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Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

DAKOTA AUSTIN ABSHER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-00738-18

BRIEF OF RESPONDENT

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DATED May 29, 2019, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in refusing to dismiss the prosecution under CrR 8.3(b)?
2. Whether the trial court erred in assessing a \$200 filing fee on an indigent defendant? (CONCESSION OF ERROR)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Dakota Austin Absher was charged by information filed in Kitsap County Superior Court with vehicular assault. CP 1. The charge was based on the driving under the influence alternative. Id.; RCW *****

The defense moved to dismiss the prosecution pursuant to CrR 8.3 and CrR 4.7. CP 11. The motion was asserted on the morning of trial. RP, 8/6/18, 3.¹ Generally, the defense argued that late discovery had prejudiced Absher's trial preparation. CP 11-22. It should be noted that no written demand for discovery appears in the record. On the omnibus order, the defense indicates that it continues to seek discovery of the "WSP lab report." CP 99.

The defense motion listed 18 items of late-received discovery. These items were received by the defense on July 26,

¹ The footer on this transcript says 11/19/18 for an unknown reason.

2018:

1. WSP Incident Details Report (CAD log)
2. 9 page report from trooper Welander
3. CID event summary
4. 1 page report from trooper Bartlett
5. 2 page report from trooper Millenbach
6. 1 page report from trooper Manning
7. 1 page report from trooper Carr
8. 16 page Certified Technical Specialist Narrative from trooper Hagadone
9. Various computer generated and hand drawn diagrams
10. 6 page measurement report
11. Collision field hand drawn diagram
12. An email from trooper Sherman
13. Court docket with entries for May, 2018 (*noting the trial date August 6, 2018*)
14. Recorded and transcribed statement of victim
15. Recorded and transcribed statement of witness
16. Recorded and transcribed statement of Mr. Absher
17. Collision automobile analysis report
18. Multiple photos

CP 13. Additionally, the defense asserted that the lab results were not provided until August 3, 2018 (a Friday with trial scheduled for Monday, August 6). CP 14.

Hearing was had on the defense motion the next day. RP, 8/7-

8/18, 1. Argument took up nearly 50 pages of transcript. RP, 8/7-8/18, 1-49. The next day, the trial court ruled with regard to items 1 through 18 as listed in the defense brief. RP, 8/7-8/18, 50. The trial court ruled that the late discovery of the listed items was misconduct, “making clear that I’m not finding any bad faith or willful conduct on the part of the state.” RP, 8/7-8/18, 51. The trial court found that the state was not even aware of the additional discovery earlier. RP, 8/7-8/18, 52.

Moving to the question of “actual prejudice to the defendant,” the trial court first found that the defense had failed to meet its burden to show actual prejudice with regard to the lab results. RP, 8/7-8/18, 52. This based on (a) the defense knew that an above the legal limit blood result was likely because discovery provided included a PBT (portable breath test) of .124, (b) because the defense did not request an independent blood test, did not arrange to interview the lab technician (having been advised of the identity of the actual witness on July 31), and made no arrangements to procure its own expert prior to receipt of the blood results, and (c) with 13 days left on speedy trial, the defense did not ask for more time, within speedy trial, to prepare or procure an expert. RP, 8/7-8/18, 52-54.

With regard to the 18 listed items, the trial court found prejudice established. RP, 8/7-8/18, 54. But, “I find that dismissal is too extreme.”

RP, 8/7-8/18, 54-55. The trial court suppressed items 5, 6, 7, 8, 9, 10 11, 12, and 17. Id. As to three new witnesses, the trial court offered a continuance within speedy trial to allow for preparation for those witnesses. RP, 8/7-8/18, 62.

Later the trial court denied Absher's motion to reconsider his CrR 8.3 motion. CP 45. That reconsideration motion included a declaration of a chemist, Janine Arvizu, a proposed defense expert on the issue of the reliability of the forensic testing done by the Washington State Patrol Toxicology Laboratory on Absher's blood. CP 38 (CV at CP 42-44). Ms. Arvizu opined that she would need additional documents to do her review, estimated that upon receipt of those documents it would take her 6-7 hours to do her work, and that her schedule was such that she would need at least three weeks to get to the review. CP 39.

Absher submitted the case to the trial court on stipulated facts. CP 47. The trial court found Absher guilty. CP 49-50; RP, 8/15/18, 14. The trial court found that the state had proven the "per se" DUI in that Absher had an alcohol concentration of .08 or higher within two hours of driving as shown by blood test results (stipulated exhibit C showed 0.10) but the trial court did not find that Absher's ability to drive was lessened to an appreciable degree by intoxicating liquor. CP 50. The stipulation included the "Toxicology Test Report." Id. The stipulation document

recites that the defense continued its objection to the admissibility of the report. CP 47-48.

The trial court entered written findings and conclusions on the verdict. CP 72-74. The findings simply track the stipulated facts received.

Absher was sentenced to four months in custody. CP 76. Absher timely appealed. CP 88.

B. FACTS

The trial court wrote findings and conclusions on the stipulated facts trial. CP 72-74. The trial court found:

--that Absher was driving;

--that the car he was driving crashed, leaving the roadway and rolling over at least once;

--that one of his passengers was injured by the crash;

--that blood was drawn and accurate and reliable testing showed a .10 alcohol concentration.

Based thereon, the trial court found Absher guilty. CP 74

III. ARGUMENT

A. THE TRIAL COURT FASHIONED AN APPROPRIATE REMEDY FOR LATE DISCOVERY AND DID NOT ABUSE ITS DISCRETION IN REFUSING TO DISMISS THE PROSECUTION UNDER CRR 8.3(B).

Absher argues that the trial court erred in refusing to dismiss the prosecution based on a finding of prosecutorial misconduct.. This claim is without merit because the trial court fashioned a reasonable remedy to address its misconduct finding and, as to the lab report, the trial correctly found that the defense failed to establish the requisite level of prejudice.

The denial of a motion to dismiss under CrR 8.3 is reviewed for manifest abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for unreasonable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). In *State v. Rohrich*, 149 Wn.2d 647, 71 P.3d 638 (2003) the Supreme Court discussed the manifest abuse of discretion standard in the context of a CrR 8.3(b) motion to dismiss:

A 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. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable

choices.

149 Wn.2d at 654 (internal quotation marks and citations omitted); *accord State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017).

The proponent of a CrR 8.3(b) motion has the burden of establishing both misconduct and actual prejudice. *Salgado-Mendoza*, 189 Wn.2d at 427 (applying the limited jurisdiction court rule, CrRLJ 8.3(b), which is precisely the same as CrR 8.3(b)). The rule 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.

Misconduct may be shown by a discovery violation. 189 Wn.2d at 429.

But “[t]he use of CrRLJ 8.3(b) to punish a discovery violation is limited because the rule expressly contemplates dismissal, the most severe sanction available to trial courts.” 189 Wn.2d at 430. Although the movant need not show bad faith on the part of the prosecution, she must show misconduct and prejudice by a preponderance of the evidence. 189 Wn.2d at 431-32

Significant to the present case, CrR 4.7(a)(1) requires the prosecution to disclose

(iii) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests,

experiments, or comparisons;

(vii) any expert witnesses whom the prosecuting authority will call at the hearing or trial, the subject of their testimony, and any reports relating to the subject of their testimony that they have submitted to the prosecuting authority

Under subsection (g)(7), upon a discovery violation, the trial court may order that the discovery be provided, grant a continuance, or enter orders that are just under the circumstances. But if the failure to comply with discovery rules is either willful or grossly negligent with resulting prejudice to the defendant, the trial court may dismiss the case. CrR 4.7(g)(7)(ii).

For a case to be dismissed pursuant to CrR 8.3(b) or CrR 4.7, a defendant must show that he has been prejudiced by the prosecutor's actions. *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). A defendant must show actual prejudice; the mere possibility of prejudice is not sufficient. *State v. Stein*, 140 Wn. App. 1045, 187 P.3d 271 (2008). To show actual prejudice, a defendant can show that either his right to speedy trial or his right to have adequately prepared counsel was jeopardized by the state's mismanagement. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

Our Supreme Court has "repeatedly stressed that dismissal of charges is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her

rights to a fair trial.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845P.2d 1017 (1993). Thus, the general approach to discovery violations is “to impose the least severe sanction that adequately addresses the prejudice.” *Salgado-Mendoza*, 189 Wn.2d at 431. For instance, a trial court may suppress evidence in order to alleviate prejudice. *Id.*

In *State v. Oppelt*, 172 Wn.2d 285, 257 P.3d 653 (2011) the Supreme Court upheld a trial court’s discretionary ruling to deny a motion to dismiss pursuant to CrR 8.3(b) even where there was a finding of prejudice to the defendant and misconduct on behalf of the state. In *Oppelt*, the defendant moved to dismiss charges after a six-year pre-accusatorial delay which resulted in the loss of potentially exculpatory information from one of the State’s witnesses. The trial court found that the delay was negligent, but refused to dismiss the case because the prejudice to the defendant was not severe enough to warrant dismissal. *Oppelt*, 172 Wn.2d at 288. In upholding the decision of the trial court, the Supreme Court held, “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.” *Oppelt*, 172 Wn.2d at 297.

In the present case, the trial court found mismanagement but hastened to add that it did not find bad faith on the part of the prosecution.

This finding takes the issue out of the dismissal provision of CrR 4.7(g)(7)(ii), which requires a finding of willfulness or gross negligence.

As noted, the trial court suppressed the bulk of the late discovery. The trial court allowed the defense an additional week, within the speedy trial limit, to interview new witnesses. These rulings extinguished any potential prejudice with regard to the 18 items. Absher could have proceeded to trial with none of that information being used against him. This was a tenable and reasonable response to the circumstances before the trial court.

It remains, however, that the trial court refused to suppress the blood test result or dismiss the prosecution. The issue is whether or not that refusal was based on an untenable reading of the law or an unreasonable application of the facts to the law.

Significant to the trial court's ruling allowing the blood test result was the trial court's assessment that the defense had essentially slept on its rights with regard to that issue. It was found that the defense had some notice of the issue in the receipt of the initial discovery of the case in May-
-Absher blew a .124 on a PBT. RP, 8/7-8/18, 52. The defense had not arranged for an independent blood test, had not retained an expert, and had not asked for more time within the speedy trial limit to prepare. RP, 8/7-8/18, 52-54.

Moreover, the defense dereliction of this issue comes through clearly in the present forum. Here, Absher complains that it was not just the lab result itself that he needed; he needed the “underlying data.” See Brief at 7. But, as noted, there are no discovery demands in the trial court record. The single defense discovery demand is found in the omnibus order and simply asks for the “WSP lab report.” CP 99. Two days after the trial date is the first time that this record shows any concern from the defense about the underlying data or any other aspect of the state’s evidence.

The problem is that the defense is indorsing an expert and demanding “underlying data” at or after the trial date. Moreover, “the mere *possibility* of prejudice is not sufficient to meet the burden of showing actual prejudice.” *State v. Rohrich*, 149 Wn.2d 647, 657, 71 P.3d 638 (2003) (italics by the court) *quoting State v. Norby*, 122 Wash.2d 258, 858 P.2d 210 (1993). The assertions of the defense are bereft on the question of what the late-endorsed expert might find that might assist the defense.

In *State v. Cannon*, 130 Wn.2d 313, 922 P.2d 1293 (1996), the Supreme Court considered the late receipt of discovery of DNA evidence in a rape prosecution. After having disposed of continuance issues under CrR 3.3, the Court addressed Cannon’s argument for dismissal under CrR

8.3(b). 130 Wn.2d at 327. The facts included that the state had mishandled a blood sample and it had deteriorated to where it was useless. 130 Wn.2d at 320. A second blood draw was done. *Id.* Various short continuances were granted because the prosecutor assigned was in another trial. This occasioned Cannon's motion to dismiss and at a hearing on that motion the state offered that it had not yet received the DNA results. 130 Wn.2d at 320-21. In time, the results were had and the trial court ruled the results were admissible. 130 Wn.2d at 322.

Cannon then submitted the case to the trial court on stipulated facts. 130 Wn.2d at 322-23. He was found guilty. 130 Wn.2d at 323. Cannon claimed that “[the state’s] slow production of the results of the FBI's DNA tests on his blood, and the Washington State Patrol's crime laboratory report regarding paint chips evidence” hamstrung his ability to adequately prepare a defense and therefore warranted a dismissal under CrR 8.3. 130 Wn.2d at 327-28 (alteration added). The Supreme Court held, in part, that dismissal was not warranted because “his trial counsel was placed on notice from the time of charging that the State intended to introduce scientific evidence relating to blood samples and paint chips in order to tie Cannon to the crime.” Further, of the reports themselves, “no new facts relevant to [the crime lab’s] procedures were interjected into the case by the reports.” 130 Wn.2d at 329 (alteration added).

These holdings are much the same as the trial court's rulings in the present case. The trial court found that the defense was on notice of the blood draw and that intoxicants were in Absher's system. The trial court was not presented with a reason to suppose that a defense expert's review of methods and procedures would help Absher's defense. The defense had from May until August to address issues raised by a blood draw and it is apparent from the record that the defense did nothing during that time period.

Under these circumstances, the trial court did not abuse its discretion. Moreover, instead of challenging the state's evidence, Absher chose to stipulate to the accuracy of the very piece of evidence the late receipt of which he argued warranted dismissal. The trial court's ruling should be affirmed.

B. THE TRIAL COURT ERRED IN IMPOSING THE \$200 FILING FEE ON AN INDIGENT DEFENDANT. (CONCESSION OF ERROR)

Absher next claims that the trial court improperly imposed the \$200 filing fee. This claim is correct. The trial court assessed the \$200 dollars against an indigent defendant. CP 81.

Absher was indigent below and the trial court entered an order of

indigency in the present proceeding. Absher is correct in his assertion that the trial court did not engage the appropriate “meaningful” inquiry into his financial situation.

RCW 10.101.060 provides that a trial court may not assess discretionary costs on an indigent defendant. *See State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018). Further, RCW 36.18.020(2)(h) specifically disallows the \$200 filing fee.

In *Ramirez, supra*, the Washington Supreme Court held that the new LFO statutes apply to any case pending on appeal. 191 Wn.2d at 749-50. This is such a case. But as in *Ramirez*, the case need not be remanded for a resentencing hearing. This court should remand with order to correct the judgment and sentence by striking the prohibited cost.

IV. CONCLUSION

For the foregoing reasons, Absher’s conviction and sentence should be affirmed. This Court should order correction of the judgment and sentence by striking the \$200 filing fee.

DATED May 29, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
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A handwritten signature in black ink, appearing to read "Chad M. Enright", is written over the typed name and title.

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