

67348-3

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COURT OF APPEALS NO. 67348-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

V.

B.M.,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Trickey, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's due process rights were violated by the court's denial of his motion to dismiss, based on unreasonable delay and prosecutorial mismanagement in the prosecution of his case.

2. Appellant received ineffective assistance of counsel when counsel failed to renew the motion to dismiss at the close of the state's case.

Issues Pertaining to Assignments of Error

1. In the state's prosecution against appellant for purse-snatching, were appellant's due process rights violated where the state's prosecution against him was unreasonably delayed by eight months, and as a result, the witness who once exculpated him had become so confused and malleable as to give differing accounts, at one point fingering appellant as the purse snatcher, in a case with multiple suspects that boiled down to identification?

2. Did appellant receive ineffective assistance of counsel, where the court found unreasonable delay in the prosecution of appellant's case but denied the motion to dismiss on grounds the *possibility* of faded memories did not justify dismissal,

and where defense counsel did not renew the motion to dismiss after the testimony of the once exculpating witness?

B. STATEMENT OF THE CASE¹

1. Motion to Dismiss for Unreasonable Delay

Juvenile appellant B.M. is appealing from his adjudication for second degree robbery, allegedly committed against Khamtanh Pholwapee on August 17, 2010. CP 1-5, 8, 68. Although B.M. was charged with the offense on August 20, 2010, his case did not go to trial until April 25, 2011. 1RP.

When trial commenced, his co-respondent A.H.² moved to dismiss under LjuCR 7.14(b)³ and CrR 8.3(b).⁴ 1RP 6-7. In support, A.H. recited the following facts:

¹ This brief refers to the transcripts as follows: 1RP – 4/25/11 and 4/26/11; and 2RP – 4/28/11, 4/29/11 and 5/5/11.

² B.M.'s case was consolidated with A.H.'s on February 9, 2011. Supp. CP __ (sub. no. 31, Order, 2/9/11). A.H. was also charged with robbing Khamtanh Pholwapee. Supp. CP __ (sub. no. X (Cause No. 11-8-00342-8 SEA), Motion to Dismiss, 4/22/11).

³ LjuCR 7.14(B) provides:

The Court may dismiss an information if it is established that there has been an unreasonable delay in referral of the offense by the police to the prosecutor and respondent has been prejudiced. For purposes of this rule, a delay of more than two weeks from the date of completion of the police investigation of the offense to the time of receipt of the referral by the prosecutor shall be deemed prima facie evidence of an unreasonable delay. Upon a prima facie showing of unreasonable delay the Court shall then determine whether or not dismissal or other appropriate sanction will be imposed. Among those factors otherwise considered the Court shall consider the following: (1)

The incident date is allegedly August 17, 2010. The alleged victim Khamtanh Pholwapee was not interviewed until January 18, 2011. Subsequently, Detective Christopher Gregorio drafted a Certification for Determination of Probable Cause for this incident on January 20, 2011. On February 11, 2011, the State filed this case.

... In this case, there was a five month delay between the date of the incident and interview of the alleged victim. The reason for this delay is unknown. The alleged victim and both witnesses were interviewed on the date of the incident, August 17, 2010. The investigation could have been considered complete at this point.

Curiously, Detective Gregorio received this case for review and follow-up investigation on January 13, 2011. This case involved few witnesses, very little collected evidence and no elaborate investigation. Thus, the investigation in this case was neither complicated nor time consuming. This court should, therefore conclude that an unreasonable delay in referral occurred, and that therefore, dismissal pursuant to LjuCR 7.14(b) is appropriate.

the length of the delay; (2) the reason for the delay; (3) the impact of the delay on the ability to defend against the charge; and (4) the seriousness of the alleged offense. Unreasonable delay shall constitute an affirmative defense which must be raised by motion not less than one week before trial. Such motion may be considered by affidavit.

⁴ CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Superior Court Criminal Rules apply in juvenile offense proceedings and when not inconsistent with Juvenile Court Rules. State v. Cantrell, 111 Wn.2d 385, 388, 758 P.2d 1 (1988).

Supp. CP __ (sub. no. 24 (Cause No. 11-8-00342-8 SEA), Motion to Dismiss, 4/22/11), pages 1, 3.⁵

B.M. joined the motion to dismiss, noting that the main issue was identification and that memories had faded:

I'm joining in and I'll make the additional comment that memories have faded. They do anyway and they certainly have in this case, and there really was no – there really was nothing between that date and how long it took to do the last interview. And then they still didn't get it in on time, but that wouldn't delay the end. It's hard to balk about if it's a two-week delay or three-week delay, but with clothing being such a big issue, what people were wearing, what they looked like, and being so delayed, it's – if the court goes ahead with the trial, you'll see how the memories have faded.

1RP 7.

The state asserted the motion was untimely, as it was filed the Friday afternoon before Monday's trial date. 1RP 8. A.H. responded the motion was noted on the omnibus order on April 12, and the state was therefore on notice. 1RP 8.

The court found prima facie evidence of unreasonable delay but that "the possibility that memories might have faded" insufficient prejudice:

All right. So here's my ruling. I do find that there is a prima facie showing of unreasonable delay

⁵ This pleading was considered by the trial court in the current case, and B.M. is designating it for this appeal, contemporaneously with filing this brief.

based on the facts as outlined in the defense brief, but I don't see that there has been sufficient prejudice to either respond to justify dismissal just based on the possibility that memories might have faded.

So if there's any issue with regard to the sufficiency of the evidence, then that goes to whether the case is proved beyond a reasonable doubt it seems to me and so I will deny the motion to dismiss.

And for the record, although I think that just raising it is not enough, I'm not going to rule on the basis of the time there, so I'm just going to reach (sic) the merits and deny the motion. Okay.

1RP 8-9.

2. Trial Testimony

Around 5:00 p.m. on August 17, 2010, Khamtanh Pholwapee was selling fish at King Plaza in Seattle's Rainier Valley. 1RP 20. Pholwapee testified she was sitting on her chair sipping a drink, when "some black people came" and "pushed [her] over." 1RP 21. Pholwapee clarified it was only one man who pushed her, and he took her black bag.⁶ 1RP 21, 30.

Pholwapee testified she dusted herself off, told a bystander to call for help, and chased after the man. 1RP 22, 34.

Pholwapee followed the man up Martin Luther King Way and around a corner, but lost sight of him near a public housing

⁶ According to Pholwapee, the bag contained her purse, bankbook, Green Card, money and a key. 1RP 29.

development. She testified she had asked the bystander to help her, but he couldn't catch the man, either. 1RP 34.

At trial, Pholwapee could not remember what the man who took her bag was wearing; she testified she was not focused on his clothing. 1RP 25. Nor did she see the man's face. 1RP 26. Pholwapee claimed he was wearing a dark-colored shirt, however. 1RP 26-27.

Paul Davison was driving east on South Myrtle Street on his way to work when he saw a young man running at high speed with a black bag under his arm and a short, Asian woman running after him, yelling for help. 1RP 40-41, 42, 60. Davison described the man as approximately 5'10" tall, possibly African and wearing dark jeans and a dark t-shirt. 1RP 42.

According to Davison, the man and woman were running west on the north side of South Myrtle Street; the woman was about 40 feet behind the man, but the gap was widening.⁷ 1RP 43, 62, 66. Davison made a U-turn and followed the pair west. 1RP 44. Approximately ¼ of a block from where he initially saw the pair, Davison turned north into a parking lot. 1RP 44. According to

⁷ Davison testified he remembered one other person standing nearby when he first saw the man with the bag and the lady chasing him. 1RP 69. According to Davison, "He was kind of standing back watching." 1RP 70.

Davison: "Either I saw him go in there or my gut feeling was that was the logical place for him to go." 1RP 44. At the time of trial, Davison no longer remembered. 1RP 44.

Regardless, Davison lost sight of the man. 1RP 44. Davison continued north through the parking lot and around the block, before returning to the parking lot where he encountered Pholwapee. 1RP 46-47. Davison was already on the phone with 911. 1RP 47. Seattle police arrived five minutes later. 1RP 53.

Meanwhile, officer Nathan Shopay happened to be in the area when the call was broadcast over the radio. 1RP 78. Believing that John C. Little Park was close to where the suspect was last seen, Shopay headed there. 1RP 78.

As Shopay drove by the park, he saw someone he believed matched the description of the suspect and pulled into the park.⁸ 1RP 78. Shopay testified the individual was walking briskly south through the park, out-of-breath, sweaty and nervous. 1RP 79, 95. The individual, later identified as Abdullahi Shire, had \$97.00 in his

⁸ At trial, Shopay could not recall what that description was, noting: "it's been eight months." 1RP 89. Shopay thought the dispatch described someone with "dark clothing." 1RP 90. Shopay described what Shire was wearing as "dark clothing." 1RP 90. Shopay did not recall anything else about the description, such as height or weight. 1RP 91.

possession.⁹ 1RP 79-80, 91; Supp. CP ___ (sub. no. 4, Order of Consolidation, 8/23/10); 1RP 80.

Shopay also testified that when he stopped Shire, “some guys [Shopay] didn’t know ran up to him” and “threw a bag at him, then ran away[.]” 1RP 94. When asked if Shire said anything about these “guys,” Shopay testified: “I believe at the time he actually didn’t know who they were.” 1RP 94. Apparently, this was not *the* bag, however, because Shopay testified he and Shire unsuccessfully attempted to locate a purse, after Shire said he knew of its location.¹⁰ 1RP 81, 88.

While Shopay was investigating Shire, officer Jarrod Stone spoke to an alleged witness – Lyndon Caldwell – who showed up at the park. 1RP 82, 179. After speaking to Caldwell, Stone “went around a corner where this witness directed [him] and located two males.” 1RP 179. Stone testified the two men, later identified as B.M. and A.H., “were by the bushes crouching down” on the side of a dumpster.¹¹ 1RP 85, 180. Stone could not remember the layout

⁹ Shire was wearing a blue t-shirt with the phrase “bail money” plus a picture of the capital with cash on it. 2RP 94, 160.

¹⁰ Someone from an assisted living facility located on 37th Avenue South found the bag several days later and left it with the front desk at the facility for police to pick up. 1RP 101-103.

¹¹ A.H. was wearing a white t-shirt with the words “tap out” on it. 2RP 94, 160. B.M. was wearing a black t-shirt with a white t-shirt underneath. 2RP 94, 160. The black shirt had an eagle design on it. 2RP 160.

exactly, however, noting: "it's been quite a bit of time." 1RP 181.

Stone took the two men into custody. 1RP 182.

When asked on cross-examination about his memory of whether the individuals were crouching down, Stone admitted his memory was somewhat foggy:

Well, what my reference is, this is an event that took place about eight months ago back in August. Since then, I've been on hundreds, if not thousands of calls, dealt with thousands of people, be it positive, negative situations. I can't remember every specific event as it happened within maybe a five-second time period. To the best of my recollection, at that time period they were crouching down, not to say anything nefarious or whatnot, but that's how I remember encountering the individuals.

1RP 186-87.

Around 5:00 p.m. that evening, Caldwell was at the Chase Bank on Martin Luther King Way and South Myrtle Street to cash a check. 2RP 6-7. She testified she noticed five young men across the street "talking like normal kids." 2RP 7. Realizing she forgot her identification, Caldwell returned to her truck to look for it. 2RP 7. Caldwell testified that while she was looking for her identification, she noticed that "the little young guy kept following some Asian ladies into the bank[.]" 2RP 7. She alleged the young guy and the others made hand gestures back and forth. 2RP 8.

Caldwell testified the young men looked Ethiopian and were wearing white t-shirts with designs on them. 2RP 9.

Caldwell cashed her check and drove to a friend's house. 2RP 9. Caldwell testified that while waiting for her friend, she observed the following:

[W]hile I was sitting in the car for my girlfriend house, I seen two young mans running down the street and a lady running behind them and another guy and a guy in a car running – one was in the car cashing [sic] and the lady and the guy was chasing two of the two young men. And I noticed that one of them gave the purse to the other young man.

2RP 9.

Caldwell testified one of the men ran one direction, while the other ran a different direction. 2RP 10. She followed the one who had the purse. 2RP 10. Caldwell testified one was wearing a white shirt; the other a green or blue shirt. 2RP 11. According to Caldwell, the individual in the white shirt handed the purse off to the one in the green or blue shirt. 2RP 12.

As indicated, Caldwell followed the one with green or blue shirt, but lost sight of him when he went into some trees. 2RP 11-12. Caldwell went around the block to access Holly Park.¹² 2RP 11. Caldwell testified that when she reached the park, she saw an

¹² Holly Park is a neighborhood adjacent to John C. Little Park. 2RP 76.

officer had the two individuals she saw handing off the purse detained and handcuffed. 2RP 11-12. Caldwell told the officer she "had seen them at the bank and after them running with the purse." 2RP 12.

When Caldwell pulled over by some trees at the officer's request, she noticed two other young men there (A.H. and B.M.). 2RP 12-13. Caldwell testified she recognized them as two other young men who had been at the bank. 2RP 13. At first, Caldwell testified she did not see what involvement these two individuals had in the incident. 2RP 14.

However, Caldwell subsequently indicated the man in the white shirt (A.H.) was the one with the purse. Her testimony further indicated that Shire was the one A.H. handed the purse off to:

Q. [prosecutor] And were you able to make any sort of identifications?

A. Yes.

Q. And who did you identify?

A. They guy with the white tee shirt and the guy with the blue shirt.

Q. And so the guy with the blue tee shirt, where was he when you first came upon where the officers were at?

A. He was with the officer and the other one with the white shirt was in the tree.

Q. And so the two that you had directed the officer to behind the tree, they were later detained by the officers?

A. Right.

Q. And one of the guys who had the white shirt, you had later identified?

A. Right.

Q. And what was his involvement in the case?

A. Like I said, he was the one who had the purse.

2RP 14-15.

A.H. attempted to impeach Caldwell's identification on cross-examination, however, and Caldwell got a little flustered:

Q. [defense counsel] Okay. And do you remember telling the officer that interviewed you on August 17th that it was actually the person in the black shirt that handed it off to the person in the white shirt; do you remember saying that?

A. I don't recall. Because, like I say, it happened a long time – I just know that that's who I seen passing it off it looked like, the guy – let me see. The guy with the whatever color his shirt now, his shirt, passed it off to the guy with the white shirt. You're getting me mixed up now.

2RP 21. At this point, Caldwell claimed she was mostly looking at faces, not clothing. 2RP 22.

When asked if she told A.H.'s defense investigator that the two people detained by police when she first pulled up in the park were the ones who handed off the purse, Caldwell testified: "You know, I might have said that, but, like I told him, that was a long time ago. The only interview I could recall is the officer interview that my brain was fresh at that time." 2RP 24.

Upon further questioning, Caldwell returned to her first position, that the two in the trees were not involved "in the transfer of the purse." 2RP 25. Rather, she testified she pointed them out to the officer because they were at the bank. 2RP 25.

On redirect by the prosecutor, however, Caldwell testified (while examining pictures of A.H., B.M. and Shire) she saw B.M. hand the purse to A.H. CP 160.

On re-cross, B.M. attempted, unsuccessfully, to clarify Caldwell's testimony:

Q. [defense counsel] -- at the beginning of your testimony on direct, the first time you were questioned, I think it was the first time you were questioned --

A. Right.

Q. -- you stated -- and I don't mean to be belaboring this point, but I'm trying to understand it.

A. Okay.

Q. – I told the officers I saw the two people in the bushes at the bank and they were not involved in the first transfer. You said that earlier today, yes?

A. Yes.

Q. So back last August you told the officers that those two were – they were at the bank, they were part of the group and were at the bank, they were part of the group and were at the bank but were not the ones you saw transfer the handoff of the bag?

A. Correct.

Q. Are you changing that testimony today?

A. I'm – how to say it? Like I told the officer, I seen them at the bank and running out. I didn't see them rob the person, like I told the officer. I seen them at the bank and after the incident. Do you understand what I'm saying? They robbed that person and then they ran, whoever the guys. And, like I told him, when I got around the corner, like I followed one of the guys and he ran into the bushes, and when I went around the corner, that's when I seen they had two guys that was detained, the bank robbery, and asked me to pull my car over on the side and that's when I pulled over and I see two guys in the bushes hiding, and that's when I said, well, they got two more guys that's in the bushes that was hiding. Do you understand what I'm saying?

2RP 43-44.

On further redirect by the prosecutor, Caldwell responded “[c]orrect,” when asked whether she told police she had seen A.H.

and B.M. “at the bank and then you saw them running but you did not see the actual robbery?” 2RP 44.

Turning back to the incident, once Shire, A.H. and B.M. were detained, officer Chris Caron took Pholwapee and Davison to John C. Little Park to see if they could identify any of the three detainees. 1RP 54, 166, 168. Caron testified he parked approximately 100-150 feet away from the other patrol car and cuffed suspects. 1RP 54, 170. Pholwapee and Davis remained in the patrol car during the show-up identification. 1RP 55, 65, 87, 169.

Caron testified Pholwapee was able to tell him “it was the one wearing the black shirt (RP 170)” after he asked her to focus on remembering the color of the shirt the culprit was wearing:

She wasn't responding. Like I said, I don't know if she understood or if it was the language barrier or if she was just upset, so I thought it would assist her if I had her focus on each of them wearing different color shirts. Can you identify the – can you point out to me the person wearing the color shirt that you remember, that you chased.

1RP 170.¹³

¹³ Detective Thomas Healy subsequently interviewed Pholwapee. 1RP 141, 172. According to him, Pholwapee pointed to B.M., who was wearing a black shirt, and said he was the man who took her bag. 1RP 142. Healy testified Pholwapee was standing approximately 30 feet from the suspects during this identification. 1RP 150. However, according to Caron's testimony, it appears Pholwapee and Davison were still in his patrol car when Healy interviewed them. Healy was unaware of the earlier show-up. 1RP 172. Detective Healy also

In contrast, Pholwapee testified she did not recognize any of the three detainees, because she did not see the face of the man who took her bag. 1RP 28-29, 30. Pholwapee testified that communicating with the officers was difficult, however, because she is “not good at the language.”¹⁴ 1RP 29.

Davison’s identification of B.M. as the man with the bag also had to do with B.M.’s clothes. 1RP 55. According to Davison, he identified B.M., because he was wearing the same shirt as the man running with the bag. Davison described it as abstract or having an unrecognizable pattern or illustration on it. 1RP 55-56.

When shown a picture of the shirt worn by B.M. that day, however, Davison testified:

Well, I mean, I guess now, what, nine months later, it’s harder to remember exactly, but I’m quite certain. I do know that that day I was 100 percent sure of seeing that shirt.

1RP 68.

Davison acknowledged the graphic on the shirt was “pretty clearly an eagle.” 1RP 70. Although Davison had seen the man’s

spoke to Ms. Caldwell. 1RP 143. According to Healy, she also identified B.M. 1RP 145, 148.

¹⁴ Davison concurred that communicating with Pholwapee was difficult, due to the language barrier. 1RP 58.

face briefly, he also acknowledged he could not identify the man at the time of trial. 1RP 56, 59.

B.M. denied any involvement with the purse-snatching, although he acknowledged he had been hanging out with A.H., Shire and several others that day. 2RP 49-71. B.M. and A.H. had departed from Shire to go to a restaurant when they heard from another friend that something had happened to Shire, and the police were everywhere. 2RP 67, 83, 102. B.M. testified that earlier, Shire had fixated on an Asian woman selling fish, after he saw her put cash in her bag. 2RP 61-62.

When A.H. and B.M. went to look for Shire, they saw him detained by police. 2RP 68. They ducked into the trees to watch and to laugh at Shire, because they had discouraged him from taking anything from the woman. 2RP 69.

C. ARGUMENT

B.M. RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO RENEW THE MOTION TO DISMISS BASED ON THE UNREASONABLE DELAY IN THE PROSECUTION OF B.M.'S CASE.

Although B.M. was charged in August 2010, his case was later consolidated with the state's prosecution against A.H., which was not charged until February 2011. As A.H.'s attorney argued,

and the court found, there was no reasonable explanation for the delay in charging between August and February, which in turn, resulted in the delay of B.M.'s case. When B.M. joined A.H.'s motion to dismiss, the state did not argue the analysis regarding unreasonable delay should be any different in B.M.'s case. Nor did the court rule the analysis differed in any respect. On the contrary, the court denied the motion on the basis that the *possibility* of faded memories did not constitute sufficient prejudice.

As the trial progressed, however, it was evident that the *possibility* of faded memories had become a reality. The failure of B.M.'s attorney to renew the motion in light of this reality constituted ineffective assistance of counsel.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

(i) Counsel Performed Deficiently in Failing to Renew the Motion to Dismiss.

Under LjuCR 7.14(B), the court may dismiss an information if it is established that there has been an unreasonable delay in referral of the offense by the police to the prosecutor and the respondent has been prejudiced. Similarly, CrR 8.3(b) authorizes dismissal of a criminal prosecution "in the furtherance of justice." Superior Court Criminal Rules apply in juvenile offense proceedings when not inconsistent with Juvenile Court Rules. State v. Cantrell, 111 Wn.2d 385, 388, 758 P.2d 1 (1988).

Dismissal for delay in bringing criminal charges is rooted in due process. U. S. Const. art, 1, § 3; U.S. Const., amends. 5, 14; United States v. Lovasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977); State v. Calderon, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984). A three-part analysis derived from Lovasco is employed to determine whether the delay deprived the defendant of his constitutional right to due process: (1) The defendant must show he was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the state is able to justify the delay, the court must undertake a further balancing of the state's

interest and prejudice to the accused. State v. Lidge, 111 Wn.2d 845, 848, 765 P.2d 807 (1989); Calderon, at 352-353.

While at the outset of trial, there was only the possibility of faded memories, by the close of the state's case, the testimony evidenced significant memory lapses by the witnesses. B.M. suffered actual prejudice to his defense as a result.

Loss of a key witness can constitute actual prejudice, but "a mere allegation that witnesses are unavailable or [that] memories have dimmed is insufficient." State v. Gee, 52 Wn. App. 357, 367, 760 P.2d 361 (1988) (citing State v. Bernson, 40 Wn. App. 729, 729, 734, 700 P.2d 758, review denied, 104 Wn.2d 1016 (1985)), rev. denied, 111 Wn.2d 1031 (1989). The Gee case is instructive here.

Gee was convicted of delivering cocaine. In July 1985, an undercover cop named Vance purchased a small amount of cocaine from Ann Barrey. In September 1985, Vance negotiated with Barrey to make a larger purchase. The two subsequently met in a parking lot. Barrey entered Vance's car alone, but said she was with her friend "Nick," who would be a good source for Vance once she left for Florida. Barrey left and then came back with Gee, who she introduced to Vance as "Nick." Gee, 52 Wn. App. at 359.

Inside Vance's car, Gee told Vance that the cocaine was over by a tree. When Vance explained he didn't want to go over to a dark tree, Gee left in Barrey's car. When he returned, he gave Vance a plastic bag containing cocaine. Vance gave the "good buy" signal and everyone was arrested. Gee, at 359.

Gee was charged on July 25, 1986. Prior to trial, Barrey left the jurisdiction. Gee testified that he was only there to make a small purchase of cocaine from Barrey, not to sell or deliver to Vance. He claimed Barrey said Vance would be a good source for him in the future. At the urging of Vance and Barrey, Gee retrieved the cocaine from under the tree. Thereafter, a discussion about the transaction ensued and Gee wished to leave. Vance gave the good buy signal, however, and Gee was arrested. Gee, at 360.

On appeal, Gee argued that the court should have dismissed on grounds of preaccusatorial delay. He argued that the charging delay prejudiced him because Barrey was no longer available as a witness. For several reasons, the Court of Appeals did not agree that Gee was prejudiced by the delay. First, there was no showing that Barrey's testimony would have corroborated Gee's. In fact, the court found it more likely that Barrey would have invoked her right against self-incrimination if called to testify. Finally, considering

Barrey's plans to move to Florida, the court found she probably would have been unavailable even if case had been filed promptly. Gee, at 367.

In contrast to the delay in Gee, the prosecutorial delay in B.M.'s case resulted in him essentially losing the most favorable witness to his defense – Caldwell. As a result of the delay, she no longer remembered that she previously told officers the individuals in the bushes were not involved in the purse hand-off. By the time of trial, Caldwell was all over the board: at one moment saying she knew nothing of B.M.'s involvement; at the next, fingering him as the one who handed off the purse to A.H. She acknowledged her memory was clearer closer in time to the event. And at that time, it appears from the majority of her testimony, she told police she recognized A.H. and B.M. only as other young men at the bank. Had trial occurred sooner, Caldwell would not have become as confused as she did. Accordingly, unlike the situation in Gee, where there was no showing that Barrey would have been available had charges been filed promptly, there was a showing here that Caldwell would have been "available" and would have corroborated B.M.'s testimony that he was not involved.

Once a defendant has established prejudice, the court must also consider the state's reasons for the delay to find a due process violation. The state must show that the delay was neither intentional nor negligent. Gee, 52 Wn. App. at 367 (citing Calderon, 102 Wn.2d at 353). In this case, the state did not allege any reason for the delay, and the court found a prima facie case of unreasonableness, based on the facts set forth in A.H.'s motion for dismissal.

If the state is able to justify the delay, under Lovasco, the court must then balance the state's interest against the prejudice to the accused in determining whether a due process violation has occurred. Gee, 52 Wn. App. at 367 (citing Calderon, 102 Wn. 2d at 353). Ultimately, the test suggested by the United States Supreme Court is "whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Gee, at 367 (quoting United States v. Lovasco, 431 U.S. at 790).

Again, the state failed to offer any explanation for the delay in this case. As a result, the true reason for the delay remains unknown. Consequently, there is nothing to balance against the prejudice suffered by B.M. as a result of the delay. B.M.'s interest

should therefore prevail. Because preaccusatorial delay violated B.M.'s right to due process and to a fair trial, his attorney performed deficiently in failing to renew the motion once the extent of the resulting prejudice was fully known.

(ii) B.M. Was Prejudiced by his Attorney's Deficient Performance.

The evidence against B.M. was not overwhelming. Pholwapee did not identify him, at least according to her testimony. While Davison identified B.M., the identification was based solely on his shirt, which admittedly, Davison described incorrectly. No money was found on B.M. and the bag or purse was not recovered until several days later. Shire, the individual first apprehended by police, was sweaty and had \$97.00 in his possession. Caldwell initially told police – when her memory was fresh – the men in the bushes were not involved in the purse hand-off. By the end of her testimony, however, and after significant questioning, she became flustered and eventually claimed it was B.M. who was running with the purse.

In light of Caldwell's inability to remember the event clearly and consistently by the time of trial, it is likely the court would have granted a renewed motion to dismiss the flimsy case against B.M.

As a result, B.M. was prejudiced by his attorney's failure to renew the motion.

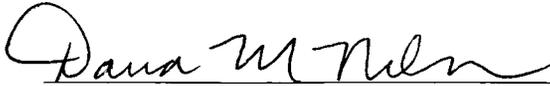
D. CONCLUSION

Preaccusatorial delay deprived B.M. of his right to due process. His attorney's failure to protect his due process rights constituted ineffective assistance of counsel. This Court should reverse B.M.'s conviction.

Dated this 30th day of December, 2011

Respectfully submitted

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