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State of Washington  
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No. 52677-8-II

**Court of Appeals, Div. II,  
of the State of Washington**

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State of Washington,

Appellant,

v.

A.V.,

Respondent.

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**Brief of Respondent**

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## **1. Introduction**

A.V. is a juvenile who was charged with second degree malicious mischief. The charges were dismissed. The State has appealed.

A.V.'s arraignment began on June 7, 2018. The trial court continued arraignment to July 12. The trial court reasonably determined that June 7 was the proper arraignment date for purposes of calculating the speedy trial period.

At the July 12 pre-trial, the trial court ordered the State to disclose its witnesses no later than July 20. The State failed to do so, filing its witness list on July 27, while A.V.'s attorney was on planned leave. When A.V.'s attorney returned, she did not have enough time to consider the witness list in preparing for trial.

The trial court reasonably concluded that A.V. was prejudiced by the late disclosure. A.V. was faced with the impossible choice of either waiving his speedy trial rights or proceeding to trial with unprepared counsel. On A.V.'s motion the morning of trial, the trial court excluded the State's witnesses. Because this left the State with no way to prove its case, the trial court dismissed the case.

The trial court's decisions were within its discretion and supported by substantial evidence. This Court should affirm.

## **2. Restatement of Issues**

1. Was the trial court's decision to consider a motion to exclude witnesses within its discretion?
2. Did the trial court properly consider lesser sanctions than excluding the State's late-disclosed witnesses?
3. Was the trial court's setting of the arraignment date within its discretion?
4. Was the trial court's determination that a continuance would violate A.V.'s speedy trial rights within its discretion?
5. Was the trial court's order of dismissal within its discretion?

## **3. Statement of the Case**

A.V. is a juvenile who was charged with second degree malicious mischief. CP 3, 17. The charges were dismissed on October 2, 2018. CP 4, 13.

A.V. was charged by Information dated May 24, 2018. CP 17. He was summoned to appear for an initial hearing on June 7. CP 19-20. A.V.'s case was called at 9:30am on June 7, but A.V. was not present. RP 3. A bench warrant was issued. RP 3. By 10:11am, A.V. had arrived at court and the case was called again. RP 3.

Commissioner Scott Harmer told A.V. that court would not restart to accommodate A.V.'s late arrival. RP 4. But the

court would take care of some of the necessary business and then continue the rest of arraignment to July 12. RP 4. The trial court quashed the bench warrant. RP 5; CP 24. The trial court appointed an attorney for A.V. RP 5; *See* CP 21. The trial court signed an order releasing A.V. to his mother's custody, with conditions of release. RP 6; CP 21-24. The trial court signed an order setting pre-trial and continued arraignment for July 12 and trial for August 9. RP 6; CP 24, 25.

A.V.'s attorney filed a demand for discovery on June 12, including a request for "The names and addresses of persons whom the prosecuting authority intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses." CP 26. By the time of the pre-trial hearing 30 days later, on July 12, the State had not yet provided a witness list. RP 11; CP 3.

A.V.'s attorney requested a deadline of July 20. RP 11; CP 3-4. She explained on the morning of trial that this deadline was designed to give her time to follow up on the witness list and prepare for trial before taking a planned week-long absence just before the trial date. RP 15. The State agreed to produce the witness list by July 20. RP 12; CP 4. The trial court requested and signed an order requiring the State to produce its witness list by the agreed July 20 date. RP 12; CP 4, 28. The State did

not produce the witness list until July 27, when A.V.'s attorney was already out of the office. RP 15; CP 4, 29.

At the July 12 pretrial hearing, A.V. entered a plea of not guilty. RP 10. An "advice of rights" form was filled out by A.V. and his attorney and delivered to the trial court. *See* RP 11.

On the morning of trial, A.V. made an oral motion to exclude all of the State's witnesses as a sanction for the State's violation of the court's order to produce the witness list by July 20. RP 15-16. The State argued for alternative sanctions, suggesting a continuance or a monetary sanction. RP 17. The trial court excluded the witnesses. RP 21. The trial court reasoned that the defense should be able to rely on a court order in determining how to prepare for trial. RP 24. The State's violation of that order prejudices the ability of defense to prepare for trial. RP 24, 27. Because the State was left with no witnesses to present its case, the trial court dismissed the case. CP 4, 13.

## **4. Argument**

### **4.1 The trial court was within its discretion to consider A.V.'s oral motion to exclude the State's witnesses.**

The procedure for making motions in criminal cases is governed by CrR 3.5, 3.6, and CR 7(b). CrR 8.2. Criminal Rules 3.5 and 3.6 apply to specific kinds of motions not at issue here.

A.V.'s motion to exclude the State's witnesses due to violation of the trial court's discovery order is governed by CR 7(b). Civil Rule 7(b) provides, "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing."

A.V.'s attorney made the motion orally, on the record, in open court, on the morning of trial. Because the motion was made "during a hearing or trial," it was not required to be in writing. When the parties are present in court for a hearing or trial, the trial court has discretion to consider oral motions. *State v. Maling*, 6 Wn. App. 2d 838, 843, 431 P.3d 499 (2018).

A.V.'s motion was not, as the State argues, a motion under CrR 8.3. A defendant may make a motion under CrR 8.3(c) to dismiss charges for lack of evidence. The motion and procedure described in CrR 8.3(c) is in the nature of a summary judgment. Where there are no material facts in dispute and the undisputed facts fail to establish the elements of the crimes charged, the charges will be dismissed. CrR 8.3(c)(3). A.V. did not seek dismissal on the basis of undisputed facts. A.V. sought exclusion of the State's witnesses as a sanction for the State's misconduct. There was no need to follow the specialized procedures of CrR 8.3(c).

A.V.'s motion also was not a motion under CrR 8.3(b). A motion under CrR 8.3(b) may only be brought by the court, not

by the defense. If the trial court's dismissal of the case could be considered a CrR 8.3(b) motion, it was nevertheless timely. Rule 8.3(b) does not require any specific timeline for advance notice, stating only, "The court, in the furtherance of justice, **after notice and hearing**, may dismiss any criminal prosecution..." CrR 8.3(b) (emphasis added).

The State's reliance on *Loveless v. Yantis*, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973), is misplaced. *Loveless* was not a criminal case. Notice of a CrR 8.3(b) motion was not at issue. Rather, *Loveless* provided an exception to the strict 5-day timeline for written civil motions by a party. *Loveless*, 82 Wn.2d at 759. In any event, the case does not require "ample time." Rather, it requires only that a party "had actual notice and time to prepare to meet the questions raised by the motions." *Id.*

Criminal Rule 8.3(b) does not specify how much notice is required. Here, the State had actual notice of A.V.'s motion to exclude witnesses days before trial. RP 17 (the prosecutor describes communication with A.V.'s attorney as early as August 2, discussing the motion). The State recognized that exclusion of its witnesses would mean that it could not prove its case and that dismissal would be the result. RP 16. The State came to trial prepared with objections to the motion, *e.g.*, RP 16, and case law to cite in opposition, *e.g.*, RP 17. The State had actual notice and time to prepare to answer the motion. The

trial court was within its discretion to consider A.V.'s motion to exclude witnesses and then to consider whether dismissal was required when the State could no longer prove its case. This Court should affirm.

**4.2 The trial court properly considered lesser sanctions before excluding the State's late-disclosed witnesses.**

**4.2.1 The trial court was within its discretion in calculating the speedy trial period from an arraignment date of June 7.**

Under JuCR 7.8, it is the responsibility of the trial court to ensure a speedy adjudicatory hearing. JuCR 7.8(a)(1). To be considered speedy, the hearing or trial must be held within 60 days of the "commencement date" defined in the rule. JuCR 7.8(b)(2). The commencement date is the date of arraignment "as determined under JuCR 7.6 and CrR 4.1." JuCR 7.8(c)(1).

Determining the date of arraignment is not nearly as simple as the State seems to think. The State argues that because A.V. was late on June 7, arraignment did not take place that day. If A.V. did not complete the arraignment process on June 7, the State reasons, it must have happened on July 12. But that is not how the rules operate. Rather, under the rules, arraignment must happen within a specific timeframe, and if it in fact happens at a later date, the court must "establish and

announce [a] proper date of arraignment” for use in calculating the speedy trial deadline. CrR 4.1(b).

This conclusion is straightforward from the plain language of the rules. “A juvenile who is detained or subject to conditions of release must be arraigned within 14 days after the information or indictment is filed.” JuCR 7.6. One who is not detained or subject to conditions must be arraigned within 14 days after the first appearance in court. CrR 4.1(a)(2).

The information in this case was filed on May 24, 2018. CP 17. The summons required A.V. to appear for arraignment on June 7, exactly 14 days later. CP 19. At the time A.V. was neither detained nor subject to conditions of release. CP 3. If he was not actually arraigned on June 7, the rules required that he be arraigned within 14 days of his first appearance on June 7. *See* CrR 4.1(a)(2); JuCR 7.8(a)(2)(iii) (defining “appearance” as “the juvenile’s physical presence in the court where the pending charge was filed” so long as (A) the prosecutor was notified and (B) the presence was noted on the record under the correct case number. These conditions were met by A.V.’s appearance on June 7).

“The procedure for the arraignment of an alleged juvenile offender is governed by CrR 4.1.” JuCR 7.6. That rule requires that when an arraignment date is outside of the 14-day limit, the trial court “shall establish and announce the proper date of

arraignment.” CrR 4.1(b). The date announced by the court then serves as the commencement date for purposes of speedy trial. CrR 4.1(b); JuCR 7.8(c).

If, as the State contends, A.V. was actually arraigned on July 12, the arraignment would have been far outside of the 14-day limit counted from A.V.’s appearance on June 7. The trial court could not, under the rules, count A.V.’s speedy trial date from July 12.<sup>1</sup> The trial court acted within its discretion when it established and announced (in its findings of fact) that the proper date of arraignment was June 7. This Court should affirm.

**4.2.2 The trial court’s finding that A.V. was arraigned on June 7 was supported by substantial evidence.**

Alternatively, the trial court’s finding that A.V. was arraigned on June 7 was supported by substantial evidence in the record that A.V. was **in fact** arraigned on June 7. This requires first understanding what “arraignment” actually is.

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<sup>1</sup> The State argues that A.V. should have objected to arraignment on July 12. This argument was not made in the trial court and should be disregarded. In any event, A.V. had no reason to object on July 12. He had in fact been arraigned, at least in part, on June 7. Nothing at the July 12 hearing would have put A.V. on notice that his speedy trial date could be calculated from any date other than June 7. A.V. cannot be said to have waived an objection to a July 12 arraignment date.

Under CrR 4.1, arraignment consists of three things:

- 1) appointment or waiver of counsel (CrR 4.1(c), (d));
- 2) determination of the defendant's true name (CrR 4.1(e)); and
- 3) the reading of the information (CrR 4.1(f)). Entry of a plea is not a necessary part of arraignment. *See* JuCR 7.6 (arraignment procedure is governed by CrR 4.1, JuCR 7.6(a), but entry of a plea is governed by CrR 4.2, JuCR 7.6(b)); CrR 4.2 (nothing in this rule indicates that entry of a plea is a part of arraignment).

At the June 7 hearing, the trial court appointed counsel for A.V. RP 5. The trial court also set hearing and trial dates, RP 5-6, and conditions of release, RP 6-7.

At the July 12 hearing, A.V. entered a plea of not guilty. RP 10-11. The trial court never inquired about A.V.'s true name and never read the information on the record. Nothing in the record indicates that A.V. expressly waived reading of the information at either the June 7 or July 12 hearing. *See* RP 5-7, 10-12.

The June 7 hearing was intended to be the arraignment. RP 3 ("on today for arraignment"). The July 12 hearing, by contrast, was styled as merely a continuation of the arraignment. RP 10 ("on today for pretrial and continued arraignment"). One of the three elements of an arraignment took place on June 7. Neither of the other two elements ever took place at all, and certainly not on July 12. Other events,

such as entry of a plea, are not required elements of an arraignment as defined in the rules. This evidence is sufficient to convince a fair-minded person that the arraignment **in fact** took place on June 7.

The trial court's findings relating to the arraignment date were supported by substantial evidence. The trial court's conclusions flow naturally from the findings. The trial court was within its discretion in determining that the arraignment date was June 7 and that the August 9 trial date was actually past the speedy trial deadline.

**4.2.3 The trial court was within its discretion in determining that a continuance would force A.V. to choose between waiving his speedy trial rights or going to trial with an unprepared attorney.**

Regardless of whether the trial court arrived at the June 7 arraignment date as a question of fact supported by substantial evidence or as a matter of discretion under the rules, the trial court then correctly calculated the speedy trial date as 60 days from June 7, per JuCR 7.8(b)(2). 60 days from June 7, 2018 put the speedy trial date at August 6, 2018 (although it appears the trial court miscalculated this as August 7). This is why the trial court observed in its findings that neither party objected to the August 9 trial date being slightly beyond the speedy trial date. CP 3. But A.V. would have been within his

rights to object to any further delay of the trial being a violation of his speedy trial rights.

Unfortunately, A.V. also had an attorney who had not been able to prepare for trial due to the State's violation of the court-ordered deadline for disclosing its witnesses. "If the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's 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, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights." *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

A.V.'s attorney was unable to prepare for trial due to the State's late disclosure of its witnesses. A.V.'s attorney requested the July 20 deadline because she was going to be away from the office on a planned week-long absence just before trial. RP 15. The July 20 deadline would have given A.V.'s attorney time to review the witness list and arrange interviews with the witnesses prior to her absence. She was unable to do so because the State did not provide the witness list until July 27, when A.V.'s attorney was already away on her planned absence.

A.V.'s attorney returned to the office on Monday, August 6. *See* RP 15.<sup>2</sup> When she returned, she did not have sufficient time to contact the witnesses before trial. She notified the prosecutor of her intent to bring a motion to exclude the State's witnesses. RP 17. On the morning of trial, A.V.'s attorney was able to briefly speak with some of the State's witnesses and learned for the first time that an additional, undisclosed witness might have knowledge relevant to A.V.'s defense. RP 18.

Given these facts, it was reasonable for the trial court to conclude that A.V.'s attorney was unprepared for trial as a result of the State's delay in disclosing its witnesses. New facts had been interjected into the case. The State's failure to provide timely discovery that would allow for adequate preparation by the defense is an inherent and material prejudice that places a defendant in a position of having to choose between a speedy trial and effective assistance of counsel. *State v. Brooks*, 149 Wn. App. 373, 388, 203 P.3d 397 (2009).

#### **4.2.4 The trial court properly considered lesser sanctions.**

The State bears the burden of suggesting lesser alternative sanctions. *Brooks*, 149 Wn. App. at 392. Here, the

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<sup>2</sup> Consulting a calendar shows that the Monday before August 9 was August 6, giving A.V.'s attorney only 2-3 days to try to contact the State's witnesses.

State suggested a continuance. However, because the speedy trial date had passed, the trial court was within its discretion to refuse a continuance. The State suggested a monetary sanction. But, again, a monetary sanction would not have remedied the prejudice to A.V. that would result from being forced to waive speedy trial or go to trial with an unprepared defense. The trial court was within its discretion to reject a monetary sanction. Exclusion of witnesses is also a lesser sanction for a discovery violation. *E.g., State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). That is exactly the lesser sanction the trial court chose in this case. CP 3 (findings 6-8). The trial court did not abuse its discretion. This Court should affirm.

#### **4.3 The trial court was within its discretion in dismissing the State's case due to the lack of any witnesses.**

The trial court's reasoning for dismissing the State's case was not as a direct sanction for the State's mismanagement under CrR 8.3. Rather, the sanction was exclusion of the State's late-disclosed witnesses. RP 21; CP 4 (*e.g.*, finding 8).

After the State's witnesses were excluded, the trial court could have proceeded to trial. At such a trial, the State would have had no witnesses and therefore could not present any evidence with which to meet its burden of proof. The State would have been forced to rest its case without evidence. At that

point, A.V. would have been within his rights to make an oral motion to dismiss for the State's failure to present evidence to prove the elements of the crime. The trial court would have been correct to grant the motion.

Instead of going through such a useless song-and-dance, the trial court cut to the chase and considered dismissal on its own motion. The State had no evidence. There was no other reasonable outcome other than dismissal.

## **5. Conclusion**

The trial court acted within its discretion and arrived at a reasonable resolution. A.V.'s oral motion to exclude the State's witnesses was procedurally proper. The trial court acted within its discretion, supported by substantial evidence, in determining that A.V.'s arraignment date was June 7 and that the August 9 trial was beyond the speedy trial date. The trial court acted within its discretion in determining that A.V. was prejudiced by the State's violation of the trial court's discovery order. The trial court acted within its discretion in determining that lesser sanctions would not cure the prejudice. With the State's witnesses properly excluded, the trial court acted within its discretion in dismissing the case. This Court should affirm.

Respectfully submitted this 14<sup>th</sup> day of June, 2019.

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## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on June 14, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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