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Division II
State of Washington
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No. 52456-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAKOTA ABSHER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court abused its discretion and violated Mr. Absher's rights under the Sixth and Fourteenth Amendments and article I, §§ 3 and 22 by denying his motion to dismiss the charge for government mismanagement pursuant to CrR 8.3(b) and CrR 4.7.

2. The court erred in imposing a \$200 filing fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court should dismiss a charge pursuant to CrR 8.3(b) and CrR 4.7 where the State's late provision of material discovery forces a defendant to choose between his constitutional rights to prepared counsel and a speedy trial. In this DUI vehicular assault case, the State did not provide a lab report until Friday, August 3, where trial was set for Monday August 6 and the speedy trial deadline was August 16. The State never provided the underlying documents necessary for expert review, and the defense expert declared she would need three weeks after receipt of the necessary documents. Did the trial court abuse its discretion and violate Mr. Absher's constitutional rights by denying his motion to dismiss?

2. A court may not order a defendant to pay a filing fee "if the defendant at the time of sentencing is indigent," meaning the defendant receives "an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level." RCW

36.18.020(h); RCW 10.101.010(3)(c). Did the court err by imposing a filing fee on Mr. Absher, where he qualified for court-appointed counsel at trial and on appeal, has no money in the bank, and owes money on two different credit cards?

C. STATEMENT OF THE CASE

Dakota Absher was driving with his girlfriend and uncle when he had an accident. CP 4. Mr. Absher and his girlfriend thought the spare tire on one of the wheels contributed to the accident, but a responding trooper believed Mr. Absher had been driving under the influence. CP 8. Mr. Absher's uncle suffered some injuries, so the trooper arrested Mr. Absher for vehicular assault. CP 9. Mr. Absher was "ok" with being arrested "as long as his uncle was going to be ok." CP 9.

On May 18, 2018, the State charged Mr. Absher with vehicular assault. CP 1-2. That same day, the State provided some discovery. CP 12. At the omnibus hearing on July 10, Mr. Absher noted he still had not received the lab report from the Washington State Patrol. CP 12-13. On July 26, the State provided 18 new items of discovery, including reports of several troopers that had been signed in May. CP 13. Mr. Absher did not learn until July 26 that troopers had taken recorded statements from certain witnesses, and that a Certified Technical Specialist Report had been conducted. CP 14. On July 31 the State disclosed the name of the

toxicologist who would testify. CP 14.

On Friday August 3, Mr. Absher received the lab results indicating a blood-alcohol level of 0.10. CP 14. Trial was set for Monday, August 6, with an expiration date of August 16. CP 33; RP (8/7/18) 16; Supp. CP ___ (sub no. 10).

Mr. Absher moved to dismiss the prosecution for government mismanagement pursuant to CrR 8.3(b) and CrR 4.7. CP 11-22; RP (8/7/18) 2-50.

The trial court found mismanagement: “Regarding the late discovery of both the discovery packet and the lab results, I’m going to find that there was misconduct that occurred; however, making clear that I’m not finding any bad faith or willful conduct on the part of the State.” RP (8/8/18) 51. The court also found the late disclosure of some of the items was prejudicial. RP (8/8/18) 54. It therefore ordered suppression of these items, which included late-disclosed police reports, victim and witness statements, and an expert’s accident reconstruction report. RP (8/8/18) 54-55.

But the court declined to order dismissal or suppression of the late lab report. RP (8/8/18) 52-53. The court found no prejudice because the defense knew Mr. Absher had failed a preliminary breath test (PBT). The court reasoned the defense “could have been preparing on how to properly

cross-examine those results earlier. They didn't necessarily have to wait until the actual blood test results." RP (8/8/18) 52.

Mr. Absher stated, "I believe the Court misunderstands the prejudice related to the late disclosure of the toxicology report." RP (8/8/18) 62-63.

My expert cannot review the work that the toxicologist did to come up with this result of .10 until the toxicologist has done that work. The toxicologist did not do that work until the week before trial, so now I need an expert. My prejudice isn't that, well, now I'm not going to be able to effectively cross-examine the toxicologist. My prejudice is, I don't know that that toxicologist's work is correct. I don't know if that's correct that there was .10. My expert needs to review the work that the toxicologist did, and then, of course, that's going to go towards my cross-examination, but it's going to go towards me presenting my own witness to show that the State's evidence of .10 is not reliable for these reasons, but I can't do that until the toxicologist has done that work. So that happened right before trial, and now I don't have an expert. Like you pointed out, I couldn't find an expert for the traffic collision stuff. I don't have an expert that's available to do that within speedy trial. I don't have -- I don't even have -- I mean, I have to get the work that the toxicologist did provide to me so that my expert can review that.

RP (8/8/18) 63.

In addition to explaining the prejudice orally, Mr. Absher submitted a declaration from his expert, stating that she would need documentation the State still had not provided and that it would take three weeks to review and evaluate the documents once received. CP 32-40. The

court adhered to its ruling, and denied a motion to reconsider. RP (8/8/18) 69; CP 45-46.

Mr. Absher was convicted after a stipulated-facts bench trial, but preserved his right to appeal the denial of the motion to dismiss. CP 47-48, 72-85; RP (8/15/18) 1-20.

D. ARGUMENT

1. The conviction should be reversed and the charge dismissed for government mismanagement.

- a. A charge should be dismissed where government mismanagement prejudices the right to a fair trial.

CrR 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.

This Court has recognized that the rule imposes two requirements. A defendant must show: "(1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial." *State v. Barry*, 184 Wn. App. 790, 797, 339 P.3d 200 (2014).

As to the first prong, a defendant need not show intentional malfeasance; "simple mismanagement is sufficient." *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). The failure to comply with

discovery orders and rules constitutes mismanagement within the meaning of the rule. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 428-29, 403 P.3d 45 (2017); *State v. Sherman*, 59 Wn. App. 763, 768, 801 P.2d 274 (1990); *see* CrR 4.7.

As to the second prong, “[i]mportantly, late disclosure of material facts can support a finding of actual prejudice.” *Salgado-Mendoza*, 189 Wn.2d at 432. A defendant demonstrates prejudice warranting dismissal by showing the mismanagement adversely affected his right to a speedy trial or his “right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. If delayed disclosure results in the defendant having to make a “Hobson’s choice” between his rights to a speedy trial and to prepared counsel, the charge should be dismissed. *See Sherman*, 59 Wn. App. at 769. This Court does “not believe a defendant should be asked to choose between two constitutional rights in order to accommodate the State’s lack of diligence.” *Id.* at 770.

- b. Mr. Absher was prejudiced because the mismanagement forced him to choose between prepared counsel and a speedy trial.

The court properly found Mr. Absher proved mismanagement. RP (8/8/18) 51. However, it should also have found prejudice warranting

dismissal, because Mr. Absher was forced to choose between his rights to a speedy trial and prepared counsel. RP (8/8/18) 63.

The trial court believed a one-week continuance, still within the speedy trial deadline, could solve the problem, but Mr. Absher explained this was not correct. Instead, the defense needed documentation the State still had not provided and it would take three weeks for the defense expert to review and evaluate the documents once received. RP (8/8/18) 63; CP 32-40. Counsel clarified:

My issue is, my own expert hasn't had an opportunity to review the work that their expert did, to determine whether or not it's reliable. I can't get that done before the 16th. I don't even have the information that I need that shows the work that they did do. I couldn't get that until they did the work, and so I've requested it, and I don't have it. Expert witnesses, they're -- you can't just line up an expert witness to be maybe, maybe not, and have them commit and, "I don't know when I'm going to need you, but sometime within this time frame." No. Even if I did have an expert witness sitting here in the wings, I don't have the information that they need to be able to review that.

RP (8/8/18) 65. Defense counsel continued, "I have the lab report, but that's not what I need. I need all the underlying data that the toxicologist -- that shows the toxicologist's method and how they came to that result, and that's what I don't have." RP (8/8/18) 67.

In sum, the defense still needed the underlying data from the lab and then three weeks for the expert to review and evaluate that data. But a

three-week continuance would have put Mr. Absher past the speedy trial deadline. Such a continuance is not an appropriate remedy, because it forces the defendant to waive his right to a speedy trial. *See Salgado-Mendoza*, 189 Wn.2d at 432; *Michielli*, 132 Wn.2d at 244-45; *Sherman*, 59 Wn. App. at 769-70. Instead of forcing Mr. Absher to choose between his rights to prepared counsel and a speedy trial, the court should have granted the motion to dismiss.

In *Michielli*, the Court held dismissal was warranted where the State's mismanagement resulted in its adding charges on October 27, just five days before trial was set to begin on November 1. *Michielli*, 132 Wn.2d at 233, 243-44. Although a month remained before the November 30 speedy trial expiration date, defense counsel apparently needed more time to prepare to meet the new charges. *See id.* at 233, 244. "Defendant was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges[.]" *Id.* at 244. The Court stressed, "Defendant's being forced to waive his speedy trial right is not a trivial event." *Id.* 245. Thus, "Defendant has supported his CrR 8.3(b) motion to dismiss the amended charges." *Id.* at 246.

Here, as in *Michielli*, there was some time remaining on the speedy trial clock when the court denied the motion to dismiss. But as in *Michielli*, not enough time remained before the speedy trial deadline to

cure the mismanagement. Just as counsel in *Michielli* needed more than a month to prepare for additional charges, counsel here needed more than a week to have an expert review the late-disclosed lab report – especially since the underlying data still had not been disclosed at the time of the ruling. Thus, as in *Michielli*, Mr. Absher proved prejudice, and dismissal was the appropriate remedy.

c. This Court should reverse.

Where a defendant establishes prejudice by showing “the interjection of new facts due to the late disclosure” forced him “to choose between his right to a speedy trial and his right to be represented by adequately prepared counsel[,]” dismissal is the only appropriate remedy. *Salgado-Mendoza*, 189 Wn.2d at 436 & n.10; *see also id.* at 432; *Michielli*, 132 Wn.2d at 246; *Sherman*, 59 Wn. App. at 769-70.

Here, the interjection of new facts due to late disclosure of the lab results forced Mr. Absher to choose between his right to a speedy trial and his right to be represented by adequately prepared counsel. Given the choice, he capitulated and submitted to a stipulated-facts bench trial. This Court should reverse and remand for dismissal of the charge with prejudice.

2. The filing fee should be stricken because Mr. Absher is indigent.

It is well-settled that the imposition of LFOs upon indigent defendants creates grave problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Thus, both the legislature and appellate courts have clarified that most costs and fees may *not* be imposed upon indigent defendants, and that sentencing courts must perform a thorough inquiry into a defendant’s financial status before imposing such costs and fees.

Here, the court imposed a \$200 filing fee on Mr. Absher despite his indigence and without an inquiry. CP 81. This was improper. Under RCW 36.18.020(h), the filing fee must be waived for indigent defendants. An indigent defendant is one who receives “an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level.”. RCW 10.101.010(3)(c).

Mr. Absher is indigent. He qualified for court-appointed counsel both at trial and on appeal. CP 91-95. He has no money in the bank and owes money on two credit cards. CP 91.

Moreover, if the sentencing court believed Mr. Absher was not indigent despite the above, the court was required to engage in an inquiry.

“Trial courts must meaningfully inquire” into a defendant’s ability to pay. *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018). This includes consideration of “(1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts.” *Id.* at 744. “[T]he record *must* reflect that the trial court inquired into *all five* of these categories before deciding to impose discretionary costs.” *Id.* (emphases added). “That did not happen here.” *Id.*

Similarly, that did not happen in Mr. Absher’s case. The court did not inquire into any relevant financial factor, let alone all five. RP (9/24/18) 1-10. The court simply imposed the filing fee with no analysis. CP 81. The filing fee should be stricken. RCW 36.18.020(h); *Ramirez*, 191 Wn.2d at 749-50.

E. CONCLUSION

Because government mismanagement prejudiced his right to a fair trial, Mr. Absher asks this Court to reverse his conviction and remand for dismissal of the charge with prejudice. In the alternative, this Court should remand for the court to strike the \$200 filing fee from the judgment.

Respectfully submitted this 17th day of April, 2019.



Lila J. Silverstein – WSBA 38394
Washington Appellate Project – 91052

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DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52456-2-II
v.)	
)	
DAKOTA ABSHER,)	
)	
Appellant.)	

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