

**NO. 49968-I-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Appellant,**

**vs.**

**BLAKE ANDREW CROCY,**

**Respondent.**

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**OPENING BRIEF OF APPELLANT**

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**THOMAS A. LADOUCEUR**  
**W.S.B.A #19963**  
**Chief Criminal Deputy Prosecutor**  
**for Respondent**

**Hall of Justice**  
**312 SW First**  
**Kelso, WA 98626**  
**(360) 577-3080**

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## **I. ASSIGNMENT OF ERROR**

THE TRIAL COURT ERRED IN ENTERING SUA SPONTE AN ORDER OF DISMISSAL.

## **II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

WHETHER AN AFFIDAVIT OF PREJUDICE WAS WAIVED WHEN NO PARTY BROUGHT THE AFFIDAVIT TO THE ATTENTION OF THE DISQUALIFIED JUDGE WHO THEN HEARD THE MATTER ON NUMEROUS OCCASIONS.

## **III. STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

By information filed on March 18, 2015, the defendant was charged with theft in the second degree-domestic violence, trafficking in stolen property in the first degree, and theft in the third degree. CP 6. The state filed a motion and affidavit of prejudice removing the Hon. Judge Gary Bashor on March 18, 2015. CP 8. The defendant later entered into the Cowlitz County Drug Court program. See Agreement for Entry into Drug Court filed on April 4, 2016. CP 26. As part of the defendant's participation in the drug court program, he appeared 10 times on drug court dockets before Judge Bashor. Specifically, he appeared before Judge Bashor on April 7, 2016, April 14, 2016, April 21, 2016, April 28, 2016, May 5, 2016, May 26, 2016, July 7, 2016, August 11, 2016, September 1, 2016 and September 22, 2016. At these court appearances neither the state nor the

defense objected to Judge Bashor hearing the matter, or even brought the affidavit of prejudice to his attention.

On December 14, 2016, Superior Court Judge Stephen Warning issued the following Findings, Conclusions, and Order. CP 32.

Findings of fact:

1. On March 18, 2015 the prosecuting attorney filed an affidavit of prejudice against Judge Bashor, the presiding judge in the Cowlitz County drug court.
2. On April 4, 2016 the parties agreed that the defendant should enter the Cowlitz County Drug Court program, and his entry into the program was approved by Judge Haan on that date. As a condition of entry into that program the defendant waived a number of rights and admitted to facts sufficient to convict him of the charged offenses.
3. Since that time the defendant has participated in the Drug Court program and been generally successful. His case was handled by Judge Bashor despite the Affidavit of Prejudice as neither party brought the fact of the affidavit to his attention. In October of 2016 Judge Bashor became aware of the existence of the Affidavit of Prejudice filed by the state. The delay in discovery of that affidavit was not due to any inappropriate conduct on the

part of any party. The judge in Drug Court does not see the court file when reviewing cases in Drug Court, and the paper docket does not note the presence of an Affidavit of Prejudice.

4. Since that time Judge Bashor has not participated in the defendant's case.
5. This court does not have the resources to create or conduct a Drug Court program with another judge.

Conclusions of law:

1. All actions and decisions by Judge Bashor in this case, prior to being made aware of the existence of that affidavit, were proper and binding on the parties. *State v. Smith*, 13 Wn App 859 (1975).
2. "No judge of a Superior Court of the state of Washington shall sit to hear or try any action or proceeding which shall be established as hereinafter provided that said judge's prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause." RCW 4.12.040 As Judge Bashor is now aware of the affidavit of prejudice, he may not hear this matter.
3. It has been suggested that the prosecutor may selectively waive their Affidavit of Prejudice, precluding Judge Bashor from hearing some portions of a case but allowing him to hear others. This is certainly not contemplated by the statute. Further, it would give a party an

inappropriate tactical advantage if they were permitted to exercise such an affidavit sporadically. The deputy prosecutor has filed an affidavit, sworn under oath, stating that they cannot "receive a fair trial and impartial trial in this case before the Hon. Judge Bashor."

They are bound by that affirmation.

4. Because of the existence of the Affidavit of Prejudice, the defendant may not continue to participate in the Drug Court program.
5. One of the rights waived by the defendant in order to participate in that program was his right to a speedy trial. Even a resolution of this matter which precluded any use of his waivers and admissions would still prejudice his right to a speedy trial.
6. The only remedy which protects the rights of the defendant is a dismissal. This works no harm against the State, as a dismissal would be the outcome of a successful completion of the program by the defendant.

Order:

This case is dismissed, with prejudice.

#### IV. ARGUMENT

Under CrR 8.3, 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. This power to dismiss is discretionary and is subject to the abuse of discretion standard. State v. Dailey, 93 Wash.2d 454, 456, 610 P.2d 357 (1980). Abuse of discretion occurs when trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Blackwell, 120 Wash. 2d 822, 845 P.2d 1017 (1993). Decision is based on “untenable grounds” or made for “untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. State v. Rohrich, 149 Wash. 2d 647, 71 P.3d 638 (2003). An abuse of discretion can also be found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. State v. Lord, 161 Wash. 2d 276, 284, 165 P.3d 1251, 1256 (2007).

Dismissals under this rule have been upheld in relatively narrow categories of cases, such as constitutional violations and governmental misconduct. State v. Getty, 55 Wash. App. 152, 154, 777 P.2d 1, 2 (1989).

The dismissal of charges under CrR 8.3(b) is an ‘extraordinary remedy.’ State v. Kone, 165 Wash. App. 420, 432, 266 P.3d 916, 922 (2011), as amended (Dec. 27, 2011) citing State v. Rohrich, 149 Wash.2d 647, 658, 71 P.3d 638 (2003) (quoting State v. Baker, 78 Wash.2d 327, 332, 474 P.2d 254 (1970)).

The state argues that Judge Warning's ruling that the affidavit of prejudice had not been waived and thus Judge Bashor could not continue to hear the matter was based on an erroneous view of the law. Further, it appears that Judge Warning believed not only that the affidavit of prejudice in this case had not been waived but also that it could not be waived.

Several cases hold that after an affidavit of prejudice is filed it can later be waived. In State v. Smith, 13 Wash. App. 859, 860, 539 P.2d 101, 102 (1975), the defendant timely filed an affidavit of prejudice against Clallam County Superior Court Judge Chamberlin. A different judge heard the case and sentenced defendant, placing him on probation. Smith was later arrested for probation violations, and a probation revocation hearing was heard before Judge Chamberlin, who revoked defendant's probation and sentenced him.

On appeal Smith argued that the mere existence of an affidavit of prejudice in the court file should have prevented Judge Chamberlin from presiding at the revocation hearing. The Smith court disagreed, holding,

Normally, an affidavit of prejudice has the effect of divesting a judge of all authority to proceed further into the merits of the action. *State v. Dixon*, 74 Wash.2d 700, 446 P.2d 329 (1968). However, the situation in the instant case is similar to that before the court in *Bargreen v. Little*, 27 Wash.2d 128, 177 P.2d 85 (1947), where an affidavit of prejudice was timely filed but not brought to the attention of the trial judge before the litigation was commenced.

The court in *Bargreen* concluded that going to trial before the challenged judge without objection, introducing testimony, and arguing on the merits without bringing the affidavit of prejudice to the attention of the challenged judge, constituted waiver of any rights created by the affidavit. *Bargreen v. Little*, supra 27 Wash.2d at 132, 177 P.2d 85. Although the instant case concerns a hearing subsequent to trial, and although Judge Chamberlin at one time knew of the affidavit of prejudice, we do not believe that it should be the responsibility of the trial judge to meticulously examine each file before him for the possible existence of an affidavit of prejudice. The revocation hearing here took place almost a full year from the time of the filing of the affidavit by Smith's attorney. Moreover, Smith's attorney admitted in his brief and again during oral argument that he had forgotten that an affidavit of prejudice was on file. Inasmuch as the affidavit of prejudice statute was intended to protect the trial bar and the parties they represent from possible prejudice from the bench, we do not believe that it would place an undue burden on the trial bar to ask that they bring such affidavits to the attention of the challenged judge, especially after a long hiatus in the proceedings, as occurred here. We conclude that failure to do so constituted waiver.

State v. Smith, at 861.

## V. CONCLUSION

In the case at bar, just as in Smith, after an affidavit of prejudice was filed the disqualified judge heard the matter and no party raised the issue of the affidavit or even brought it to the court's attention. Further still, whereas in Smith, the disqualified judge heard only one proceeding, here the disqualified judge heard numerous proceedings. Under Bargreen v. Little and State v. Smith, affidavits of prejudice can be waived where a party later fails to inform the disqualified judge before litigation commences. The court in this case ruled that the affidavit of prejudice had not and could not be waived. This was an erroneous view of the law.

Because the court based its order dismissing the case on an erroneous view of the law, the court abused its discretion. The state asks this Court to reverse the trial court's dismissal order.

Respectfully submitted this 24 day of August, 2017

By   
\_\_\_\_\_  
Tom Ladouceur  
WSBA # 19963  
Chief Criminal Deputy Prosecuting  
Attorney  
Representing Appellant

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jennifer Freeman  
Attorney at Law  
Department of Assigned Counsel  
949 Market Street, Suite 334  
Tacoma, WA 98402-3696

[Jfreem2@co.pierce.wa.us](mailto:Jfreem2@co.pierce.wa.us)

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 24<sup>th</sup>, 2017.

  
\_\_\_\_\_  
Michelle Sasser

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

**August 24, 2017 - 10:52 AM**

**Transmittal Information**

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