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NO. 67752-7-I

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

REC'D

MAR 20 2012

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Appellant,

v.

D.W.,

Respondent.

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

The Honorable Christopher Washington, Judge

BRIEF OF RESPONDENT

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A. RESTATEMENT OF THE ISSUE

Where the State conceded that a 4.5 month delay by police before referring a juvenile case to the prosecutor's office was unreasonable, and where this delay caused respondent to lose access to juvenile sentencing benefits, did the trial court act within its discretion when it dismissed the case pursuant to LJuCR 7.14(b)?

B. RESTATEMENT OF THE FACTS

On July 20, 2010, Robert Dyer arrived at the Enumclaw home in which he was house-sitting to find it had been burglarized. Dyer called 911. After police arrived, Dyer identified the stolen property as various electronics and two collectible World War I firearms. CP 7, 32.

Officer Tony Ryan's investigation of the burglary quickly led him to Christopher Waddell, a teenage neighbor who had hosted a party the night of the burglary. When Ryan went into Waddell's room to ask him some questions, Allen Torti and D. W. (respondent) were present. Torti and D.W. left shortly after Ryan's arrival. While talking with Waddell, Ryan observed some white trash bags in Waddell's closet. Waddell said they merely contained some items from when he moved in. Ryan left. CP 7, 33.

The next day, Waddell contacted police to report that he had looked in the garbage bags and found the stolen property reported by Dyer and also two shot glasses. Waddell explained to police that on the night of the incident he had overheard Torti and D.W. talking about stealing shot glasses off the neighbor's porch. Waddell said he had had no knowledge about the burglary until he discovered the stolen items in his closet. CP 7, 33-34.

After talking with Waddell, Officer Ryan confronted Torti. Torti quickly admitted to burglarizing Dyer's home and provided a written statement. He explained that D.W. was also part of the undertaking. CP 8, 34.

Later that day, Ryan went to D.W.'s home and confronted him. At first, D.W. denied involvement, but quickly confessed to the burglary when Ryan informed him that there was evidence placing him at the scene. D.W. was arrested and eventually made a full confession. CP 8, 34.

Just a few weeks later, on August 2, 2010, officers submitted some of the stolen property to the Washington State Patrol crime lab for fingerprint analysis. On August 16, 2010, Enumclaw police Detective Grant McCall was assigned the case for the follow-up

investigation. On January 11, 2010, however, McCall was placed on administrative leave. CP 34, 39.

On January 24, 2011, the Washington State Patrol Crime Lab submitted its report to the Enumclaw Police. There, the report sat for months until Detective McCall returned from his administrative leave on March 29, 2011. Even after McCall returned, however, he did not refer the case to the King County Prosecutor's Office for nearly a month. The case was finally referred on April 22, 2011. CP 39.

On June 7, 2011, the King County prosecutor's office charged respondent with one count of residential burglary. CP 5. Given that D.W.'s eighteenth birthday was on September 13, 2011, the court extended juvenile jurisdiction until April 1, 2012. CP 14. The case was originally set for a fact-finding on July 21, 2011 – a year after the burglary took place. CP 39.

D.W. did not have the opportunity to meet with his public defender until July 20, 2012. CP 34. Given the passage of time since the incident, the defense had considerable difficulty finding and interviewing witnesses in preparation of a defense. CP 34-36. Consequently, the defense had to request continuances in order to properly investigate the case, to competently prepare D.W.'s

defense, and to negotiate with the State. RP 6-7. This pushed back the fact-finding date to October 24, 2010. CP 39.

Meanwhile, on September 9, 2011, the defense filed a motion seeking dismissal under LJuCR 7.14(b), citing unreasonable preaccusatorial delay. CP 27-30. In response, the State conceded the delay was unreasonable but took the position that D.W. was not prejudiced by it. CP 40-50; RP 10-18. The defense argued D.W. was prejudiced in two ways: (1) by the unavailability of witnesses; and (2) by the loss of access to juvenile justice system benefits. CP 27-30; RP 3-7.

At the hearing, defense counsel informed the trial court that she had confirmed with D.W.'s juvenile probation officer that because of his age, D.W. would receive less access to juvenile services upon sentencing. RP 6. The State did not rebut the fact D.W. lost access to juvenile justice system benefits and services; instead, it argued that such loss did not constitute prejudice to D.W.'s ability to defend himself. RP 10-11.

Although the trial court was not persuaded by D.W.'s argument the delay prejudiced his ability to defend due to witness unavailability, it found D.W. was prejudiced by the loss of access to juvenile justice system benefits. RP 9, 19-20; CP 62. The trial court

expressed particular concern that, because of the delay in bringing this case to trial, D.W. would have to serve his time in King County jail rather than within the juvenile justice system. RP 9. Given this prejudice and the State's concession that the delay was unreasonable, the trial court granted the motion to dismiss. RP 19-20; CP 62.

C. ARGUMENT

THE TRIAL COURT PROPERLY DIMISSED THE CASE UNDER LJuCR 7.14.

The prompt adjudication of juvenile cases has been identified as an important goal of Washington's juvenile justice system. State v. Chavez, 111 Wn.2d 548, 555, 761 P.2d 607 (1988). LJuCR 7.14(b) promotes this goal. Id. As codified in King County, the rule 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 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.

LJuCR 7.14(b). Dismissal under this rule is reversible only if the trial court manifestly abused its discretion. Chavez, 111 Wn.2d at 562. As explained below, that is not the case here.

Because LJuCR 7.14(b) applies to prejurisdictional events, it must be interpreted as comports with due process. Chavez, 111 Wn.2d at 558-59. The Washington Supreme Court recently clarified the “preaccusatorial delay analysis” to be applied when determining whether due process supports dismissal:

The test, simply stated, is that (1) the defendant must show actual prejudice from the delay; (2) if the defendant shows prejudice, the court must determine the reasons for the delay; (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution.

State v. Oppelt, 172 Wn.2d 285, 295, 257 P.3d 653 (2011). While not explicit in its analysis, the trial court properly applied this test.

Under the first prong, a trial court must determine whether the defendant’s right to a fair trial has been prejudiced by the delay. Chavez, 111 Wn.2d at 562-63. Here, the trial court properly found

D.W.'s fair trial rights were prejudiced when he lost access to juvenile justice benefits such as less-harsh juvenile sentencing options. RP 19-20; CP 62.

Attacking the trial court's conclusion, the State suggests that prejudice associated with the penalty or dispositional phase of a trial does not implicate a defendant's right to a fair trial. BOR at 10-11. Case law does not support such a limited view of that right, however. In fact, the Washington Supreme Court has expressly held the loss of juvenile jurisdiction, which it defined as including the loss of access to the juvenile system's less-harsh penalties, satisfies the prejudice prong.¹ State v. Alvin, 109 Wn.2d 602, 604, 746 P.2d 807 (1987); see also, State v. Dixon, 114 Wn.2d 857, 861 792 P.2d 137 (1990) (same). Just as in and Alvin in Dixon, D.W. has met his burden of showing prejudice by establishing the loss of access to juvenile justice system benefits.

The State also claims D.W.'s emphasis on the loss of access to less-harsh penalties serves only to establish "speculative"

¹ Additionally, the United States Supreme Court's opinion in Blakely v. Washington, 542 U.S. 296, 310-314, 124 S.Ct. 2531 (2004) is predicated on the notion that fairness in sentencing is an element of a defendant's right to a fair trial.

prejudice because D.W. has never been convicted. BOR at 11. This is not so. First, as the trial court found, the State's case against D.W. was strong given his confession. RP 9, 19. Based on this record, the loss of access to less-harsh penalties is a very real prejudice. Second, the State fails to explain why a procedural error that prejudices a future disposition is any more speculative than one that prejudices a future fact-finding. Both situations ask the trial court to project into the future and assess the ultimate impact of the delay, whether that impact is to the defense's future presentation of a defense or to the defendant's future dispositional options.

The State also argued that defense counsel's need to continue the case beyond D.W. eighteenth birthday militates against his showing of prejudice. BOR at 7; RP 20; CP 49. Yet, nothing in the record suggests defense counsel somehow contributed to, or manufactured, the difficulties in preparing the defense. In fact, the State concedes all the defense's difficulties in preparing its case that necessitated the continuance were "common in criminal trials." BOR at 14. As such, the defense's need to continue the case was a foreseeable consequence of the unreasonable preaccusatorial delay. Thus, the trial court properly

found the unreasonable delay by police directly contributed to the defense's need to continue the case in order to competently prepare a defense – a task that was made more difficult by the passage of time. RP 20.

Under the second prong of the test, this Court must consider the State's proffered reasons for the delay. Oppelt, 172 Wn.2d at 295. For purposes of LJuCR 7.14(b), a delay of more than two weeks constitutes prima facie evidence of unreasonableness. In this case, the delay was 4.5 months -- 800% longer than what is presumed unreasonable.

Given this lengthy delay, it is not surprising the State quickly conceded the 4.5 month referral delay was unreasonable and, instead, focused its argument entirely on the question of whether respondent could show prejudice. BOR at 6, CP 40-50. In fact, the prosecutor told the trial court: "it's not our burden to prove anything." RP 10. When pushed by the trial court to proffer some reason for the delay, however, the prosecutor stated only:

So [police] received their fingerprint return in January, January 24, 2011. At that time, the investigative officer was on administrative leave, so when the letter came into his desk, he wasn't there to get it. It has nothing to do with this particular case. It just has to do with the fact that we're talking about the Enumclaw Police Department.

When he came back from leave on March 29th, 2011, he got the letter from the crime lab that said there were no usable latent prints. And less than a month later, he referred the case while dealing with the backlog that he'd accumulated while he was on leave.

RP 13.

Administrative leave – unlike sick leave, compensation time, vacations, and training courses – is not the “normal routine in every police department” justifying delay. See, Alvin 109 Wn.2d at 606 (explaining sick leave, compensation time, vacations, and training are normal routine and may justify preaccusatorial delay). Additionally, the State has offered no explanation why arrangements were not made by the police department to avoid such a delay. There is nothing in the record explaining why the investigating officer's open cases were not reassigned while he was on leave, or why the officer took nearly a month after returning from leave to refer the charges. Given this record, the trial court did not abuse its discretion in accepting the State's concession that the 4.5 month delay was unreasonable. CP 62.

Finally, under the third prong, a trial court must weigh the State's reasons for the delay against the prejudice to the defendant and determine whether fundamental conceptions of justice would

be violated by allowing prosecution. Oppelt, Wn.2d at 295. In this case, prejudice clearly outweighs the reason for delay. On the one hand, the trial court found D.W. was prejudiced by the referral delay based on the loss of access to juvenile justice system benefits. On the other hand, the State conceded the delay was unreasonable. Given the State's lack of any compelling reason for the delay, even the slightest showing of prejudice² to D.W.'s right to a fair trial tip the scales in his favor.

Furthermore, the State has failed to establish a record remotely establishing why fundamental conceptions of justice need tolerate a 4.5 month referral delay in a juvenile case, resulting solely from an officer's administrative leave.

This is not one of those situations where the record establishes that there are significant societal interests justifying the State's delay that outweigh D.W.'s interest in accessing juvenile sentencing benefits. Compare with, Alvin, 109 Wn.2d at 606 (holding that fundamental concepts of justice were not offended where State's delay directly served the societal interest in maintaining the orderly administration of justice). Instead, this is a

² In making this argument, respondent does not suggest his loss of juvenile justice benefits is slight.

case where police efforts were out of step with the Legislature's well-recognized goal of promptly adjudicating juvenile cases so youthful offenders may benefit from the rehabilitative opportunities within the juvenile justice system. See, Chavez, 111 Wn.2d at 555. As such, the record supports the trial court's decision to dismiss the case. Therefore, this Court should affirm the order of dismissal.

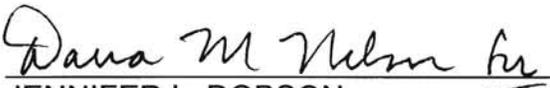
D. CONCLUSION

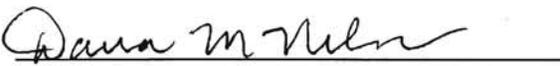
For the reasons stated above, respondent respectfully asks this Court to affirm the trial court.

Dated this 20th day of March, 2012.

Respectfully submitted

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

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|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | COA NO. 67752-7-1 |
| |) | |
| DANNY WICKLANDER, |) | |
| |) | |
| Respondent. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF MARCH, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANNY WICKLANDER
2634 LAUKALA PL, APT D
ENUMCLAW, WA 98022

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF MARCH, 2012.

x *Patrick Mayovsky*