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Court of Appeals
Division III
State of Washington
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

NO. 36094-6-III

STATE OF WASHINGTON,
Plaintiff/Respondent,

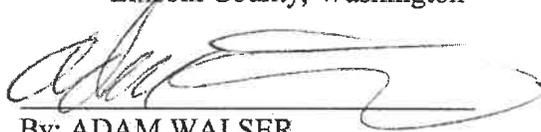
v.

AARON T. MACK,
Defendant/Appellant

BRIEF OF RESPONDENT

APPEAL FROM THE SUPERIOR COURT OF
LINCOLN COUNTY, No 17-1-00006-7

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STATE OF WASHINGTON,

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Court of Appeals # 36094-6-III
Lincoln County # 17-1-00006-7
RESPONDENT'S BRIEF

COMES NOW, the Respondent, State of Washington, by and through Adam Walser, Special Deputy Prosecuting Attorney for Lincoln County, and respectfully submits this brief.

I. STATEMENT OF THE FACTS

On 17 September, 2016, Trooper William Tylock, of the Washington State Patrol, pulled over Appellant's vehicle for an out headlight. Report of Proceedings (RP) 99 & 101. Initially, Appellant provided Trooper Tylock with a false name, but ultimately provided his correct name. RP 103-4. Trooper Tylock determined that Appellant had

outstanding warrants and was driving with a suspended license; the trooper placed Appellant under arrest. RP 105. About this time, a second trooper arrived to assist and noticed suspected drug paraphernalia in Appellant's vehicle. RP 104. At the Trooper's request, Appellant authorized him to seize that paraphernalia, which turned out to be two slightly melted pen tubes. RP 104-5. Appellant claimed that he used these tubes to smoke THC oil. RP 105. Simultaneously, Trooper Tylock was searching Appellant, incident to his arrest, and discovered a small piece of plastic containing what he suspected to be heroin. RP 104 & 106.

Trooper Tylock submitted the suspected heroin and two pen tubes to the State Toxicology Lab for testing. RP 107. Initially, the lab technician determined that only the suspected heroin residue needed to be tested. RP 28. The results of the testing done on this residue returned positive for heroin. RP 73.

Approximately two weeks prior to Appellant's trial the detailed prosecuting attorney left employment at the prosecutor's office and Appellant's case was detailed to a different attorney. RP 6-7. After a review of the case file, and consultation with the arresting officers, the new prosecuting attorney determined that additional testing of the material

seized from Appellant was warranted. RP 7. The decision was made to submit a rush request to the state crime laboratory for additional testing on the pen tubes seized from Appellant's vehicle. RP 7. Testing was completed on one of the pen tubes, and the results were communicated to the prosecuting attorney the day before Appellant's trial was set to begin, March 20, 2018. RP 6. The tested pen tube came back positive for the presence of heroin. RP 5. The results of this testing were provided to Appellant's counsel that same day. RP 4.

Prior to the start of Appellant's trial, a motions hearing was held regarding the second testing and a defense request of the court to suppress the results. RP 1-64. During this hearing, the primary contention of the Defense Counsel was that the late discovery was detrimental to their proposed defense strategy of unwitting possession, specifically, that Appellant believed the possessed substance to be THC oil. RP 5 & 9. The trial judge did not find that the prosecution had committed misconduct and also found that there was no prejudice to the Appellant. RP 42. The court also noted that his proposed defense of unwitting possession was still available, as one of the pen tubes had not been tested and could still have

been used to smoke THC oil. RP 43. In its determination that there was no prejudice, the court required the prosecutor stipulate that a second piece of untested paraphernalia could have contained THC oil. RP 41-43. Even though the court had determined that no prejudice existed, the Judge still provided a remedy to Appellant, by allowing the defense to elicit his self-serving hearsay statements, during cross-examination of the arresting officer. RP 58.

At trial Appellant testified in his defense and raised the defense of unwitting possession, including the assertion that he believed the substance to be THC oil. RP 137. Appellant was convicted of possession of a controlled substance, and sentenced to four months of incarceration. RP 202 & 218. Additionally, the court assessed \$800 in legal and financial obligations, to include a \$200 criminal filing fee and a \$100 DNA collection fee. RP 219. While assessing these legal and financial obligations, the court observed that Appellant had approximately \$18,000 in pre-existing fines and opined that “I don’t think he has the funds to pay it.” RP 218-9.

After sentencing, Appellant moved for a new trial, citing the same bases as were cited during the pre-trial motion hearing. RP 224-239. The

court denied that motion, again finding that Appellant was not prejudiced by the subsequent testing. RP 239.

II. ARGUMENT.

A. THE TRIAL COURT'S DENIAL OF THE DEFENSE MOTION TO EXCLUDE EVIDENCE WAS NOT AN ABUSE OF DISCRETION

The Superior Court Criminal Rules (CrR) expressly define the initial discovery obligations of a prosecuting attorney. “The prosecuting attorney shall disclose to the defendant: ... (ii) any expert witness whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney.” CrR 4.7(2). These same rules provide for instances in which discoverable material is found after the time for initial discovery has passed. “If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material...” CrR 4.7(h)(2).

Should a defendant believe that a prosecuting attorney has not fulfilled their discovery obligations, potential remedy may be found within CrR 8.3, which states “[t]he court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or government misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.”

When a party seeks relief under CrR 8.3, they “bear the burden of showing both misconduct and actual prejudice.” *State v Salgado-Mendoza*, 189 Wn.2d 420, 430 (2017). In deciding whether a party violated those discovery rules, courts have “broad authority to compel disclosure, impose sanctions, or both.” *Id.* At 428.

1. Although the Evidence was Produced Late in the Trial Process, it Did Not Amount to Misconduct by Either Prosecuting Attorney

“The party seeking relief bears the burden to show misconduct by a preponderance of the evidence.” *Id.*, at 431. A showing of misconduct does not require a showing of ill intent or bad faith, simple

mismanagement may be sufficient. *State v Dailey*, 93 Wn.2d 454, 457 (1980).

The relief requested in Appellant's brief would require a finding that the prosecuting attorney engaged in misconduct by failing to order additional testing of the suspected drug paraphernalia. However, the decision regarding which material to test was initially made by the crime laboratory expert, who determined that additional testing was not needed. RP 7. This prosecutor relied upon the knowledge and expertise of subject matter experts; this reliance deserves at least a basic presumption of reasonableness. Certainly this presumption could be overcome by evidence that this reliance was not reasonable at the time. However, Appellant's brief fails to list any facts that existed at the time of this decision which detract from the reasonableness of that decision. Instead, Appellant's brief judges the decisions of the prosecutor based on their outcome, not the facts available to him at the time.

"Misconduct" is not synonymous with whether or not a decision turns out to be the best, in hindsight. The original prosecuting attorney's decision not to request further testing was based upon a

determination made by matter experts at the state crime laboratory, and was reasonable under the circumstances. The decision whether to request subsequent testing was by no means guaranteed to benefit the State's prosecution of Appellant. The subsequent testing may have resulted in no findings at all, which would undercut the State's theory of the case and have been a benefit to the Defense's theory. The trial court did not find that the lack of a request for subsequent testing established mismanagement or misconduct by the prosecutor. The lack of substantive testing is also an insufficient basis for this Court to find that the trial court abused its discretion.

The incoming prosecutor's request for subsequent testing cannot reasonably be considered mismanagement, or misconduct. Appellant's brief points to no case law or statute which requires that a prosecuting attorney stop seeking new evidence on the eve of trial. Competent trial practice may even *require* the search for further evidence throughout the trial. The "continuing duty to disclose", as outlined in CrR 4.7(h)(2), is based entirely upon the principle that discovery of new material may take place after the time for initial discovery has passed, and throughout the entire pre-trial process.

The number of decisions which must be made throughout a trial process are beyond quantifying, as are the number of ways each decision can ultimately be decided. The initial prosecutor's decision to rely upon the expertise at the state crime lab was a reasonable one under the circumstances. The subsequent prosecutor's decision to request additional testing was a similarly reasonable conclusion, even though it was different than the one reached by his predecessor. Neither of the prosecuting attorneys' decisions should be deemed to be mismanagement; their decisions were simply different.

Appellant's brief seeks to draw similarities between the conduct of the prosecutors in the present case and those in State v Salgado-Mendoza, 189 Wn.2d 420. However, the expert who was to testify in Salgado-Mendoza was at least in existence at the appropriate time for discovery, even if they had not been specifically identified. *Id.* at 433. Additionally, the prosecutor knew they would be calling an expert and that they had a duty to disclose that expert to the Defense. *Id.* In the present case, the prosecuting attorney could not have disclosed the findings any earlier, as they were not in existence until the day they were presented to Appellant's counsel. RP 6. Any delay in discovery

was a matter of hours, and was only due to the time it took physically accomplish the discovery. RP 6. The reason for the late hour of this discovery had nothing to do with mismanagement of the case. Instead, it had everything to do with an unexpected swap of prosecuting attorneys and the difference in strategic decision making by each.

A finding of mismanagement by either detailed prosecutor can only be accomplished if this Court compares the trial strategy of each, decides which was best, and declares the other misconduct, all through the lens of hindsight. This would impose an impossible standard on prosecuting attorneys.

2. The Late Discovery of Evidence by the Prosecutor Did Not Result in Actual Prejudice Upon Appellant

A trial court's decision regarding which, if any, sanctions to impose, "is discretionary, and the decision is reviewable only for manifest abuse of discretion." *State v Krenik*, 156 Wn. App 314, 320 (2010). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v Blackwell*, 120 Wn.2d 822, 830 (1993). A trial court's decision is exercised on untenable grounds or for

untenable reasons “if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654 (2003). “A decision is ‘manifestly unreasonable’ if the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take’ and arrives at a decision ‘outside the range of acceptable choices.’” *Id.* (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99 (1990) and *State v. Rundquist*, 79 Wn. App. 786, 793 (1995)).

The prejudice, alleged both at trial and in Appellant’s brief, is that the late discovery of this evidence tended to undermine the intended trial defense strategy of unwitting possession. However, as the Trial Court found, the newly discovered evidence did not inhibit Appellant’s ability to present this as a defense theory. Even though one of the pen tubes tested positive for heroin during the second testing, the other pen tube still remained untested. RP 72. Appellant was still able to argue at trial that the second pen tube was used to smoke THC oil. Testing one of the pen tubes did nothing to prevent the argument that Appellant believed the heroin to be THC oil, and thus that his possession was innocent.

Additionally, in order to further mitigate even the potential of prejudice, the Trial Court allowed the Defense counsel to elicit Appellant's self-serving hearsay through the cross examination of the arresting officer. RP 43. The core of the Defense's intended case theory was that Appellant believed the material he possessed to be THC oil. The only potential source of evidence relating to what Appellant believed the substance to be, would have been testimony by the Appellant himself. By allowing the Defense an opportunity to elicit this hearsay evidence from the arresting officer, the Trial Judge effectively gave Appellant the opportunity to present this evidence without having to testify to that effect. This unique remedy was made for the express purpose of ensuring that Appellant was not unfairly prejudiced by the late introduction of this evidence. Even though Appellant did testify in his defense, the Trial Judge's "belt and suspenders" approach of providing a unique remedy, even though he found no prejudice, ensured that Appellant was not materially prejudiced by the newly discovered evidence.

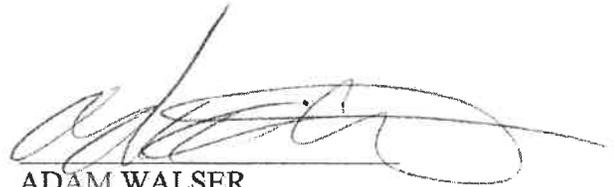
**B. THE TRIAL COURT SHOULD NOT HAVE
IMPOSED THE CRIMINAL FILING FEE AND THE \$100
DNA COLLECTION FEE, AS THEY ARE NO LONGER
MANDATORY**

Respondent concedes that the criminal filing fee and DNA collection fee should not have been collected by the trial court. Appellant's legal analysis of this issue is correct. Respondent agrees that, on this issue alone, their requested relief should be granted.

III. CONCLUSION

For the reasons above, the State respectfully requests that the court deny Appellant's request for reversal of his convictions. However, the State agrees that the \$200 criminal filing fee and the \$100 DNA collection fee should be stricken from Appellant's judgment and sentence.

RESPECTFULLY SUBMITTED this 29th day of JULY, 2019



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Certificate of Mailing

I, Tami Odenrider, do hereby certify and declare that I am the administrative assistant to the Deputy Prosecuting Attorney for Lincoln County, and that I deposited in the United States Post office in the City of Davenport, Lincoln County, Washington, on the date below, a properly stamped and addressed envelope(s) directed to the appellant Ms. Andrea Burkhart, at the address of 8220 W. Gage Blvd #789, Kennewick, WA 99336 containing a true and correct copy of: Brief of Respondent.

Dated: 7/29/19

Tami Odenrider
TAMI ODENRIDER

LINCOLN COUNTY PROSECUTOR'S

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