

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32961-5-III  
Consolidated with  
No. 341593

**FILED**  
**Nov 10, 2016**  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOEL M. GROVES,

Defendant/Appellant

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Supplemental Brief of Respondent

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A. ISSUES FOR ADDITIONAL BRIEFING

- a. Whether the State delayed producing exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).
- b. Whether the search of the 2407 N. Ellington Street house on July 9, 2014 was constitutional, and whether Mr. Groves preserved this issue for review.
- c. Whether any of Mr. Grove's statements to Officer Jennifer Katzer or Detective Clasen were admitted at trial, and if so, whether these statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

B. RESPONSE TO QUESTIONS PRESENTED FOR ADDITIONAL BRIEFING

- a. Is there a violation of Brady, when the state discloses DNA evidence prior to trial and defense denies an opportunity for additional testing or investigation and pushes the case to trial?
- b. Can a defendant raise an objection to a search warrant for the first time on appeal?

- c. Did the court abuse its discretion in admitting the defendant's statements given in an interview with a detective that the defendant requested in the presence of his attorney that was recorded when the defendant was read Miranda rights and waived those rights?

#### C. STATEMENT OF THE CASE

The respondent relies on the statement of facts originally filed in the brief by respondent in this case with the following additional facts relevant to the issues presented.

Mr. Groves gave two different statements to the police. (RP 1 at 57,) The first was given to Detective Katzer and during a pretrial suppression hearing, the court ruled most of those statements were not admissible in trial against the defendant and none of that interview was presented to the jury at trial. (RP at 57, 59; RP at 162). The defendant gave a second recorded statement at his request to Detective Clasen with his attorney present. (RP 1 at 77 – 79). He also hand wrote a letter he gave to the prosecutor's office through his attorney that was the substance of his interview. (RP 1 at 75). A copy of the recorded interview was admitted at the hearing for the judge's review along with a written transcript of that hearing (RP at 79 – 81). Before that interview Detective

Clasen read the defendant his Miranda warnings and advised the defendant the interview was being recorded. (RP at 79; CP at 163). After the suppression hearing, in a written ruling, the court ruled that the statement given to Detective Clasen was admissible, but that the statements given to Detective Katzer were not admissible. (CP at 162 – 63).

The defendant was charged via INFORMATION and an arrest warrant issued for his arrest on July 10, 2014 (CP 2 – 3). The defendant was arrested on that warrant on July 14, 2014 and the trial for these very serious charges began 121 days later on November 12, 2014. (CP at 10 – 14; 238). The gun that was used in this case was recovered as evidence on August 11, 2014 and immediately sent to the Washington State Patrol Crime lab for fingerprint, ballistics, and DNA processing (CP at 203).

Throughout the case, there were many discussions about the complex discovery issues, including outstanding DNA requested by the state. On November 3, 2014 defense filed a motion titled “Motions in Limine and to Suppress Evidence,” objecting to “late production” of the outstanding DNA results. (CP at 196 – 200). The state filed a response on November 7, 2014 outlining the process the state had undergone in order to get DNA testing done

by the state crime lab in a timely manner and get to results to the defendant before the trial date (which had been set for November 4) (CP at 204). Specifically, the motion indicated:

On October 15, 2014 the crime lab completed the first of the three stages of analysis, the fingerprint analysis. There were no suitable impressions recovered on the gun, the fired cartridge or the unfired cartridge for comparison purposes. The gun was then forwarded to the DNA testing unit the crime lab.

On October 23, Detective Clasen communicated with the crime lab about the likelihood of the DNA analysis being completed by the trial date of November 4. The analyst indicated the testing would likely not be completed by November 4, but asked for a “reference sample” of the defendant’s DNA which could expedite and quantify findings.

On October 24, the state prepared an order for a DNA sample from the defendant. The state presented the order in court to Judge Sparks to sign. Because Judge Sparks had recused himself from the case, he would not sign the order and directed counsel to seek a visiting judge or a Judge Pro Tem to sign the order. The state contacted several court administrators via email (Grant County and Yakima County) to get a judge to look at the order. The defense attorney indicated via email in response that he objected to the order. No judge was able to review or sign the order for the state on October 24.

On Monday, October 27, counsel for the state contacted the court administrator asking that a judge hear the state’s motion for an order for the DNA sample before October 31, which was the next date a judge would be available to hear the motion. The court administrator did not respond to requests by the state to set an earlier telephonic hearing.

The state’s order was presented to Judge Chmelewski on Friday, October 31, 2014 and signed. Detective Katzer took a reference sample of the defendant’s

DNA and drove it directly to the crime lab. The analyst informed her that the analysis would likely not be completed by November 4, but that she would expedite the findings. The state expects the analysis to be completed by the end of this week, November 7, 2014 and plans to use the results in our case in chief as we have indicated since the gun was recovered.

At the hearing on November 7, 2014 defense asked that the gun and DNA be suppressed and the judge denied that motion and ordered that in the ten days between that hearing and when the state planned to call the DNA expert the defense be given complete access to the analysts who did the analysis and would be testifying for the state (RP 1 at 171). The court specifically found that the state had undergone diligent efforts to obtain the DNA results and supply them to the defendant and that his remedy if he needed more time was a motion to continue (Id. at 172).

#### D. ARGUMENT

- a. **THERE WAS NO BRADY VIOLATION BY THE STATE WHEN THEY DISCLOSED DNA EVIDENCE AS SOON AS POSSIBLE; THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING A DEFENSE MOTION TO SUPPRESS DNA EVIDENCE AS THE DEFENDANT'S PROPER REMEDY WAS A CONTINUANCE.**

CrR 4.7(h) (7) (i), provides:

[T]he court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss

the action or enter such other order as it deems just under the circumstances.

State v. Glasper, 12 Wn. App. 36, 38, 527 P.2d 1127 (1974)

was the first case to interpret the rule. The court in that case pointed out Washington's rule was adapted from FED. R.

CRIM. P. 16(g), with one difference: the advisory

committee omitted a clause allowing the court to "prohibit

the party from introducing in evidence the material not

disclosed." Glasper, 12 Wn. App. at 39 (quoting

WASHINGTON PROPOSED RULES OF CRIMINAL

PROCEDURE, Rule 4.7, cmt. at 85 (West 1971)). Glasper

therefore held CrR 4.7(h)(7)(i) does not allow the trial court

to suppress evidence as a remedy for discovery violations,

and Washington courts have consistently followed that

holding. See, e.g., State v. Ray, 116 Wn.2d 531, 538, 806

P.2d 1220 (1991); State v. Laureano, 101 Wn.2d 745, 762,

682 P.2d 889 (1984), overruled by State v. Brown, 111

Wn.2d 124, 761 P.2d 588 (1988); State v. Thacker, 94

Wn.2d 276, 280, 616 P.2d 655 (1980); State v. Hutchinson,

135 Wn.2d 863 (1998).

The purpose of the rule is to protect against surprise that might prejudice the defense. State v. Clark, 53 Wn. App. 120, 124, 765 P.2d 916 (1988), review denied, 112 Wn.2d 1018 (1989). The trial court's decision in dealing with violations of a discovery order is discretionary. State v. Bradfield, 29 Wn. App. 679, 630 P.2d 494, review denied, 96 Wn.2d 1018 (1981).<sup>1</sup>

The court rules clearly allow the trial court to grant a continuance "when required in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense." CrR 3.3(h)(2); State v. Guloy, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986).

The Sixth Amendment of the US Constitution affords the accused a right to a speedy trial. However, it is not a constitutional mandate that a defendant in-custody be brought to trial within 60 days, per CrR 3.3. State v.

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<sup>1</sup> Dismissal is not an appropriate remedy either. "[T]he question of whether dismissal is an appropriate remedy is a fact-specific determination that must be resolved on a case-by-case basis." State v. Sherman, 59 Wn. App. 763, 770-71, 801 P.2d 274 (1990). The court's power to dismiss is reviewable only for a manifest abuse of discretion. State v. Laureano, 101 Wn.2d at 762. However, dismissal for violation of discovery procedures is an extraordinary remedy. State v. Laureano, *supra*.

Saunders, 153 Wash.App 209 (2009). The speedy trial rule is a procedural rule not a constitutional right or mandate. Id.; State v Schmidt, 30 Wash.App. 887 (1982). In the absence of language defining “speedy” in days, months, or year, a reasonable time is the focus when reviewing a constitutional speedy trial claim. State v. Whelchel, 97 Wash.App. 813 (1999). The rule is designed to protect, not guarantee, the constitutional right. State v. Angulo, 69 Wash.App 337 (1993). Violation of the speedy trial rule does not necessarily result in a constitutional violation of the right to speedy trial. State v. Smith, 67 Wash.App. (1992).

The state is responsible for bringing the defendant to trial within speedy trial. The trial court is responsible for ensuring compliance with the speedy trial rule. State v. Wilks, 85 Wash.App. 303 (1997). The defendant’s right to a speedy trial imposes upon the prosecution a duty of good faith and due diligence. State v. Ross, 98 Wash.App. 1 (1999).

CrR 3.3(e)(3) and (f)(2) provide that “(o)n motion of the court or a party, the court may continue the hearing to a specified date when such continuance is required in the

administration of justice *and* the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial hearing has expired” (emphasis added).

In determining whether a delay in bringing a defendant to trial impairs the defendant’s *constitutional right* to a speedy trial, the court must consider four factors: (1) the length of the delay, (2) reason for the delay, (3) the defendant’s assertion of his right, and (4) prejudice to the defendant. State v. Parris, 30 Wash.App. 268 (1981).

Testing for DNA is generally accepted in the scientific community and is admissible evidence - the results of which can be either incriminatory or exculpatory. State v. Cannon, 130 Wn.2d 313 (1996). A request for DNA evidence is not unreasonable, State v. Cauthron, 120 Wn.2d 879, (1993) (A four-month continuance of the trial date was justified. Arrest occurred in October 1988. Trial did not occur until March 1989). See also State v. Brown, 973 P.2d 773 (Kan.1999) (three month delay upheld even though the request for DNA testing was made 11 days before the scheduled trial date); State v. Turner, 564 N.W.2d 231

(Neb.1997) (court upheld a 74 day delay for DNA testing); State v. Green, 867 P.2d 366 (Kan.1994) (court upheld two continuances, totaling 120 days, for DNA testing); State v. Stroud, 459 N.W.2d 332 (Minn.Ct.App.1990) (error to deny the State a continuance for DNA testing even though the State could not show that the DNA results would be favorable to its case); United States v. Drapeau, 978 F.2d 1072 (8th Cir.1992) (two continuances, totaling eight weeks, were reasonable where the government demonstrated delay was required to complete the analysis).

Here the state disclosed DNA evidence as soon as the information was provided to them. The DNA evidence was provided to defense prior to trial and the court found the state had done diligent efforts to get the results to the defendant and offered the defendant a remedy for the disclosure so near to trial: a continuance. The law is clear that the sixty day rule is not a Constitutional mandate and that delays for scientific evaluations are reasonable. The defendant made his own decision to proceed to trial and not to request additional time for testing or evaluation although this option was available to him: he already had a court

appointed investigator and according to his attorney had contacted a DNA lab for analysis. His decision cannot be held against the state as some sort of discovery violation.

The defendant and his attorney both raise issues in their additional grounds brief about whether the defendant's DNA was in CODIS and alleges the prosecutor misled the court regarding this fact. That is not what the record reflects: the DNA lab explicitly requested a reference sample from the defendant to expedite the request for analysis. There is no factual record about how the DNA lab uses CODIS, or whether the DNA lab has access to a national CODIS database. This issue is irrelevant, as the request for the reference sample expedited the requests, which benefitted the defendant as it was provided to him in an expedited fashion. If the court is concerned about the references to CODIS, the proper remedy is remand for a factual determination about how the DNA lab uses the CODIS database and how it was used or not used in this case. Those facts are not present in the record.

b. MR. GROVES CANNOT RAISE ISSUES REGARDING THE SEARCH WARRANT FOR THE FIRST TIME ON APPEAL.

RAP 2.5(a) states that “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” The purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011). Even if a defendant objects to the introduction of evidence at trial, he/she “may assign evidentiary error on appeal only on a specific ground made at trial.” State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

Defense makes two claims about the warrant: first that it is overbroad and not supported by probable cause and secondly that the defense attorney was deficient in not raising this issue at the trial level. Both claims are meritless.

The warrant was for a home the defendant was known to reside in. In support of the warrant, Detective Weed indicated to Judge Ellis that the defendant had been

arrested on a warrant at that home by a different Ellensburg Police Officer one month prior. There is a nexus between the defendant and the home and the warrant was lawful. The defendant's attorney not to challenge the warrant was likely based on this belief and was not deficient.

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). The failure to show either element ends our inquiry. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), overruled on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. Grier, 171 Wn.2d at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. Grier, 171 Wn.2d at 34. Claims of ineffective

assistance of counsel are reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Although this case presented many issues and voluminous discovery, Mr. Moser made many motions on behalf of the defendant: motions for release, motions for suppression, motions in limine, motion for a new trial, etc. The record is replete with examples of Mr. Moser raising issues for the defendant and effectively assisting him: had he challenged the warrant, his challenge would have been denied and his failure to do so cannot be deemed to have been ineffective.

- c. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING STATEMENTS MADE BY THE DEFENDANT IN AN INTERVIEW HE REQUESTED WITH THE POLICE WHERE HIS ATTORNEY WAS PRESENT AND THE DETECTIVE READ HIM HIS MIRANDA WARNINGS, WHICH HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED AND GAVE A RECORDED STATEMENT.

The Fifth Amendment to the United States Constitution provides criminal suspects with the right to be free from self-incrimination. State v. Warner, 125 Wn.2d 876, 884, 889 P.2d 479 (1995); State v. Hickman, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010). Because of the

coercive nature of custodial interrogations, law enforcement officers are required to provide a suspect with Miranda warnings prior to questioning the suspect in a custodial setting. Hickman, 157 Wn. App. at 772.

Specifically, the requirements of Miranda apply where “a suspect endures (1) custodial (2) interrogation (3) by an agent of the State.” State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Absent effective Miranda warnings, a suspect's custodial statements are presumed to be involuntarily given and, therefore, cannot be used against the suspect at trial. Miranda, 384 U.S. at 476; Hickman, 157 Wn. App. at 772. The decision to admit a defendant's statements is reviewed for abuse of discretion. Stenson, 132 Wn.2d 668, 701 (1997).

In this case, Detective Clasen testified about the contents of Mr. Groves' second recorded interview. There was no abuse of discretion by the court to admit this recorded statement given to the police at the defendant's request after he had been given Miranda warnings and knowingly, intelligently, and voluntarily waived those rights. Because he didn't like the way the interview

proceeded and did not like the outcome, the defendant would like the court to find there was something illegal about what the police did, this is not the case. There was nothing coercive or illegal about the interview and there was no abuse of discretion in the court admitting the statement against the defendant in the state's case.

#### E. CONCLUSION

For the reasons stated, none of the additional grounds raised by the defendant have any legal merit. The state respectfully requests the court grant the relief requested in the state's original response to the appellant's brief and affirm the defendant's convictions; denying the relief requested in the statement on additional grounds.

\_\_\_\_\_  
/s/

/s/ Jodi M. Hammond  
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PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 11/10/16, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

State of Washington,	)	Court of Appeals No. 32961-5-III
Respondent.	)	
vs.	)	
	)	
JOEL M. GROVES,	)	AFFIDAVIT OF SERVICE
Appellant.	)	
_____	)	

STATE OF WASHINGTON )  
 ) ss.  
 County of Kittitas )

The undersigned being first duly sworn on oath, deposes and states:

That on the 10<sup>th</sup> day of November, 2016, affiant an electronic copy directed to:

Renee Townsley  
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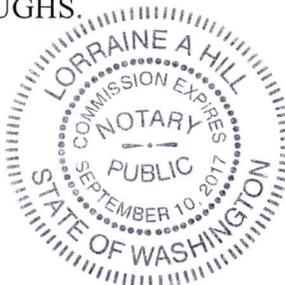
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containing copies of the following documents:

- (1) Affidavit of Service
- (2) Supplemental Brief of Respondent

Theresa Burroughs

SIGNED AND SWORN to (or affirmed) before me on this 10<sup>th</sup> day of November, 2016, by THERESA BURROUGHS.



Lorraine A. Hill  
 NOTARY PUBLIC in and for the  
 State of Washington.  
 My Appointment Expires: 09-10-17