(1) whether there has been any governmental misconduct or arbitrary action, and (2) whether there has been prejudice to the rights of the accused.” *State v. Koerber*, 85 Wn. App. 1, 4, 931 P.2d 904 (1996).

A trial court’s authority to dismiss with prejudice under CrR 8.3(b) is limited to “truly egregious cases of mismanagement or misconduct by the prosecutor.” *Id.* at 5. “Dismissal is an extraordinary remedy, one to which a trial court should turn only as a *last resort*.” *Holifield*, 170 Wn.2d at 237 (quoting *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003) (emphasis added)). Furthermore, “trial courts should consider intermediate remedial steps before ordering the extraordinary remedy of dismissal.” *Id.* “Absent a finding of prejudice to the Defendant, dismissal of a criminal case is not warranted.” *Koerber*, 85 Wn. App. at 5. The prejudice to a Defendant must have materially affected his or her right to a fair a trial, and absent that level of prejudice, dismissal is unwarranted. *State v. Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). A Defendant must show that actual prejudice, not merely speculative prejudice, affected his or her right to a fair trial. *State v. Kone*, 165 Wn. App. 420, 433, 266 P.3d 916 (2011).

a. *Williams fails to establish government misconduct or mismanagement by the State.*

Governmental conduct “need not be of an evil or dishonest nature,” and simple mismanagement is sufficient to constitute misconduct under CrR 8.3(b). *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997) (quoting *Blackwell*, 120 Wn.2d at 831). Absent a showing of arbitrary action or governmental misconduct, a trial court cannot dismiss charges. *Michielli*, 132 Wn.2d at 240. The rule “is designed to protect against government misconduct, and not to grant courts the authority to substitute their judgment for that of the prosecutor.” *Id.* at 240 (quoting *State v. Cantrell*, 111 Wn.2d 385, 390, 758 P.2d 1 (1988); and *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975)).

“Preaccusatorial delay is “a subcategory of government misconduct under CrR 8.3(b)”, and is reviewed under the abuse of discretion standard. *State v. Oppelt*, 17 Wn.2d 285, 297, 257 P.3d 653 (2011). In *Oppelt*, an officer wrote an investigative report for a sexual assault of a child and forwarded the report to the prosecutor’s office. *Id.* at 288-89. Almost six years after the report was filed, a Child Protective Services worker inquired about the case and charges were then filed and the defendant was ultimately convicted. *Id.* at 289. The defendant filed a motion to dismiss the charges against him under CrR 8.3(b) alleging that

the preaccusatorial delay caused him to lose relevant evidence, because the victim's grandmother could no longer remember what brand of lotion she gave to the victim after the assault². *Oppelt*, 17 Wn.2d at 289.

The trial court found that the State was negligent in the delay, that the grandmother's lack of memory caused actual prejudice to the defendant, but that it was not severe enough to warrant dismissal. *Id.* The Supreme Court upheld the trial court under CrR 8.3(b) and held that the trial court did not abuse its discretion and that the defendant received a fair trial. *Id.* at 298. The Court reasoned that "even where a defendant shows some actual prejudice and State misconduct, the judge may in her discretion refuse to dismiss under CrR 8.3(b) if the actual prejudice is slight and the misconduct is not too egregious." *Id.* at 297-98.

There is a distinct lack of negligence by the State in this case in comparison to *Oppelt*. In *Oppelt*, a report was submitted to the prosecutor's office and nothing was done with it for six years. *Id.* at 289. Whereas here, Detectives never submitted reports to the prosecutor's office in regards to the investigation into the September 17, 2013 and

² The facts of *Oppelt* were that the defendant twice rubbed the victim's genitals with his fingers, causing the victim pain. The victim first complained to her grandmother who gave her lotion to put on her genitals. The grandmother later took the victim to a nurse who observed redness and swelling. Another examination a week later showed a significant decrease in swelling. This loss of memory prevented the defendant from definitively arguing that the redness and swelling was caused by a reaction to that lotion. *Oppelt*, 17 Wn.2d at 289.

November 5, 2013 bank robberies until after Williams pleaded guilty to the other seven charges and confessed. RP 21-22, 34. Before pleading to the other seven robberies and confessing to these two robberies, charges were never referred against Williams because Detective Zapata did not believe he had sufficient evidence for an arrest warrant, let alone for a successful prosecution. RP 22. There was no six year delay in reviewing a report in this case. Instead, the State lacked the information and evidence to charge Williams during an on-going investigation that finally completed after his confessions. This is not negligence under *Oppelt*. Because of the lack of negligence on the part of the State in this case, there was no misconduct under CrR 8.3(b).

The State is unaware of any case law requiring the prosecutor to be aware of all possible charges against a defendant when he is charged with a crime, even when law enforcement has yet to refer to charges. This is the misconduct and mismanagement on the part of the State that Williams is alleging in this case³. If this were deemed mismanagement under CrR 8.3(b), it would result in the State needing to affirmatively search out all possible crimes a defendant may have committed and charge them to avoid dismissal. Rather than promoting judicial economy, this would lead

³ Williams argues that the State should have charged him with the September 17, 2013 and November 5, 2013 bank robberies at the time he was charged with the October 29, 2013 bank robbery, because he was referenced as a suspect in those two robberies in the probable cause declaration for the October 29, 2013 bank robbery. CP 45.

to the filing of uninvestigated and potentially spurious charges. Such a result is impractical and unsupported under the law, and further cuts against Williams claim of misconduct and mismanagement.

Furthermore, a trial court's authority to dismiss with prejudice under CrR 8.3(b) is limited to "truly egregious cases of mismanagement or misconduct by the prosecutor," but this showing is lacking in this case. *See Koerber*, 85 Wn. App. at 5. There was nothing egregious about the State's actions in this case, which were simply not filing charges that had not yet been referred to them by law enforcement.

Cases finding egregious misconduct warranting dismissal have all dealt with the State withholding evidence, violating court orders, or mismanagement that forced a defendant to be unprepared for trial. See *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990) (where the State failed to provide discovery that they had agreed to produce, failed to file a motion to reconsider discovery after the scheduled trial date, filed an amended information after the scheduled trial date, failed to produce a separate witness list, and attempted to add an expert witness on the day of trial); *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009) (where the State did not disclose the victim statement until the day before trial, failed to provide the Defendant's statements and the lead officer's report, and never subpoenaed the victim for trial). Here, the State's actions fall well

short of this type of mismanagement or misconduct, because they did not result in actual prejudice to Williams.

b. Williams fails to establish any actual prejudice caused by the State's actions.

Williams is also required to establish that the alleged misconduct by the State caused him actual prejudice, but he fails to establish this. Even if there is sufficient misconduct or arbitrary action under the rule, actual prejudice must result from those actions to warrant the extraordinary remedy of a dismissal with prejudice. *Koerber*, 85 Wn. App. at 5-6. "To justify dismissal, the Defendant must show actual prejudice; the mere possibility of prejudice is insufficient." *State v. Krenik*, 156 Wn. App. 314, 320, 231 P.3d 252 (2010) (citing *State v. Stein*, 140 Wn. App. 43, 56, 165 P.3d 16 (2007), *review denied*, 163 Wn.2d 1045, 187 P.3d 271 (2008)). Misconduct prejudices a Defendant, and warrants a dismissal, when a Defendant is forced to choose between his speedy trial rights and his right to effective counsel who has had the opportunity to adequately prepare a material part of the defense. *Brooks*, 149 Wn. App. at 387. "The Defendant, however, must prove by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of

these rights.” *Id.* (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Dismissal is only appropriate when the prejudice materially affects a defendant’s right to a fair trial, and that prejudice cannot be remedied by granting a new trial. *State v. Baker*, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970). “Mere expense and inconvenience, or additional delay within the speedy trial period, do not meet (the test for actual prejudice); the misconduct must interfere with the Defendant’s ability to present his case.” *Clewis*, 159 Wn. App. at 851. It is an abuse of discretion to dismiss a case without finding actual prejudice. *Koerber*, 85 Wn. App. at 6.

When preaccusatorial delay is alleged to be the misconduct under CrR 8.3(b) the defendant must still show actual, rather than speculative, prejudice. *State v. McConville*, 122 Wn. App. 640, 646, 94 P.3d 401 (2004). Actual prejudice is therefore something that affects a defendant’s right to a fair trial; not the length of punishment he receives.

Here, Williams fails to allege or show any actual prejudice caused by the delay in filing charges for the September 17, 2013 and November 5, 2013 bank robberies. His argument is simply that the delay in charging the bank robberies increased his offender score, thus resulting in a higher sentence than if he pleaded guilty to all the bank robberies at once. This is not prejudice under CrR 8.3(b). There is no allegation that he lost

evidence, as in *Oppelt*. 17 Wn.2d 285. Nor is there any evidence that he was unprepared for trial or was forced to waive his right to speedy trial to prepare for trial, as was the case in *Sherman and Brooks*. *Sherman*, 59 Wn. App. 763; *State v. Brooks*, 149 Wn. App. 373. Williams fails to allege any actual prejudice, and his claim fails.

Dismissal under CrR 8.3(b) is an extraordinary remedy, and one that was not appropriate in this case. Williams fails to establish any misconduct or mismanagement on the part of the State. And even if he did, he fails to allege any actual prejudice. The trial court did not abuse its discretion in denying Williams' motion to dismiss, and Williams' convictions should be upheld.

II. Williams' due process rights were not violated by any preaccusatorial delays by the State.

Williams also argues that the preaccusatorial delay by the State denied him due process under Article 1, section 3 of the Washington Constitution and the 14th Amendment of the United States Constitution. Williams alleges that the preaccusatorial delay in bringing charges against him for the September 17, 2013 and November 5, 2013 bank robberies caused him prejudice. However, Williams is required to establish that the preaccusatorial delay resulted in actual prejudice to him and he fails to do so. His claim fails.

“Whether due process rights are violated by a preaccusatorial delay is a question [reviewed] de novo.” *Oppelt*, 17 Wn.2d at 290; citing *State v. Salavea*, 151 Wn.2d 133, 138-39, 86 P.3d 125 (2004) (citing *State v. Warner*, 125 Wn.2d 876, 883, 889 P.2d 479 (1995)). To succeed on a preaccusatorial delay claim, a defendant must satisfy a three part test:

- (1) the defendant must show actual prejudice from the delay;
- (2) if the defendant shows prejudice, the court must determine the reasons for the delay;
- (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution.

Oppelt, 17 Wn.2d at 295 (internal reference omitted). “The court will only reach the second part of the test if the defendant established prejudice.” *McConville*, 122 Wn. App. at 646; citing *State v. Norby*, 122 Wn.2d 258, 264, 858 P.2d 210 (1983). This analysis is similar to the CrR 8.3(b) analysis, therefore a defendant must establish prejudice that affects his right to a fair trial. *Oppelt*, 17 Wn.2d at 297; *McConville*, 122 Wn. App. at 646. A defendant must be able to establish that he cannot receive a fair trial. *Oppelt*, 17 Wn.2d at 296.

Here, Williams fails to establish that he suffered any actual prejudice from the preaccusatorial delay. As stated above, the prejudice alleged by Williams is that he received a longer sentence because of the delay in bringing charges against him. This is not actual prejudice under a

due process analysis, because it did not affect his right to a fair trial, nor did it prevent him from receiving a fair trial.

Williams cites to *State v. Maynard*, 183 Wn.2d 253, 351 P.3d 159 (2015), in support of his claim that the preaccusatorial delay in this case caused him prejudice. However, *Maynard* is inapplicable to the present case as it dealt with the loss of juvenile court jurisdiction resulting from a delay in the State filing charges. *Id.* at 259-60. Cases dealing with preaccusatorial delays that result in charges being filed in adult versus juvenile court have a presumption of prejudice, because “offenders fulfil their burden of proof when preaccusatorial delay causes a loss of juvenile court jurisdiction.” *State v. Salavea*, 151 Wn.2d 133, 139, 86 P.3d 125 (2004). This presumption is unique to juvenile court matters, therefore the prejudice finding in *Maynard* is inapplicable to this case where there is no allegation that the delay in charging Williams resulted in a loss of juvenile court jurisdiction.

Williams must show that the preaccusatorial delay in this case resulted in actual prejudice: that he was deprived the right to a fair trial. Williams has failed to establish this, and he therefore has failed to establish a due process violation. His claim fails.

III. The State does not intend to seek a cost bill.

The State does not intend to seek a cost bill in this case in the event it substantially prevails on appeal. Williams' argument is therefore moot.

CONCLUSION

The trial court did not abuse its discretion in denying Williams' motion to dismiss pursuant to CrR 8.3. There was no misconduct or mismanagement by the State, nor was there actual prejudice to Williams' right to a fair trial. Furthermore, Williams' due process rights were not violated by any delay in filing charges for the September 17, 2013 and November 5, 2013 bank robberies. Williams has not shown any error which requires reversal. This Court should affirm Williams' convictions for two counts of robbery in the first degree.

DATED this 29 day of August, 2017.

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