

FILED

Court of Appeals

NO. 353800

Division III

State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
6/28/2018 3:08 PM  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCONVILLE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF KLICKITAT COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00052-7

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BRIEF OF RESPONDENT

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## **I. ISSUE PRESENTED**

1. WAS THERE A WAIVER OF THE STATE'S RIGHT TO USE THE DEFENDANT'S CUSTODIAL STATEMENT?
2. DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO DISMISS THIS CASE FOR A DISCOVERY VIOLATION?
3. WAS THERE A SCRIVNERS ERROR ON THE JUDGEMENT AND SENTENCE REQUIRING CORRECTION?

## **II. STATEMENT OF FACTS**

The defendant was charged with the crime of Burglary in the First Degree on May 15, 2016 for an incident which occurred on May 12, 2016. During the pendency of this case the defendant failed to appear for a mandatory hearing on January 3, 2017 and the State amended the information to charge an additional count of Bail Jumping on February 16, 2017. Trial in this matter occurred on May 3-4, 2017 and the jury returned a verdict of guilty to the lesser charge of Assault in the Fourth Degree and Bail Jumping.

It is the State's position that for purposes of this appeal the significant fact at issue is that the defendant gave two versions of the events which occurred on May 12, 2016. One version when he was questioned post-Miranda on the day of his arrest and a second version when he testified at trial.

On May 12, 2016, at a residence located at 95 Main Street,

Wishram, Klickitat County, Washington, the defendant, who did not live at this residence, confronted two residents about monies owed to the defendant by one of these residents, Devon Delatorre. Tempers flared, a struggle ensued, Delatorre fled the house and police were called. The defendant was not located until two days after the incident. At the time of his arrest, and after being advised of his Miranda warnings, the defendant denied being present at the house where the incident occurred and claimed to have been in another city within Klickitat County at the time of the incident. RP 198-200. On January 3, 2017, prior to trial in this matter, the defendant failed to appear at a pre-trial hearing where his presence was mandatory. During trial the defendant testified that he was actually present at the Wishram house and had in fact engaged in an argument with Delatorre and his girlfriend but he had permission to be in the house and that he had not assaulted anyone. RP 176-195.

### **III. STATEMENT OF THE CASE**

At various times throughout the pendency of the case the State indicated to the Court and the defendant's various lawyers that it was not requesting or needing a CrR 3.5 hearing in the State's case in chief and his post arrest statements were not to be offered or solicited. In short, the State did not intend to offer the defendant's statements and accordingly no CrR 3.5 hearing was needed. The "statements of accused" were not going to be

“offered in evidence” CrR 3.5 (a). It was only after the defendant testified contrary to the statements he gave the police that the State requested, and over the defendant’s objection the Court held, a CrR 3.5 hearing. RP 196. Subsequently the Court held that the defendant’s post arrest statements to law enforcement were admissible. RP 125.

During argument over the propriety of holding a CrR 3.5 hearing and the unnamed alleged prejudice the defendant would suffer, the defendant raised the issue of an audio/video of the defendant’s statement to police which his attorney claimed had not been provided in discovery. During argument counsel stated “maybe you did send it. I don’t know. I can check. I -- I have my computer with me. I can check. To see if it’s in my.” RP 219. Regardless, the Court recessed for the day to allow additional preparation time and to sort out the discovery issue regarding the video. RP 220. The following morning, after further argument, the Court found that “With regards to the -- 3.5 hearing held midtrial in these cases, while it is clear that the case law does allow for a 3.5 hearing mid-trial” the court indicated a preference to have such matter held pre-trial. RP 249. The Court went on to find that “it does not indicate that there’s been any prejudice shown to Mr. McConville by having the 3.5 hearing here held mid-trial. We did excuse the jury for Mr. Myers to go ahead and examine the – the issues outside the presence of the jury, and he’s going to have a full opportunity to

do that. So there's been no prejudice to Mr. McConville by having that occur mid-trial." RP 250. The Court went on to discuss whether there had been a waiver or stipulation by the State. RP 251. After further argument the Court found that:

[a]gain, as we talked about, if the state can waive or stipulate that they're not going to use certain evidence in their case at any point in time, we look at two different times to look at that, according to *State v. Thompson*, whether or not there was a waiver or stipulation. There was no express assertion at the omnibus hearing that they were not going to be potentially using Mr. McConville's statement. It's actually contrary to that; there was actually a request in the omnibus application for a 3.5 hearing for the potential use of any statements that were made by Mr. McConville. Actually there was a 3.5 hearing that was set in this case and was stricken by this -- Well, the state's the one that noted it. The court has no idea at whose request or who -- indicated that they did not need the 3.5 hearing. So there's been no express assertion that they were not going to -- they were waiving their right to proceed with regards to the use of this potential statements down the road, nor there's been any stipulations that should be binding. There's been nothing that's expressly been put on the record that there's been an agreement between the parties that they were not going to use the statements here. That's very consistent with *State v. Thompson* -- whether or not they were going to potentially use them in their case in chief, or whether or not they were going to potentially use those statements if Mr. McConville got on the stand and testified inconsistent with what those statements were. Additionally, the defendant in this case could have asked in motions in limine whether or not they were going to have -- use those statements for any purpose whatsoever. That requested was not -- that request was -- for a motion in limine was not held in this case. So I'm not finding that there's been any waiver, express waiver or express stipulation to not use the statements at all. It -- it comes right up to the line, on both of these issues, whether or not a 3.5 hearing is appropriate, and could be potentially prejudicial, and whether or not there was an express waiver or stipulation in this case, but the court is not finding that there was, and certainly will -- the statements will be potentially admissible if the court, after hearing the -- after having a 3.5 hearing

the court determines that they were knowingly, intelligently and voluntarily made. RP 251-253.

On the morning of May 4, 2017 the defendant moved to dismiss the case for a violation of discovery for failing to provide the audio/visual tape of the defendant's post-Miranda statement. After further argument the Court found that:

but as pointed out, dismissal is a very extraordinary remedy, and should be only granted under the most egregious of cases. In this case what we are talking about is a video that you did have an opportunity to review, I did recess the trial and the 3.5 hearing yesterday to allow you the opportunity to get prepared, here, for today's hearing. The video is not going to -- is corroborative of what I understand is what was included within the police report and those statements that were made by Mr. McConville. My understanding is that the video would just show Mr. McConville's person while he's making those statements. You do have the video, you've had an opportunity to review it. So if there's inconsistencies between what they testify was on the video versus what's on the video you'll have the opportunity to cross examine the individuals with regards to that. So I'm not going to dismiss the case at this point in time. I'm going to reserve, though, on what potentially there are as to other sanctions to the state for their violations -- of the discovery rules in this case and other cases going forward. But at this point in time I'm not going to dismiss the case or exclude the potential use -- any statements that Mr. McConville made to law enforcement if they're deemed admissible after we complete the 3.5 hearing, which we haven't done -- at this point in time. RP 242-244.

#### **IV. ARGUMENT**

##### **I. THERE WAS NO WAIVER OF THE STATE'S RIGHT TO USE THE DEFENDANT'S CUSTODIAL STATEMENT**

The defendant's argument boils down to the assertion that because the State does not request a Cr.R. 3.5 hearing pre-trial this is some type of waiver or stipulation which allows a defendant to testify in a manner totally

inconsistent to his prior statement with impunity. This is essentially a procedural “gotch ya” to avoid the truth without consequence – that the State’s tactical decision not to present the defendant’s self-serving exculpatory statement somehow paves the way for newer and better exculpatory testimony at trial without those contradictory prior inconsistent statements having to be explained to the jury.

The case of *State v. Thompson*, 73 Wn.App. 122, 867 P.2d 691 (1994), is on point. Here, as in *Thompson*, the State chose not to use the defendant’s exculpatory statements in its case in chief. It was only after the defendant testified to a version of events which conflicted with his prior statements that the State sought to introduce these prior inconsistent statements. A CrR 3.5 hearing held during the middle of a trial does not violate a defendant's due process right to a fair trial. *State v. Taylor*, 30 Wn.App. 89, 92-93, 632 P.2d 892, review denied, 96 Wash.2d 1012 (1981). Courts have observed that “[p]retrial hearings are but mechanical devices designed to effectuate substantive rights and remedies.” *Taylor*, 30 Wn.App. at 93. Although a mid-trial hearing does not “precisely conform to the bifurcated procedure contemplated ... by the rules, CrR 3.5, 4.5” it does not amount to a denial of due process absent “a showing of prejudice.” *Taylor*, 30 Wn. App. at 92-93.

There is, in short, no requirement in CrR 4.5 or in any case law that a

CrR 3.5 hearing be held pretrial. From a practical standpoint, it is a more efficient use of court and counsel's time to conduct a CrR 3.5 hearing during the trial when the indications are, as they were here, that the defendant's statement will be offered only for impeachment purposes in the event the defendant takes the witness stand and gives testimony contrary to an out-of-court statement. In such circumstances, there is no reason to conduct the hearing before trial because the State and the court do not then know if the defendant will testify or, if he does, whether the testimony will be inconsistent with a prior out-of-court statement. If the defendant needs to know if the prosecutor will seek to use his statement at trial, in order to evaluate whether or not to testify at trial, the defendant can raise the issue by a motion in limine.

Here the court found no prejudice to the defendant, no waiver or stipulation as they may have related to the admissibility of the defendant's custodial statements, no failure to provide the statements through the police reports, or that this could not have been addressed by a pre-trial defense motion which was never filed.

The defendant's argument that the State was somehow made aware of the defendant's intent to testify, based upon a representation of counsel is without any merit. Until a defendant is actually sitting in the witness box, having taken an oath to tell the truth and started to answer questions it would

be malpractice to rely on such a representation regardless of the intent, honor, or sincerity of opposing counsel. The federal and state constitutions both provide criminal defendants the right to testify on their own behalf. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). “Only the defendant has the authority to decide whether or not to testify.” *Id.* Reliance on such a representation before the defendant actually testifies is fraught with potential harmful, and potentially fatal, consequences for the state’s case.<sup>1</sup>

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO DISMISS THIS CASE FOR A DISCOVERY VIOLATION.

The Court denied the defendant’s motion to dismiss the case for failure to provide a copy of the audio/visual recording of the defendant’s post-Miranda statements. The Court specifically found that while this recording should have been provided and that it would take into consideration an appropriate sanction for similar alleged discovery violations, the recording merely showed a recording of the defendant making the same statements which were memorialized in the police reports. RP 242-244. Moreover, there was never any claim by the defendant that his actual post-Miranda statements found in the police reports were not provided or were inaccurate.

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<sup>1</sup> Not the least of which would be the well-deserved scorn and ridicule any attempt to enforce such an assertion would meet from a reviewing court.

If a party fails to comply with the rules of discovery, trial courts have broad authority to compel disclosure, impose sanctions, or both. See, e.g., *State v. Hutchinson*, 135 Wn.2d 863, 882-83, 959 P.2d 1061 (1998) (regulation of discovery is left to the "sound discretion" of trial courts). The criminal rules authorize a court to dismiss a criminal action if the State violates its discovery obligations. However, even if the State fails to live up to its discovery obligations, dismissal is available only if the trial court finds prejudicial governmental misconduct or arbitrary action which materially effects the defendant's right to a fair trial. CrR 8.3(b).

The party seeking relief bears the burden to show misconduct by a preponderance of the evidence. See, e.g., *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). However, the party does not need to prove bad faith on the part of the prosecutor. See *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). The criminal discovery rules are "designed to enhance the search for truth." *State v. Boyd*, 160 Wn.2d 424, 433, 158 P. 3d 54 (2007). The purpose of the discovery rules is to "provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross - examination, and meet the requirements of due process." *Id.* at 434. Courts should apply the rules to "insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage." *Id.* at 433.

Cases interpreting CrR 4.7(h)(7)(i) have typically involved the failure to produce evidence or identify witnesses in a timely manner. *See, e.g., State v. Linden*, 89 Wash.App. 184, 947 P.2d 1284 (1997) (holding trial court acted within its discretion when granting continuance to defense for prosecution's late disclosure of information). Violations of that nature are appropriately remedied by continuing trial to give the non-violating party time to interview a new witness or prepare to address new evidence. Where the State's violation of the rule is serious, mistrial or dismissal may be appropriate. *See, e.g., State v. Jones*, 33 Wash.App. at 868-69, 658 P.2d 1262 (holding State's numerous failures to adhere to trial judge's discovery orders justified mistrial).

The party requesting dismissal also bears the burden of demonstrating prejudice. *See, e.g., State v. Michielli*, 132 Wn.2d at 240. Case law makes clear that a party cannot meet this burden by generally alleging prejudice to his fair trial rights – a showing of actual prejudice is required. *See State v. Rohrich*, 149 Wn.2d at 649 (noting "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" (emphasis added)); *see also City of Seattle v. Orwick*, 113 Wn.2d 823, 829, 784 P.2d 161 (1989) (" '[A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate.'" (quoting *United States v.*

*Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981))). Importantly, late disclosure of material facts can support a finding of actual prejudice. See *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). In the dismissal context, a defendant is prejudiced when delayed disclosure interjects "new facts" shortly before litigation, forcing him to choose between his right to a speedy trial and to be represented by an adequately prepared attorney. *Id.* Here, the late disclosed audio/video recording merely, as the trial court found, corroborated the statements already provided to the defendant and did not present any new facts let alone any material new information.

Generally speaking, the scope of discovery under the criminal rules is within the trial court's sound discretion. *State v. Yates*, 111 Wn.2d 793, 798, 765 P.2d 291 (1988). The trial court is to regulate discovery in a manner which will ensure a fair trial to all concerned. *Yates*, 111 Wn.2d at 799. A trial court's ruling on a CrRLJ 8.3(b) motion is under the deferential abuse of discretion standard. See, e.g., *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). 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) (internal quotation marks omitted) (quoting *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)). 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.* (internal quotation marks omitted) (quoting *Rafay*, 167 Wn.2d at 655). A reviewing court may not find abuse of discretion simply because it would have decided the case differently – it must be convinced that “no reasonable person would take the view adopted by the trial court.” *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000) (quoting *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)). A refusal to dismiss a case for late disclosure of the recording which, as the trial court found, further corroborates evidence already provided, cannot be considered manifestly unreasonable or based on untenable grounds.

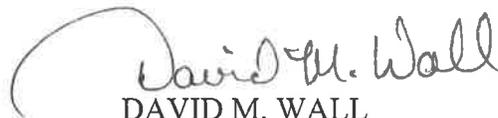
3. THERE WAS NO SCRIVNERS ERROR ON THE JUDGEMENT AND SENTENCE REQUIRING CORRECTION.

RCW 9.94A.589 sets for the rules governing consecutive and concurrent sentences. Generally, absent serious violent offenses or weapon offenses which are not present in the defendant’s case, all sentences for offenses at one sentence hearing are served concurrently. In fact, in the defendant’s Judgment and Sentence, section 4.1 (b) specifically provides that all counts shall be served concurrently. While the amount of total confinement was omitted from the form, it is abundantly clear as a matter of both law and fact that the court in this case imposed a sentence of 84 months of total confinement and his sentence for both crimes were to be

served concurrently. This is apparent on the Judgment and Sentence and should not necessitate the use of valuable resources spent returning the defendant to Klickitat County from DOC for the purposes of making express that which is obvious.

V. CONCLUSION

For the reasons above the State asks that the Court deny Appellant's requested relief.

A handwritten signature in cursive script that reads "David M. Wall". The signature is written in black ink and is positioned above the printed name and title.

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# KLICKITAT COUNTY PROSECUTOR'S OFFICE

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