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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

A.V.,

Respondent.

Appeal from the Superior Court of Washington for Pacific County

Appellant's Brief

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I. ASSIGNMENTS OF ERROR

1. Substantial evidence in the record did not support the trial court's findings of fact 3, 4, 6, 7, 8, 11, 12, 13, 14, 15, 16, and entry of these findings was in error.
2. The trial court erred when it entered conclusions of law numbers 1, 2, 3, 4, 5, 6.
3. The trial court erred when it permitted the motion to exclude witnesses without notice or motion.
4. The trial court erred when it dismissed the case.

II. ISSUES

1. The trial court erred in finding of fact 3 and 4 when it found the Respondent, A.V., was arraigned on June 7, 2018. CP 3. The respondent failed to appear at his initial arraignment, arriving long after court had been adjourned and a warrant issued. However, the trial court reconvened, chastised A.V. for his late arrival, and informed him that everything was being reset and that he was "going to come back to Court on July 12th because we are not going to restart Court just because you wandered

in the door late.” VRP 4.¹ Thus, A.V. was not arraigned as asserted by the trial court in the findings of fact 3 and 4. CP 3-5. The balance of the trial court’s concern with the time for trial rule as outlined in conclusion of law 5 and 6 was, therefore, not supported by the record, as A.V. was not placed in a “Hobson’s Choice” as significant time for trial remained. *Id.*

2. The trial court finding of fact 3, that A.V.’s trial was set beyond that authorized for the time for trial is unsupported by the record. Specifically, the trial court found that A.V. was arraigned on June 7, 2018. CP 3. This was in error, as the arraignment did not actually occur until July 12, 2018. VRP 10. A.V. was out of custody for all these hearings. CP 3. Thus, the time for trial began at arraignment, on July 12, 2018, and not June 7, 2018, as found by the trial court. *Id.*, JuCR 7.6. The trial court incorrectly found that A.V.’s initial appearance began the time for trial rule; however, the trial court did not arraign A.V. on June 7, 2018, and instead re-set everything due to his late appearance. VRP 10. Furthermore, A.V. did not object at arraignment to his July 12, 2018 arraignment, but

¹ The VRP is a continuously paginated transcript reporting hearings that occurred on several different dates. Citations will be to page numbers without reference to the date of the hearing.

instead then asked the trial court to accept a not guilty plea. VRP 10. Thus, pursuant to JuCR 7.6 and CrR 4.1(b), he lost the right to object to a timely arraignment and his time for trial began at arraignment, establishing the last allowable date for trial to be August 31, 2018. JuCR 7.8(b)(2)(i). Even if the trial court had constructively established A.V.'s arraignment 15 days after the June 7, 2018 initial appearance, the last allowable date for trial would have been August 27, 2018.

3. The trial court's finding of fact 6 is not supported by the record. The State filed its witness list on July 27, 2018, 15 days after arraignment and 13 days before trial. CP 4.
4. The trial court's finding of fact 7 is not supported by the record. The trial court incorrectly found that prior to trial, A.V. moved to exclude all of the state's witnesses. A.V.'s attorney never filed a motion, supported by declaration, requesting any action by the trial court in advance of the trial. It was not until the beginning of trial that A.V. objected to the State calling any witness. VRP 15. At no point did A.V.'s attorney comply with CR 7(b), CrR 8.2, or CrR 8.3(c). The court's actions in hearing this motion were in error.

5. The trial court considered A.V.'s oral motion as a CrR 8.3(b) motion to dismiss based upon government mismanagement or misconduct. CP 4. The trial court misapplied the rule, as notice and an opportunity for a hearing was required, but the trial court heard the motion without such an opportunity for the state to reply. Furthermore, the trial court findings 8, 10, 11, 12, 14, 15, 16 and conclusions of law 1, 2, 3, 4, 5, and 6 are not supported by the record and misapply the law. Moreover, A.V. failed to establish prejudice to the rights of the accused or prejudice that the 7 day delay in producing a witness list materially affected the accused's right to a fair trial. Thus, the trial court's decision was not supported and was an abuse of discretion.

III. STATEMENT OF THE CASE

A.V., a juvenile, was charged by information with second degree malicious mischief for using a sharp object to damage his neighbor's car. CP 4. A.V. was summonsed to court and directed to appear on June 12, 2018. *Id.* A.V. failed to appear. CP 3-5, VRP 3. Because A.V. was late to court, the trial court elected to appoint A.V. an attorney, but set arraignment to July 12, 2018. VRP 4, 11.

A.V. was arraigned on July 12, 2018. VRP 10.

A.V. did not object to his arraignment date. VRP 10-11, JuCR 7.6, CrR 4.1(b).

A.V. remained out of custody. CP 4. Therefore, A.V.'s last allowable day for trial was August 31, 2018. JuCR 7.8, 7.6., CrR 4.1(b). Even if constructive arraignment applied, which the state asserts does not apply, A.V.'s time for trial would not have expired until August 27, 2018. *Id.* The trial court set trial on August 9, 2018. CP 3.

The trial court ordered a witness list filed by July 20, 2018, which was 8 days after arraignment and 20 days before trial. CP 3-5.

The state filed a witness list on July 27, 2018. CP 4.

A.V. did not file any objection, motion to compel, or motion to dismiss, but instead as the case was called for trial orally moved to exclude all witnesses. VRP 15.

The state objected to the failure to comply with the requirements of CrR 8.3, and further stated that A.V.'s remedy resulted in a dismissal of the case which was neither warranted nor supported by existing case law. VRP16-17.

The trial court, without indicating as much, overruled the state's objection and instead stated, "I guess my remedy here is to

preclude the State from calling the witnesses that were not identified in a timely manner pursuant to the court's order," realizing the remedy is "an extreme remedy under [CrR] 8.3(b); but I think there's a reason the Court did an order. I think there's a reason why we do pretrials, and I don't think we can just ignore those," finding, absent the order, the proper remedy to a late witness list would be "a continuance," but where there is an order then there is "inherent prejudice" as it "changes the way [the Defense] manages their case." VRP 21, 23-25. The trial court stated, "the court's order, in and of itself, has weight and should be followed" and that because the Defense was entitled to know who the state would call as a witness, and because the witness list was not timely filed, the defense had no opportunity to prepare the case because "it's [not] realistic to expect the Defense to go through the entire police report and interview everybody and not know who is coming as a witness based upon what the state files." VRP 26, 27. The trial court noted that it was not unreasonable for the defense to think that when there is a deadline for a witness list and no witness list is filed by that day to presume the state is "not calling any witnesses." VRP 27.

In attempting to understand the prejudice the trial court was finding which was sufficient to dismiss the case, the trial court

concluded, in short, that a late arriving witness list creates “inherent prejudice” sufficient to dismiss the state’s case. VRP 28.

The state timely filed a notice of appeal. CP 7-8.

Following the notice of appeal, the trial court entered written findings of facts and conclusions of law which made additional findings that were not endorsed as ground for dismissal at the time of the hearing. CP 3-5.

IV. ARGUMENT

A. DISMISSAL WAS NOT WARRANTED OR SUPPORTED BY THE RECORD

1. Standard of Review.

Factual determinations are reviewed for substantial evidence and conclusions of law *de novo*. *State v. McLean*, 178 Wn.App. 236, 313 P.3d 1181 (2013).

A trial court's dismissal under CrR 8.3(b) is reviewed under the deferential abuse of discretion standard. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 428, 403 P.3d 45 (2017). A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 668, 260 P.3d 874 (2011). A discretionary decision is manifestly unreasonable or based on untenable grounds if it results from

applying the wrong legal standard or is unsupported by the record. *Id.* A trial court that misunderstands or misapplies the law bases its decision on untenable grounds. *Little v. King*, 160 Wa.2d 696, 703, 161 P.3d 345 (2007).

Before resorting to the sanction of dismissal, the trial court must clearly indicate on the record that it has considered less harsh sanctions and a failure to do so constitutes an abuse of discretion. *Rovers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 696, 41 P.3d 1175 (2002).

2. The trial court improperly permitted an untimely motion.

The trial court improperly permitted a motion to be heard without the moving party first meeting the procedural requirements of CR 7(b), CrR 8.3(b), or CrR 8.3(c).

All motions must be in writing, shall state with particularity the grounds therefor, and shall set for the relief or order sought. CR 7(b)(1), CrR 8.2; *see also* CR 5, CrR 8.4; *State v. Tucker*, 171 Wn.2d 50, 246 P.3d 1275 (2011).

Here, there was no written motion supported by an affidavit filed in this matter. *See* CR 7(b), CrR 8.2, 8.3(c). Thus, the defendant's motion was not properly before the court, nor did the

defendant provide the trial court with evidence on which it could properly base its decision.

The court chose to treat the defendant's motion as a motion of the court, pursuant to CrR 8.3(b). VRP 20. However, even a motion of the court to dismiss requires notice and a hearing. CrR 8.3(b). While a deviation from the normal time limits is permitted, there must nevertheless be "ample notice and time to prepare." *Loveless v. Yantis*, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973). Here, this issue was raised orally and without proper notice, which deprived the state of a meaningful opportunity to respond. Without such notice, the state was prejudiced, especially where the trial court was to evaluate the willfulness or extent of the delayed discovery. The trial court, therefore, abused its discretion by hearing the matter.

The trial court further abused its discretion by failing to clearly indicate on the record that it considered less harsh sanctions, or misapplying what sanctions may be available. *Rovers v. Washington State Conference of Mason Contractors*, 145 Wn.2d at 696.

The trial court noted, "I guess my remedy here is to preclude the state from calling the witnesses that were not identified." VRP 21. While the Court believed this was "an extreme remedy," the analysis that followed failed to consider other options:

“I think there’s a reason the Court did an order. I think there’s a reason why we do pretrials, and I don’t think we can just ignore those.” *Id.*

The state respectfully submits that such analysis is insufficient when considering whether the case should be dismissed.

3. The trial Court’s findings of fact and conclusions of law are not supported by the record and the trial court misapplied the law.

The court’s findings of fact and conclusions of law are unsupported in the record and the trial court’s misapplication of the legal standard improperly informed the trial court’s decision. Thus, the trial court abused its discretion by dismissing the state’s case.

The findings of fact are not supported by the record; specifically the trial court was incorrect when it found A.V. was arraigned on June 7, 2018. CP 3. A.V. failed to appear at his initial arraignment, arriving long after court had been adjourned and a warrant issued. VRP 3. However, the trial court reconvened, chastised A.V. for his late arrival, and informed him that “everything was being reset” and that he was “going to come back to Court on July 12th because we are not going to restart Court just because you wandered in the door late.” VRP 4. Thus, A.V. was not arraigned on June 7, 2018, which later drove the trial court’s incorrect conclusions

regarding prejudice to the defendant based on timing of disclosure of the state's witness list. CP 3-5.

Next, the trial court incorrectly found that A.V.'s trial was set beyond that authorized for the time for trial. CP 3. This finding is unsupported by the record. A.V. was out of custody and arraigned on July 12, 2018. VRP 10. A.V. did not object at arraignment to his July 12, 2018, commencement date, which established his time for trial, but instead A.V. asked the trial court to accept a not guilty plea. *Id.* Thus, pursuant to JuCR 7.6 and CrR 4.1(b), he lost the right to object to the timing of his arraignment and his time for trial began at his July 12, 2018 arraignment, establishing a last allowable date for trial to be August 31, 2018. JuCR 7.8(b)(2)(i). Even if the trial court had constructively established A.V.'s arraignment 15 days after the June 7, 2018, initial appearance, the last allowable date for trial would have been August 27, 2018. The trial court dismissed the matter on August 9, 2018, three weeks before the expiration of the time for trial.

In fact, the time between the state's disclosure of its witness list on July 27, 2018, and the last allowable date for trial of August 31, 2018, was actually greater than the time that would have been afforded between the trial court's deadline of July 20, 2018, and trial

on August 9, 2018. Therefore, the trial court's conclusion 4, that Defendant's right to a fair trial was prejudiced, was manifestly unreasonable.

It is evident from the transcript that the trial court was frustrated with the mere fact that the state did not timely file a witness list as directed by the court. In fact, it appears the seven day delay established what the court called "inherent prejudice" in order to support dismissal. However, by the time the trial court entered its own findings of fact and conclusions of law, the trial court's focus became the time for trial rule, which was not discussed at the CrR 8.3 hearing.

Regardless, the trial court misapplied both rules, as there was sufficient time for trial to permit a continuance. Expense, inconvenience, or additional delay within the speedy trial period are insufficient grounds to dismiss a case when sufficient time for trial exists. *State v. Chichester*, 141 Wn.App. 446, 457, 170 P.3d 583 (2007) (the requirement for a showing of prejudice under CrRLJ 8.3(b) is not satisfied merely by expense, inconvenience, or additional delay within the speedy trial period; the misconduct must interfere with the defendant's ability to present his case). Here, as no motion was properly filed by the defendant, no evidence of

defendant's ability to present his case was properly before the court.

Thus, the trial court's conclusion that A.V. was placed in a "Hobson's Choice" of having to choose between a prepared attorney or a timely trial was a misapplication of the law to the facts, and dismissal was an abuse of discretion. CP 3-5.

4. Dismissal was not warranted.

While trial courts have broad authority to compel disclosure, impose sanctions, or both, dismissal pursuant to CrR 8.3(b) is available only if the trial court found prejudicial governmental misconduct or arbitrary action materially affecting the accused's right to a fair trial. *State v. Salgado-Mendoza*, 198 Wn.2d at 429, citing *State v. Brooks*, 149 Wn.App. 373, 375, 203 P.3d 397 (2009). The party seeking relief bears the burden to show misconduct and actual prejudice and a party cannot meet this burden by generally alleging prejudice to his fair trial rights—a showing of actual prejudice is required. *State v. Salgado-Mendoza*, 198 Wn.2d at 432, citing *In re Rhome*, 172 Wn.2d 654, 260 P.3d 874 (2011) (dismissal under CrR 8.3(b) requires a showing of not merely speculative prejudice but actual prejudice to the defendant's right to a fair trial); see also *City of Seattle v. Orwick*, 113 Wn.2d 823, 829, 784 P.2d 161 (1989)

(Absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate.)

While late disclosure of material facts can support a finding of actual prejudice, such dismissal is only appropriate in context of interjecting “new facts” shortly before litigation, forcing a defendant to choose between his right to a speedy trial and to be represented by an adequately prepared attorney. *State v. Price*, 94 Wash.2d 810, 814, 620 P.2d 994 (1980). That is not the case here. Prior to disclosure of the witness list, the state had already provided the police reports, which included A.V. and his co-defendant’s statements to law enforcement, the repair garage damage estimate to repair the vehicle with the estimator’s name and phone number, and the victim’s statement regarding the incident, which likewise included her contact information. A.V. acknowledged having these items. VRP 11. Whether the co-defendant would testify was the only issue unresolved until the day of trial, but the co-defendant was nevertheless listed on the state’s witness list. VRP 18-19, 23. A.V.’s further concern was that the state had not listed a witness A.V. wanted called, but the Defense listed no witnesses and did not subpoena any witness. VRP 12, 22-23.

Whether the seven day delay is misconduct may certainly be up for debate, and certainly the state is not conceding that in this case. Nevertheless, A.V. must show actual prejudice. None was demonstrated to the trial court. Thus, dismissal was inappropriate and the trial court's decision should be reversed.

V. CONCLUSION

Dismissal under these facts was not supported by the record as the trial court incorrectly assessed the time for trial rule which appears to have impacted the trial court's decision. Also, before dismissal the trial court was required to consider an intermediate step, specifically a continuance, to determine the proper effect. Unfortunately, the trial court incorrectly determined Respondent would then be placed in the position of having to make a "Hobson's Choice." Because that was not the case, the trial court should have considered, and imposed, the least severe sanction that adequately addresses the prejudice, if any. The state respectfully asserts there was no prejudice to the defendant, and any need for additional time to prepare for trial could have been resolved by granting a continuance within the existing several weeks of time for trial remaining.

Thus, the decision of the trial court should be reversed, and
this matter should be remanded for trial.

RESPECTFULLY submitted this 14th day of January, 2019.

TS/ for MARK MCCLAIN

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

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)
 Appellant,)
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 AV,)
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 Respondent.)

No. 52677-8-II

CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
) ss.
 County of Pacific)

The undersigned being first duly sworn on oath deposes and states: That on the 14th day of January, 2019, affiant delivered by electronic mail a true and correct copy of Appellant's Brief to:

Nancy McAllister
nmcallisterlaw@gmail.com

This statement if certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Dated this 14th day of January, 2019, in South Bend, Washington.



Brandi Huber
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