

FILED
Court of Appeals
Division II
State of Washington
1/2/2018 3:13 PM

Washington State Court of Appeals
Division II

—◆—
Docket No. 50285-2-II

Consolidating

Lewis Cy. Sup. Ct. Cause No. 16-1-00773-7 (Ware)

**IN RE THE PETITION TO CONVENE A GRAND JURY,
BARNES MICHAEL WARE,**

Petitioner-Appellant.

with

Lewis Cy. Sup. Ct. Cause No. 17-2-00013-21 (Johnson)

**IN RE THE APPLICATION FOR A CITIZEN COMPLAINT,
ERIKA JOHNSON, PETITIONER**

Petitioner-Appellant.

**APPELLANTS' ANSWER TO
AMICUS BRIEF OF ANIMAL LEGAL DEFENSE FUND**

ANIMAL LAW OFFICES OF
ADAM P. KARP, JD, MS
Attorney for Petitioners-Appellants
114 W. Magnolia St., Ste. 400-104
Bellingham, WA 98225
(888) 430-0001
WSBA No. 28622

TABLE OF AUTHORITIES

CASES

Com. v. Brown, 447 Pa.Super. 454 (1995).....5

Com. v. Vascovitch, 40 Mass.Ct.App. 62 (1996).....5

Comm. v. Pritchard, 408 Pa.Super. 221 (1991).....5, 6

State v. Bianchi, 92 Wn.2d 91 (1979).....5

State v. Higley, 78 Wash.App. 172 (1995)3

State v. Soderholm, 68 Wash.App. 363 (1993).....3

State v. Sonneland, 80 Wn.2d 343 (1972)4

State v. Starrish, 86 Wn.2d 200 (1975)4

State v. Unnamed Defendant, 150 Wis.2d 352 (1989)6

STATUTES/RULES

Code of 1881 § 776.....3

CrRLJ 8.31, 2

RCW 10.46.0903

Petitioner-Appellants Erika Johnson and Barnes Michael Ware respond only to the narrow contention of Animal Legal Defense Fund that the State may “ultimately determine whether to proceed with initiated charges,” including those initiated by citizen complainant and, in part, for that reason, no separation of powers objection can be sustained. Though technically overstated, given that CrRLJ 8.3(a) and CrR 8.3(a) prevent a prosecutor from unilaterally dismissing a case without judicial approval, it has practical soundness. Indeed, in the course of forgiving ALDF’s misapprehension of these rules and former RCW 10.46.090, one perceives yet greater justification to eschew such separation of powers objection. CrRLJ 8.3, titled “Dismissal,” states:

(a) On Motion of Prosecution. The court may, in its discretion, upon motion of the prosecuting authority setting forth the reasons therefor, dismiss a complaint or citation and notice.

(b) On Motion of Court. 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.

(c) On Motion of Defendant for Pretrial Dismissal. The defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.

(1) The defendant's motion shall be in writing and supported by an affidavit or declaration alleging that there are no material disputed facts and setting out the agreed facts, or by a stipulation to facts by both parties. The stipulation, affidavit or declaration may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding the motion to dismiss. Any attached reports shall be redacted if required under the relevant court rules and statutes.

(2) The prosecuting authority may submit affidavits or declarations in opposition to defendant's supporting affidavits or declarations. The affidavits or declarations may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding defendant's motion to dismiss. Any attached reports shall be redacted if required under the relevant court rules and statutes.

(3) The court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. In determining defendant's motion, the court shall view all evidence in the light most favorable to the prosecuting authority and the court shall make all reasonable inferences in the light most favorable to the prosecuting authority. The court may not weigh conflicting statements and base its decision on the statement it finds the most credible. The court shall not dismiss a sentence enhancement or aggravating circumstance unless the underlying charge is subject to dismissal under this section. A decision denying a motion to dismiss under this rule is not subject to appeal under RALJ 2.2. A defendant may renew the motion to dismiss if the trial court subsequently rules that some or all of the prosecuting authority's evidence is inadmissible.

(4) If the defendant's motion to dismiss is granted, the court shall enter a written order setting forth the evidence relied upon and conclusions of law. The granting of defendant's motion to dismiss shall be without prejudice.

CrRLJ 8.3(a) expressly provides that the prosecution may, in essence, take a nonsuit with judicial acquiescence.

A defendant choosing to be heard on such prosecutor's motion would be suffering from masochistic delusion to oppose dismissal of the charge against him, except where desirous of dismissal *with* prejudice should the prosecutor want dismissal *without* so that new charges can be filed, which happens to be the default outcome should a defendant initiate a motion to dismiss. CrRLJ 8.3(c) and (c)(4). While, conceptually, a trial court might deny a prosecution's motion to

dismiss given the use of the word “may” in CrRLJ 8.3(a), it is so improbable as to be virtually impossible as a defendant will certainly not demand that the case go to trial. Under CrRLJ 8.3(a), the matter will ultimately terminate at the instance of the prosecutor, with or without leave to refile, subject to judicial discretion. *See State v. Higley*, 78 Wash.App. 172, 187 (1995)(finding no abuse of discretion in trial court granting prosecutor’s CrRLJ 8.3(a) motion to dismiss without prejudice even though it had previously refused to revoke an order of deferred prosecution, thus allowing State to file file a felony charge in superior court); and *State v. Soderholm*, 68 Wash.App. 363, 373 (1993)(notice of intent to dismiss under CrRLJ 8.3(a) not required to be given to defendant).

CrRLJ 8.3(a)’s statutory predecessor, RCW 10.46.090, eliminated the right of *nolle prosequi*. It stated:

Nolle prosequi. The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section.

RCW 10.46.090 [1909 c 249 § 62; Code 1881 § 775;¹ RRS § 2314]. 1984 c 76 §29 repealed RCW 10.46.090.

Against this contextual backdrop, where the judicial branch has exercised veto power over criminal complaints, citations and notices, and indictments for over a century, CrRLJ 2.1(c) fits right in. One would be surprised if the

¹ The Code of 1881 § 776 stated, “The entry of a *nolle prosequi* is abolished, and no prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in [§ 775].”

Respondent would not also contend that CrRLJ 8.3(a) and CrR 8.3(a) violate separation of powers. Given the holding of *State v. Sonneland*, 80 Wn.2d 343, 346 (1972), which rejected the State's contention that "the trial court" is granted "power equal to that possessed by the prosecuting attorney," instead holding that RCW 10.46.090 gives the court *more power* than the prosecuting attorney, for it "evidences a legislative intent that the trial court Alone (sic) is authorized to dismiss criminal charges" such that "[t]he statute completely abrogates the prosecuting attorney's common law discretion to dismiss a criminal prosecution," such challenge would appear futile. *Id.*, at 346.

The practice of allowing judges to decide whether to grant a prosecutor's motion to dismiss has been the law for the last 137 years and not raised a single constitutional eyebrow, likely because there has never been an instance where a trial judge has refused the State's motion. Thus, ALDF's aforementioned contention properly states the spirit of the law as it has existed since Statehood and dispenses with any superficial objection that a charge initiated by CrRLJ 2.1(c) or citizen-petitioned grand jury could not be halted by the prosecution. A diligent review of case law from 1881 through 1984 reveals not a single case challenging RCW 10.46.090 on separation of powers grounds, nor of CrRLJ 8.3(a) or CrR 8.3(a). Rather, the Washington Supreme Court has held that CrR 8.3(b) authorizes the superior court to *sua sponte* dismiss charges over a prosecutor's objection. *State v. Starrish*, 86 Wn.2d 200, 204-05 (1975).

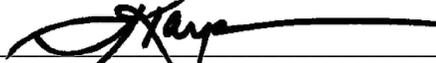
That said, there might be an instance where dismissing a case over a prosecutor's objection (versus *refusing* to do so) might violate separation of powers, yet that is neither the hypothetical raised by ALDF nor the reality of the instant matter. *See Com. v. Vascovitch*, 40 Mass.App.Ct. 62 (1996) (trial court violated separation of powers doctrine of Massachusetts Constitution in dismissing larceny of motor vehicle charge over prosecutor's objection after defendant paid victim restitution and where there was no independent legal basis for the dismissal). Furthermore, besides the court and defendant, the private citizen complainant would not have standing to intervene to object to a CrRLJ 8.3(a) or CrR 8.3(a) motion for dismissal. *State v. Bianchi*, 92 Wn.2d 91, 92 (1979)(no rule, statute, or precedent allows third party to intervene in criminal proceeding).

Far from the LCPAO urging prosecution of Burke, Allshouse, and Miller but the Lewis County District Court opting, instead, to dismiss under CrRLJ 8.3(b), we find the prosecuting attorney refusing to even initiate criminal charges. Perhaps an order granting Ms. Johnson's petition would have the necessary check-and-balance effect on prosecutorial inertia and that office's misapprehension of the merits of the case (a point conspicuously *still* ignored by the Respondent in its briefing before this court), prompting a change of mind and cause justice to be done. But if not, the salubriously democratic impact of such process, far from being trivial or absurd, would further constitutional principles, as described in *Comm. v. Brown*, 447 Pa.Super. 454, 461 (1995); *Comm. v.*

Pritchard, 408 Pa.Super. 221, 233 (1991); and *State v. Unnamed Defendant*, 150 Wis.2d 352, 372 (1989)(Day, J., concurring). Like CrRLJ 8.3(a), CrRLJ 2.1(c) constitutionally vests discretion in the district court to initiate and terminate misdemeanor charges brought by citizen-initiated complaint. And like CrR 8.3(a), RCW 10.27.030 authorizes the superior court to initiate and terminate felony charges brought by citizen-initiated indictment.

Dated this January 2, 2018

ANIMAL LAW OFFICES



Adam P. Karp, VSB No. 28622

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 2, 2018, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

[X] Email (stipulated)

Pamela Loginsky
Washington Association of Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501-1311
pamloginsky@waprosecutors.org
jonathan.meyer@lewiscounty.gov
Bradley.meagher@lewiscounty.gov

Rob Roy Smith
Rachel B. Saimons
Kilpatrick, Townsend & Stockton
1420 5th Ave., Ste. 3700
Seattle, WA 98101
rsmith@kilpatricktownsend.com
rsaimons@kilpatricktownsend.com

David B. Rosengard
Kathleen Wood
Animal Legal Defense Fund
919 SW Taylor St.
Portland, OR 97205
drosengard@aldf.org
kmwood@aldf.org



Adam F. Karp, WSBA No. 28622
Attorney for Petitioners-Appellants

ANIMAL LAW OFFICES OF ADAM P. KARP

January 02, 2018 - 3:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50285-2
Appellate Court Case Title: In re the Petition to Convene a Grand Jury, Barnes Michael Ware, Petitioner
Superior Court Case Number: 16-1-00773-7

The following documents have been uploaded:

- 502852_Briefs_20180102151210D2239319_2305.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was 180102 Appellants Answer to Amicus signed to file.pdf

A copy of the uploaded files will be sent to:

- bradley.meagher@lewiscountywa.gov
- jewilson@kilpatricktownsend.com
- jonathan.meyer@lewiscountywa.gov
- pamloginsky@waprosecutors.org
- rrsmith@kilpatricktownsend.com
- rsaimons@kilpatricktownsend.com
- teri.bryant@lewiscountywa.gov

Comments:

Sender Name: Adam Karp - Email: adam@animal-lawyer.com
Address:
114 W MAGNOLIA ST STE 400-104
BELLINGHAM, WA, 98225-4354
Phone: 888-430-0001

Note: The Filing Id is 20180102151210D2239319