

FILED
Aug 19, 2016
Court of Appeals
Division III
State of Washington

No. 33340-0-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Appellant,

vs.

DANIEL OBADIAH BATSELL,
Respondents

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Vic L. VanderSchoor, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES IN RESPONSE.....1

B. COUNTERSTATEMENT OF THE CASE.....1

Facts known to motion judge at the March 18, 2015 hearing.....2

Argument on the March 18, 2015 oral motion to dismiss.....5

C. ARGUMENT IN RESPONSE.....8

1. The trial court properly ruled that it lacked authority to reconsider its entry of final judgment of dismissal.....8

2. Denial of the state’s motion to reconsider the entry of a final judgment of dismissal is not appealable under RAP 2.2(b) and RAP 2.4.....12

3. Pursuant to RAP 5.2(a) and (e) the final judgment of dismissal is not reviewable under a later filed notice of appeal that designates the order denying motion to reconsider as the decision to be reviewed.....15

4. The trial court did not abuse its discretion in dismissing Mr. Batsell’s charges for governmental misconduct.....17

a. Both State and Federal Constitutions obligate the government to share material evidence with a defendant..17

b. The prosecution inexcusably withheld <i>Brady</i> material from Mr. Batsell.....	19
c. Reversal is the proper remedy.....	22
5. Appeal costs should not be imposed.....	25
D. CONCLUSION.....	28

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)..... <i>passim</i> , 1, 13, 17, 18	
<i>California v. Trombetta</i> , 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).....	17
<i>Klapprott v. United States</i> , 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949).....	10
<i>Kyles v. Whitley</i> , 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).....	18
<i>Strickler v. Greene</i> , 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).....	18
<i>United States v. Bagley</i> , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).....	18, 22

<i>In re Personal Restraint of Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (1993).....	18
<i>In re Personal Restraint of Gentry</i> , 137 Wn.2d 378, 972 P.2d 1250 (1999).....	18
<i>King Cy. v. Williamson</i> , 66 Wn. App. 10, 830 P.2d 392 (1992).....	15, 16
<i>Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.</i> , 68 Wn.2d 756, 415 P.2d 501 (1966).....	11, 12
<i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002).....	8
<i>Scheib v. Crosby</i> , 160 Wn. App. 345, 249 P.3d 184 (2011).....	20, 21
<i>State ex rel. Lundin v. Superior Court</i> , 90 Wash. 299, 155 P. 1041 (1916).....	9
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	26
<i>State v. Brooks</i> , 149 Wn. App. 373, 203 P.3d 397 (2009).....	20, 21, 23
<i>State v. Chichester</i> , 141 Wn. App. 446, 170 P.3d 583 (2007).....	24, 25
<i>State v. Dailey</i> , 93 Wn.2d 454, 610 P.2d 357 (1980).....	21
<i>State v. Englund</i> , 186 Wn. App. 444, 345 P.3d 859 (2015).....	9
<i>State v. Gaut</i> , 111 Wn. App. 875, 46 P.3d 832, 835 (2002).....	12, 15
<i>State v. Hartwig</i> , 36 Wn.2d 598, 219 P.2d 564 (1950).....	22
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	20
<i>State v. Jacobson</i> , 36 Wn. App. 446, 674 P.2d 1255 (1983).....	23
<i>State v. Keller</i> , 32 Wn. App. 135, 647 P.2d 35, 38 (1982).....	11

<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	21
<i>State v. Mullen</i> , 171 Wn. 2d 881, 259 P.3d 158 (2011).....	19, 20
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	25
<i>State v. Price</i> , 94 Wn.2d 810, 620 P.2d 994 (1980).....	21, 22
<i>State v. Sampson</i> , 82 Wn.2d 663, 513 P.2d 60 (1973).....	9
<i>State v. Scott</i> , 92 Wn.2d 209, 595 P.2d 549 (1979).....	9
<i>State v. Scott</i> , 20 Wn. App. 382, 580 P.2d 1099 (1978), aff'd 92 Wn.2d 209, 595 P.2d 549 (1979).....	10
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612, rev. denied, 185 Wn.2d 1034 (2016).....	25, 26
<i>State v. Smith</i> , 84 Wn.2d 498, 527 P.2d 674 (1974).....	9

Constitutions and Statutes

U.S. Const. amend. 5.....	17
Wash. Const. art. 1, § 3.....	17
Wash. Const. art. 1, § 22.....	22
RCW 10.73.160.....	25
RCW 10.73.160 (1).....	25

Court Rules

CR 50(b).....14

CR 52(b).....14

CR 59.....9, 14, 16

CR 60(a).....10

CR 60(b).....8, 10, 11

CR 60(b)(11).....10

CrR 7.4.....10, 14

CrR 7.5.....14

CrR 8.3.....22

CrR 8.3(b).....21, 22

RAP 2.2(b)(1) through (6).....13

RAP 2.2(b).....1, 12, 13

RAP 2.2(b)(1).....13, 15

RAP 2.3.....15

RAP 2.4.....1, 12, 13, 15

RAP 2.4(b).....14

RAP 2.4(c).....14

RAP 2.4(f).....14

RAP 5.2(a).....1, 15, 16, 17

RAP 5.2(e).....	1, 15, 16, 17
RAP Title 14.2.....	25
RAP 14.2.....	25
RAP 15.2(f).....	26, 27

Other Resources

General Court Order, Court of Appeals, Division III (filed June 10, 2016).....	27
Trautman, Vacation and Correction of Judgments in Washington, 35 Wash.L.Rev. 505, 515 (1960).....	11

A. ISSUES IN RESPONSE

1. Whether the trial court lacked authority to reconsider its decision after final judgment of dismissal was entered?

2. Whether the denial of the state's motion to reconsider the entry of a final judgment of dismissal is not appealable under RAP 2.2(b) and RAP 2.4.

3. Whether pursuant to RAP 5.2(a) and (e) a final judgment of dismissal is not reviewable under a later filed notice of appeal that designates the order denying motion to reconsider as the decision to be reviewed.

4. Whether the court properly exercised its discretion in dismissing the case due to the state's withholding of *Brady*¹ material until the last minute in violation of Mr. Batsell's due process rights?

B. COUNTERSTATEMENT OF THE CASE

On the morning of trial on March 18, 2015, the trial court granted a pre-trial defense motion and dismissed with prejudice the single count of possession of a controlled substance—methamphetamine. The written order of dismissal was entered that day and the state did not appeal the

¹ *Brady v. Maryland*, 373 U.S 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

final judgment of dismissal. CP 41, 42; 3/18/15 RP 2–8. On March 26, 2015, the state filed a motion for reconsideration. CP 17–40. The state now appeals² from the order denying that motion for reconsideration of a final judgment of dismissal. CP 3–5, 41.

On September 17, 2014, the state filed an information alleging Daniel Obahiah Batsell unlawfully possessed on September 15, 2014 a controlled substance—methamphetamine. CP 42; 3/18/15 RP 2.

Facts known to motion judge at the March 18, 2015 hearing. In September 2014 the Honorable Vic VanderSchoor presided over Mr. Batsell’s arraignment. 9/23/14 RP 4–6. In February 2015 (six weeks before trial) Judge VanderSchoor became aware (1) defense counsel was still actively trying to find two witnesses who were at the residence at the time Mr. Batsell’s alleged possession occurred and (2) the state had not tested for fingerprints a broken pipe containing meth residue found in Mr. Batsell’s pants pocket. 2/3/15 RP 4–5. Five (5) weeks before trial Judge VanderSchoor became aware the state had now sent the pipe out for testing and intended to use the results to help establish Mr. Batsell’s guilt. Defense counsel anticipated no prints would be found linking the pipe to

² The state filed its notice of appeal on May 21, 2015. CP 3. The state filed its opening brief of appellant on November 2, 2015. Undersigned counsel was appointed to represent Mr. Batsell on March 10, 2016, after trial counsel obtained an order of indigency. CP 54–55.

Mr. Batsell but requested the trial date be reset to March 18 to allow time to investigate this new evidence. 2/10/15 RP 3–4; CP 49–50, 51. Two weeks before trial, the test results were not yet in. 3/3/15 RP 2. One week before trial Judge VanderSchoor became aware the test results were still not in. The parties indicated they were ready for trial, although defense counsel had anticipated having the results earlier and suggested he might be asking to move the date. The judge responded “We are not going to do it the day before trial. We don’t do things the day before trial.” 3/10/15 RP 6.

On the morning of trial on March 18, 2015, Judge VanderSchoor presided over the motion hearing. 3/18/15 RP 2–8. The court heard the following information.

In initial discussions at the time the charges were filed, counsel told the prosecutor the defense was unwitting possession and that counsel was attempting to locate the person known to them only as “Joshua” who was associated with the car Mr. Batsell was loading at the time police became involved. 3/18/15 RP 2–3. The name “Joshua” (no last name) was disclosed in the report provided by the prosecutor in initial discovery. 3/18/15 RP 7.

An integral part of the defense case was that the offending methamphetamine was found in a container on a key ring belonging to the vehicle that Mr. Batsell was loading a duffel bag into and the duffel bag belonged to the person known only as “Joshua.” 3/18/15 RP 3. Counsel had wanted to identify the “Joshua” who was at the scene and run down the ownership of the vehicles at the scene so that as part of his defense Mr. Batsell could distance himself from the keys (and the drugs found on the key chain). Part of the defense was that “Joshua” was an active methamphetamine user and Mr. Batsell was loading things from the house where “Joshua” was staying into the car because “Joshua” had indicated a willingness or desire to undergo some drug treatment. 3/18/15 RP 4–5. A second prong of the defense case was Mr. Batsell had borrowed the pants from “Joshua” and Mr. Batsell didn’t know the pipe was in the pocket. 3/18/15 RP 4.

During that initial stage of the case counsel asked the prosecutor if the state had any information regarding the vehicle registration or identification of this individual. 3/18/15 RP 2. The prosecutor indicated counsel “had everything they had” and thereafter provided no additional information. 3/18/15 RP 2. Counsel continued to attempt to identify and locate the person named “Joshua” and kept the prosecutor advised of

progress. 3/18/15 RP 7. Counsel believed the prosecutor “has known [he’d] been trying to find the person ‘Joshua’ because ‘Joshua’ is connected to the car.” 3/18/15 RP 6–7.

On March 17 while preparing for the next day’s trial, Mr. Batsell had insisted “are you sure there isn’t anything else” and observed that in discovery the state hadn’t even provided a report from the police officer who initially contacted Mr. Batsell at the scene. 3/18/15 RP 2–3. At 2:30 pm counsel sent an e-mail to the prosecutor. 3/18/15 RP 3, 6. After returning from court at 4:00 pm and investigating, the prosecutor located and e-mailed a report prepared by the contact officer. 3/18/15 RP 3, 6.

The police report belatedly produced on the eve of trial identified “Joshua Farris” as the full name of the person counsel had been looking for and indicated police had arrested Mr. Farris at the scene on outstanding warrants. 3/18/15 RP 3. The reporting officer also noted many observations consistent with methamphetamine users: “Joshua” was tweaking, was under the influence of meth, was hyperactive and paranoid, had a shotgun in his hand, and was claiming people were watching him and keeping him under surveillance. 3/18/15 RP 4–5.

Argument on the March 18, 2015 oral motion to dismiss. Counsel had already explained the critical importance of the identification of

“Joshua” and vehicles at the scene to its investigation and defense strategy. See *supra*. The full name of “Joshua” was not disclosed in any of the police reports previously given to the defense. 3/18/15 RP 7. Counsel emphasized the contacting officer’s initial report of events occurring at the scene should have been disclosed early on and had it been disclosed counsel would have had “the benefit of having this knowledge and preparing for trial today.” 3/18/15 RP 5. Counsel had no ability the morning of trial to attempt to locate “Joshua Farris,” and because the report was received on the eve of a trial that would likely be concluded in one or one and one-half days, there was only a slim likelihood counsel could meaningfully follow up on the information provided in the report. 3/18/15 RP 5. Characterizing it as a “*Brady* motion,” counsel contended the state had a duty to timely disclose the information and failed to do so. Counsel asked the court to dismiss the case or, alternatively, to reset or continue the trial to allow briefing by the parties prior to the court making a decision. 3/18/15 RP 5.

Judge VanderSchoor invited the prosecutor to respond several times.³ 3/18/15 RP 5, 7. The prosecutor said he was not aware of any initial report of contact between law enforcement and Mr. Batsell because police had not provided the report to his office, and that he timely provided the report once counsel inquired about its existence. 3/18/15 RP 6. He acknowledged the belatedly-provided “initial report” did in fact contain Mr. Batsell’s name and referenced the contact that day between Mr. Batsell and law enforcement. 3/18/15 RP 6. At the end of his very brief argument, the prosecutor acknowledged he knew counsel was looking for “Joshua” but because counsel had said he had an investigator looking for “Joshua” he assumed counsel had previously fully identified “this person.” 3/18/15 RP 7–8. The prosecutor did not argue that there had been no discovery violation or that dismissal was inappropriate or that a continuance was warranted, and failed to suggest any other alternatives short of dismissal. 3/18/15 RP *passim*.

Based on all of the above facts and argument, the court granted the motion to dismiss. 3/18/15 RP 8. The court ordered that:

³ Contrary to the state’s “argument” in its statement of the facts, Judge VanderSchoor did not (1) cut the prosecutor’s argument off but instead redirected him to the issue at hand that counsel hadn’t had a chance to talk to Joshua Farris (Brief of Appellant at 7; 3/18/15 RP 6) and (2) did not limit the prosecutor to “one more sentence of explanation” but instead made his ruling after the prosecutor had apparently said all he intended to say. Brief of Appellant at 8; 3/18/15 RP 7–8.

[T]his matter is dismissed with prejudice for the state's failure to produce a report that was required to be provided under *Brady v. Maryland*, 373 U.S. 83 (1963) and subsequent cases refining *Brady*. The report contained information that had it been provided, the defendant would have had the opportunity to either attack or challenge the evidence or support an affirmative defense to the charges.

CP 41. The order of dismissal was signed by all parties after the hearing and filed with the Franklin County Clerk the same day.

C. ARGUMENT IN RESPONSE

1. The trial court properly ruled that it lacked authority to reconsider its entry of final judgment of dismissal.

The denial of a motion for reconsideration is reviewed under the abuse of discretion standard. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). Discretion is abused when it is exercised in a manifestly unreasonable manner or on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Here, the court determined it did not have authority to reconsider its entry of the order dismissing the case. 5/4/15 RP 13. The court was correct and did not abuse its discretion.

The vacation of criminal judgments is governed by CR 60(b) and the court has no inherent power beyond the rule to vacate or modify its

final judgments.⁴ “[A] trial court has no power to vacate or modify its final judgment after the announcement and the proper final entry thereof, in the absence of a showing of some statutory ground for such vacation or modification” *State ex rel. Lundin v. Superior Court*, 90 Wash. 299, 302, 155 P. 1041 (1916). Procedural rules adopted by the Supreme Court control and supersede legislative acts in case of difference. See *State v. Smith*, 84 Wn.2d 498, 502, 527 P.2d 674 (1974). Thus, relief from final judgments and orders in both civil and criminal cases is governed by CR 60(b), which supersedes RCW 4.72.010. *State v. Scott*, 92 Wn.2d 209, 595 P.2d 549 (1979); *State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973).

There is no authority for the state's contention that CR 59, dealing with new trials and amendment of judgments, applies to and allows for the reconsideration of a final judgment of dismissal in a criminal case. The state notably makes no argument and cites no authority that one or more of the nine (9) grounds enumerated by the rule constitutes a sufficient reason

⁴ *State v. Englund*, 186 Wn. App. 444, 345 P.3d 859 (2015), cited by the state, involved a renewed motion for self-representation. Brief of Appellant at 15. There, the trial court was not asked to reconsider and grant relief from a final judgment of dismissal. Here, the state requested such relief and the requested relief is governed by CR 60. See *infra*.

for reconsideration or somehow grants a court the authority to reconsider its final judgment of dismissal. Brief of Appellant at 14–16. New trials or arrest of judgments in criminal cases is governed by the provisions of CrR 7.4, and such relief is invoked upon the motion of a *defendant*. The state’s present request for relief from the final judgment of dismissal is therefore governed by CR 60(b).

CR 60(a) provides that corrections may be made to a judgment or order for clerical mistakes. The grounds for relief authorized by CR 60(b) are inapplicable to this case, with the possible exception of CR 60(b)(11):

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

....

(11) Any other reason justifying relief from the operation of the judgment.

Relief pursuant to CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of the rule. *State v. Scott*, 20 Wn. App. 382, 580 P.2d 1099 (1978), *aff’d* 92 Wn.2d 209, 595 P.2d 549 (1979); see also *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949). Errors of law are not correctable through CR 60(b); rather, direct appeal is the proper means of remedying legal errors.

CR 60(b) does not authorize vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings. *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 415 P.2d 501 (1966). “[I]rregularities justify vacation whereas errors of law do not. For the latter the only remedy is by appeal from the judgment. The power to vacate for irregularity is not to be used by a court as a means to review or revise its judgments or to correct mere errors of law into which it may have fallen” *State v. Keller*, 32 Wn. App. 135, 140–41, 647 P.2d 35, 38 (1982), citing Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash.L.Rev. 505, 515 (1960).

Here the state asked the trial court to reconsider the matter to resolve three legal disputes: (1) whether there was a *Brady* violation or governmental misconduct; (2) whether the defendant was prejudiced by the last-minute disclosure of a police report; and (3) whether dismissal was the proper remedy. CP 22–26. These are legal matters which should have been raised and considered at the initial hearing, and which are beyond the scope of CR 60(b). The proper avenue of relief after the judgment of dismissal had been entered was for the state to appeal.

The state did not appeal the entry of the final judgment of dismissal and instead moved for reconsideration. The parties briefed and argued the legal issues, and the court correctly determined it had no authority to reconsider the dismissal of record. Had the court revised its legal conclusions by reversing itself and reinstating the charges, it would have erred because that is not the proper function of motions to vacate. *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, supra. “The claim that the judgment is erroneous as a matter of law is a matter to be raised by appeal, writ, or personal restraint petition. “[I]t is no ground for setting aside the judgment on motion.” ’ ’ *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832, 835 (2002) (citations omitted). The state failed to timely appeal the final judgment of dismissal and its appeal should be stricken.

2. Denial of the state’s motion to reconsider the entry of a final judgment of dismissal is not appealable under RAP 2.2(b) and RAP 2.4.

There are two requirements for a superior court decision to be appealable by the state in a criminal case: (1) the decision must fall within

a category enumerated in RAP 2.2(b)(1) through (6), and (2) the appeal must not place the defendant in double jeopardy. RAP 2.2(b).

Under the plain language of RAP 2.2(b)(1), the state may appeal from

[a] decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

On March 18, 2015, the trial court entered its order dismissing the charge with prejudice based on discovery violation under *Brady v.*

Maryland, 373 U.S 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). CP 41.

The state did not timely or otherwise file an appeal of the entry of the order of dismissal, which was in fact appealable as of right under RAP 2.2(b)(1).

Instead, the state pursued a motion for reconsideration. The motion was denied (CP 4) and on May 21, 2015, the state timely filed its appeal seeking review of “the Order Denying Motion for Reconsideration entered by Judge Vic VanderSchoor on May 19, 2015.” CP 3–4. Under RAP 2.4, the scope of review of the decision designated in the notice of appeal does not extend to the original order dismissing the charge.

Under RAP 2.4(b) the appellate court will review a trial court order not designated in the notice if (1) the order prejudicially affects the decision designated in the notice, and (2) the order is entered before the appellate court accepts review. Here, the original order dismissing the charge is not reviewable because it does not “prejudicially affect” the subsequent Order Denying Motion for Reconsideration.

Under RAP 2.4(c) the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding *a timely post-trial motion* based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial). This provision is not triggered because the designated Order Denying Motion for Reconsideration was not an order deciding a “timely post-trial motion.” The order dismissing the charge instead decided a pre-trial motion.

Under RAP 2.4(f) an appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5

(new trial). This provision is not implicated because the appeal of the designated Order Denying Motion for Reconsideration is not an appeal from a final judgment.

Under RAP 2.2(b)(1) the state's appeal of the Order Denying Motion for Reconsideration is not an appeal of right.⁵ Under RAP 2.4 the scope of review of the designated order does not extend to the original final judgment of dismissal. Because the state failed to timely appeal the final judgment of dismissal, its appeal should be stricken.

3. Pursuant to RAP 5.2(a) and (e) the final judgment of dismissal is not reviewable under a later filed notice of appeal that designates the order denying motion to reconsider as the decision to be reviewed.

In *King Cy. v. Williamson*, 66 Wn. App. 10, 830 P.2d 392 (1992), the court noted that under RAP 5.2(a) and (e), a notice of appeal must be filed within 30 days following the decision to be reviewed or within 30 days following the entry of an order deciding a timely motion for

⁵ The state could have sought discretionary review of the Order Denying Motion for Reconsideration under RAP 2.3, provided it met the rule's criteria for acceptance. However, the scope of review would be restricted to “ ‘the propriety of the denial *not* the impropriety of the underlying judgment.’ ” See *Gaut*, 111 Wn. App. at 881 (citation omitted) (emphasis added).

reconsideration. *Williamson*, 66 Wn. App. at 11–12. Thus the court recognized that when a party files certain timely motions, RAP 5.2(e) authorizes the party to file a notice of appeal at a time later than prescribed by RAP 5.2(a).

However, the notice of appeal must properly identify the decision that the appellant wants reviewed. *Williamson* involved a civil application of the rule. There, the appellants timely sought reconsideration of a summary judgment entered against them on August 21. The motion for reconsideration was denied on October 10. On October 29 the appellants filed a notice of appeal of the summary judgment against them. King County moved to dismiss it as untimely. In part, the reviewing court found the notice of appeal was timely because it was filed within 30 days of their timely filed motion for reconsideration and the notice of appeal designated the underlying summary judgment as the decision to be reviewed. *Williamson*, *supra*.

Here, in a criminal context, the state timely filed a motion for reconsideration of a final judgment of dismissal. As discussed above, CR 59 does not apply to allow the state to modify or vacate a final judgment through the guise of a motion to reconsider and the state did not timely or otherwise appeal the judgment of dismissal. Unlike in *Williamson*, the

state's subsequent notice of appeal identifies only the order denying motion for reconsideration as the decision it wants reviewed. For these reasons, RAP 5.2(a) and (e) provide no authority to substitute/incorporate the underlying final judgment of dismissal in as the designated decision to be reviewed. The state's appeal should be stricken.

4. The trial court did not abuse its discretion in dismissing Mr. Batsell's charges for governmental misconduct.

a. Both State and Federal Constitutions obligate the government to share material evidence with a defendant. The due process clauses of the State and Federal Constitutions guarantee an accused the right to a fair trial and a meaningful opportunity to present a defense. U.S. Const. amend. 5;⁶ Const. art I, § 3;⁷ *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Due process requires the government disclose material evidence to an accused. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 21(1963).

The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

⁶ The Fifth Amendment of the United States Constitution, incorporated to the states by the Fourteenth Amendment, provides, in part: "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]"

⁷ Art. I, Sec. 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law."

Id. The United States Supreme Court has set out the standard for prosecutorial misconduct under *Brady*:

The evidence is favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

Evidence is material if

‘there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different’ ... A ‘reasonable probability... is a probability sufficient to undermine confidence in the outcome.’

In re Personal Restraint of Benn, 120 Wn.2d 631, 649, 845 P.2d 289 (1993) (quoting *United States v. Bagley*, 473 U.S. 667, 678, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). The "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received [or would receive] a fair trial, understood as a trial resulting in a verdict worthy of confidence." *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999) (alteration added) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

b. The prosecution inexcusably withheld *Brady* material from Mr. Batsell. Here, Judge VanderSchoor was involved in the case since the time of arraignment and had before him substantial information that the prosecution waited until the last minute before turning over highly relevant and potentially exculpatory evidence to the defense. The state knew the general nature of the defense theories and that counsel had been looking from the beginning of the case to find the person known only as “Joshua” and ownership information for vehicles at the residence to prepare his defense. The state does not contest the fact that the report of the officer who initially contacted Mr. Batsell at the scene was in police possession. The state offered the excuse that the arresting officer’s report regarding Mr. Batsell had a different law enforcement case number than the number assigned to the incident that caused police to be at the scene in the first place. 3/18/15 RP 6. But a prosecutor is accountable for information known to police. *State v. Mullen*, 171 Wn. 2d 881, 901, 259 P.3d 158 (2011).

The record before the motion judge also established the names of Mr. Batsell and “Joshua” were in both reports and given his presumed familiarity with law enforcement reports and case number assignments, the prosecutor should have realized Joshua’s full name and information

regarding vehicles at the scene would likely be in the contacting officer's report. An individual prosecutor has a duty to seek out evidence *already* in the state's possession. *Mullen*, 171 Wn. 2d at 902 fn 8. Appellate counsel's suggestion⁸ Mr. Batsell could have done something else such as file a public records act request ignores both the state's duty and the prosecutor's affirmative representation that counsel "had everything they had" and reinforcing the representation by providing no additional information as is required by his continuing obligation to provide *Brady* material. 3/18/15 RP 2.

Judge VanderSchoor found the late disclosure of the contacting officer's report substantially prejudiced Mr. Batsell's defense because had it timely been provided "the defendant would have had the opportunity to either attack or challenge the evidence or support an affirmative defense to the charges." CP 41. The state did not assign error to the court's finding and it is a verity on appeal. *Scheib v. Crosby*, 160 Wn. App. 345, 349, 249 P.3d 184 (2011) (citing *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

In *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009), a trial court dismissed the defendants' charges following the state's failure to

⁸ See Brief of Appellant at 20–23.

provide the defense with certain discovery material until the eve of trial. *Id.* at 377–83. On appeal the court affirmed the trial court’s CrR 8.3(b) dismissal order, holding that the state’s late disclosure of discovery material prejudiced the defendants because it “prevented defense counsel from preparing for trial in a timely fashion.” *Brooks*, 149 Wn. App. at 390. Our Supreme Court has similarly held that prejudice under CrR 8.3(b) includes an infringement on the “ ‘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) (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)); *see also State v. Dailey*, 93 Wn.2d 454, 458–59, 610 P.2d 357 (1980) (affirming trial court’s CrR 8.3(b) dismissal for the state’s mismanagement in providing supplemental witness list on the eve of trial and for other delays in providing discovery).

If the prosecution had timely disclosed the report that was in its possession from the outset, counsel would have had sufficient opportunity to adequately prepare the material parts of his defense. The absence of that critical information infringed on Mr. Batsell’s “right to be represented by counsel who has had sufficient opportunity to adequately prepare a

material part of his defense” and undermines confidence that Mr. Batsell would have nevertheless received a fair trial. See *Price*, 94 Wn.2d at 814.

c. Reversal is the proper remedy. Where a *Brady* violation meets the *Bagley* standard, “a constitutional error occurs, and the conviction must be reversed.” *Bagley*, 473 U.S. at 678. CrR 8.3 authorizes the trial court to dismiss a criminal prosecution “in the furtherance of justice.” CrR 8.3(b). The right to a fair trial embodied in the due process clauses of the State and federal constitutions includes the right to an attorney who has had adequate opportunity to prepare for trial. Denial of a defendant’s rights to counsel with a reasonable time for preparation and consultation is more than a mere abuse of discretion; it is a denial of due process of law. *State v. Hartwig*, 36 Wn.2d 598, 601, 219 P.2d 564 (1950) (“The constitutional right to have the assistance of counsel, Art. I. sec. 22, carries with it a reasonable time for consultation and preparation.”).

Where the state has deliberately or even inadvertently withheld *Brady* evidence, the question of whether a prosecution will be reversed should not turn on whether the accused was fortunate enough to have obtained the sought-after evidence at the last minute. Such a rule would reward the prosecutor for delaying discovery as long as possible and

deprive the defendant of a remedy without regard to the significance of the violation or the materiality of the evidence.

Dismissal for discovery violations is an extraordinary remedy available only when the alleged misconduct has materially affected the defendant's right to a fair trial. *State v. Jacobson*, 36 Wn. App. 446, 450, 674 P.2d 1255 (1983). “The plain language of the *Jacobson* court appears to provide that it is, in fact, the prejudice to the defendant's right to a fair trial that must be material, rather than the evidence itself.” *Brooks*, 149 Wn. App. at 389. Here, the delayed discovery prevented defense counsel from preparing for trial in an adequate and timely fashion. Judge VanderSchoor did not abuse his discretion by dismissing the case.

The state argues the trial court abused its discretion in ordering dismissal “without considering defense counsel’s offer of a continuance” because “dismissal is a remedy of last resort and no record suggests that another remedy was inappropriate.” Brief of Appellant at 24–25. The issue of alternative remedies is not properly before this court. The prosecutor did not propose a continuance. The prosecutor did not argue in support of defense counsel’s offer of a continuance. The prosecutor failed to propose *any* alternatives and instead provided only excuses for the delay.

There is nothing in the record to suggest Judge VanderSchoor did not consider the alternative of a continuance when proposed by defense counsel. At the time of the motion hearing on the day trial was scheduled to begin, the facts known to the court included that the suppressed report had been in the possession of the state from the outset; the requested information was critical to the defense theory and material to counsel's trial preparation; from early on in the case and continuing thereafter counsel had inquired of the prosecutor and been told the state had no more information than previously provided; and only after Mr. Batsell insisted there must be another report did the state look for the missing report and was able to locate and provide it to counsel within a half an hour. Based on all the information known to it, the court did not abuse its discretion in deciding against a continuance.

The trial court faced a very difficult decision caused by the governmental mismanagement, which in turn affected the accused's ability to receive a fair trial. It is the state's burden to suggest alternative remedies in lieu of dismissal. *State v. Chichester*, 141 Wn. App. 446, 448, 170 P.3d 583 (2007). Here the state was absolutely silent as to dismissal, a continuance or any alternative intermediate remedies. Where the trial court acts within its discretion to deny a continuance and the state

fails to propose an alternative to dismissal, the court's ruling on dismissal rests on tenable grounds. *Id.* The trial court did not abuse its discretion by granting final judgment of dismissal. Because the state failed to appeal the order of dismissal, the order stands as a final judgment of dismissal.

5. Appeal costs should not be imposed.

Mr. Batsell asks this court to exercise its discretion not to award costs in the event the state substantially prevails on appeal.

Under RAP Title 14.2, clerks or commissioners may not exercise discretion in imposing appellate costs; costs must be awarded. However, the appellate courts have discretion to refrain from ordering an unsuccessful appellant to pay appellate costs even if the state substantially prevails on appeal. RCW 10.73.160 (1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, rev. denied, 185 Wn.2d 1034 (2016); RAP 14.2. In *Sinclair*, the court affirmed that RCW 10.73.160 authorizes the appellate court to deny appellate costs in appropriate circumstances. 192 Wn. App. at 388.

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. In the same way that imposition of legal financial obligations following a trial creates problematic ongoing consequences for the criminal defendant,

so, too, costs on appeal grow at a compounded interest rate of 12%, lengthen court jurisdiction, interfere with employment opportunities, and create barriers to re-integration in the community. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Under *Sinclair*, it is "entirely appropriate for an appellate court to be mindful of these concerns." 192 Wn. App. at 391.

Under RAP 15.2(f), where a trial court has made an unchallenged finding of indigency, there is a presumption of continued indigency throughout review. *Sinclair*, 192 Wn.2d at 393. The appellate courts should also consider important nonexclusive factors such as an individual's other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual's age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant "cannot contribute anything toward the costs of appellate review." *Sinclair* 192 Wn. App. at 391.

In *Sinclair*, the court ordered appellate costs not to be awarded. *Id.* at 363. The court found the trial court had authorized the defendant to pursue his appeal in *forma pauperis*, and to have appointed counsel and preparation of the record at state expense. *Id.* at 392. The court held

Sinclair's indigency, advanced age and lengthy prison sentence precluded the possibility he could pay appellate costs.

Mr. Batsell is the respondent in this matter and is currently 42 years old. CP 42⁹. The trial court found Mr. Batsell indigent for purposes of defending against the state's prosecution. CP 8, 53. The charges against him were dismissed below and the court found Mr. Batsell remained indigent for purposes of responding to the state's appeal as he was unable to pay for the expenses of appellate review and was entitled to appointment of appellate counsel at public expense. CP 54–55. Appellate counsel anticipates filing a report as to Mr. Batsell's continued indigency and likely inability to pay an award of costs no later than 60 days following the filing of this brief, as required by the General Court Order.

RAP 15.2(f) provides there is a presumption of continued indigency throughout the appeal. In the event he does not substantially prevail on the state's appeal, Mr. Batsell asks the court to consider his present and/or likely future inability to pay and not assess appellate costs against him

⁹ Mr. Batsell's date of birth is April 24, 1974. CP 42.

D. CONCLUSION

For the reasons stated, Mr. Batsell requests this Court strike the state's appeal or, alternatively, affirm the trial court's final judgment of dismissal. If Mr. Batsell is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the state ask for them.

Respectfully submitted on August 19, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 19, 2016, 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 brief of respondent:

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