NO. 43204-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

CHRISTOPHER MAYNARD,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

By information filed August 26, 2011, the Cowlitz County Prosecutor charged the defendant Christopher Maynard with once count of First Degree Malicious Mischief, and five counts of Third Degree Malicious Mischief. CP 1-3. The state alleged that the defendant committed these offenses in July and August of 2010 in the City of Woodland. *Id.* The defendant was born on August 1, 1993. CP 4. Consequently, the state alleged that he committed the offenses around the time of his seventeenth birthday. *Id.* Following arraignment, the defendant moved to dismiss the charge under two arguments: (1) that the state's negligent pre-accusatorial delay had robbed him of juvenile court jurisdiction, and (2) that he had been denied effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when his appointed juvenile court attorney failed to move to extend juvenile court jurisdiction. CP 11, 82-90. The Affirmation of Counsel given in support of this motion included true and correct copies of the following documents for the court's consideration:

(1) Probable Cause Statement dated 8/26/10;

(2) Complaint and Affirmation for Search Warrant, Search Warrant, and Return of Service dated 8/18/10;

(3) Consents to Search signed by Teresa Maynard on 8/18/10, by Vivian Fallis on 8/26/10, and by Douglas Maynard on 8/20/10;

(4) Sworn written confession of Christopher Maynard signed on 8/18/10, Justin O'Connor signed on 8/18/10, Michelle Fallis signed on 8/25/10, and Andrew Fallis signed on 8/25/10; and

(5) Woodland Police Department Narrative Report in case No. W10-2316 dated 8/26/10. The report shows that a copy was sent to the Cowlitz County Juvenile Court on September 14, 2010. The face sheet of the report bears a "Received" stamp from the Cowlitz County Prosecutor's Office dated 9/15/10, and a "Received" stamp from the Cowlitz County Juvenile Department dated November 29, 2010.

(6) Information from *In re: Christopher Nelson Maynard*, No. 11-8-00242-2;

(7) Notice and Summons to Juvenile Court from *In re: Christopher Nelson Maynard*, No. 11-8-00242-2;

(8) Notice and Summons to Juvenile Court from *In re: Christopher Nelson Maynard*, No. 11-8-00242-2 ;

(9) Probable Cause Statement from *In re: Christopher Nelson Maynard*, No. 11-8-00242-2;

(10) Motion & Order to Dismiss from *In re: Christopher Nelson Maynard*, No. 11-8-00242-2;

(11) The 7/3/11, 7/19/11, and 8/9/11 Minute Sheets from *In re: Christopher Nelson Maynard*, No. 11-8-00242-2, and

(12) Cowlitz County Prosecutor's offer sheet from *In re: Christopher Nelson Maynard*, No. 11-8-00242-2.

CP 12-81.

The state responded to this argument by filing the Affidavit of Lacey Skalisky, the Deputy Prosecuting Attorney in charge of both the juvenile and adult case against the defendant. CP 91-94. However, the state did not call

any witnesses at the hearing on the Motion to Dismiss, introduce any evidence, or contest the accuracy of the documents the defense had attached to its Affirmation of Counsel. RP 1-51. While the state did not introduce any evidence at the hearing, the defense did call and examine Tierra Busby, who had been the defendant's appointed counsel in the companion juvenile court proceeding, entitled *State of Washington v. Christopher Maynard*, No. 11-8-00242-2. RP 9-40. Following her testimony and argument by counsel, the court granted the defendant's motion and dismissed the charge. RP 51-54. The court later entered the following findings of fact and conclusions of law in support of its ruling:

FINDINGS OF FACT

1. In July and August of 2010, a number of businesses and non-profit organizations in the Woodland area were "tagged" by a small number of local youths. "Tagging" is an activity whereby a person paints graffiti on structures, usually with a mark or sign unique to the individual "tagger." The "tagged" structures were as follows: (1) the Woodland Little League playing fields on August 13, 2010; (2) a Columbia Mega Storage Moving Van on August 11th or 12th; (3) the Freedom Skateboard Park on August 17th; (4) the Woodland Auto Supply on August 17th; (5) a City of Woodland Maintenance shed on August 1st or 2nd; and (6) the Woodland Little League dugout on July 2nd.

2. On August 18, 2010, the day after the last incident, Woodland Police Officers Keller and Murray arrested the defendant for these crimes when the defendant went out to one of his last tagging sites to take pictures. At that time, the defendant had just turned 17-years-old. He was born on August 1, 1993.

3. After the arrest, the officers took the defendant to the

Woodland Police station where he gave a lengthy and complete confession of all of his tagging activities, including a list of the other juveniles involved, whom the defendant referred to as his tagging crew. These people were Andrew Fallis (dob 7/13/94); Michelle Fallis (dob 12/19/92); Justin O'Conner (dob 7/7/95), Vincent Dizon (dob 3/27/95). On this same day, the officers secured the written confession of Justin O'Conner.

4. Based upon the information the defendant provided, the Woodland Officers obtained a search warrant, and on August 25, 2010, executed that warrant on a Woodland address and seized various items of evidence of the crimes the defendant and his "crew" had committed. On August 18th, 20th and 26th, the officers also searched the homes of the other suspects with the consent of the other suspects' parents.

5. On August 25, 2010, the officers secured the written confessions of Michelle Fallis and Andrew Fallis. By August 26th, 2010, the Woodland Officers finished their investigation in the case.

6. On September 14, 2010, the Woodland Officers forwarded their reports and supporting documents to the Cowlitz County Juvenile Court. These materials included a three and one-half page, sworn, single-spaced, typed probable cause statement dated August 26, 2011, that identified each victim, stated the exact amount of each victim's damages, identified each defendant and each defendant's confession, and included all the particulars of the police investigation.

7. The Cowlitz County Prosecutor's Office received the report, supporting materials and probable cause statement on September 15, 2010. The prosecutor assigned to the case then contacted the Woodland Police department to request more photographs and information about the reporting parties.

8. On November 17, 2011, the prosecutor assigned to the case received the requested information from the Woodland Police Department, and then forwarded all of the reports and supporting documents, along with the probable cause statement, to the Juvenile Court Probation Department for consideration for diversion.

9. On December 10, 2011, the Juvenile Court Probation Department returned the defendant's case to the prosecutor along with a note that it had been rejected for diversion.

10. Between December 10, 2011, and June 16, 2011, the prosecutor exchanged a number of e-mails with the Woodland Police department, seeking "more information, specifically in regards to restitution amounts owed to the victims." See Affirmation of Lacey Skalisky, Deputy Prosecuting Attorney. The state made these repeated requests in spite of the fact that the police reports and the probable cause statements already provided contained a detailed statement of the damages each victim had sustained.

11. On June 16, 2011, over 10 months after receiving the reports in this case, the Cowlitz County Prosecutor's Office prepared an information charging the defendant with five counts of malicious mischief. # 11-8-00242-2. There was also filed the investigating officer's probable cause statement dated August 26, 2010. Nothing had been added to the probable cause statement after the date it was originally signed.

12. The information was filed and probable cause statement in the juvenile court on July 7, 2011, and served the defendant with a summons to appear in court on July 12, 2011, which was 19 days before he turned 21-years-old.

13. On July 12, 2011, the defendant appeared on the summons, at which time the juvenile court appointed Tierra Busby to represent him. The court then put the matter over one week for arraignment. Although the normal procedure during the first appearance would have been for the court to extend jurisdiction for an offender such as the defendant who was close to turning eighteen years of age, the court did not do so in this case. Neither the court, the prosecutor and the probation officer in charge of the case mentioned that the defendant would be eighteen years old within a few weeks.

14. On July 19, 2011, the defendant appeared with his attorney and entered a plea of not guilty. The defendant's attorney did not note his birth date, although it was stated on the information. The court then set a pretrial of August 9, 2011, a readiness review of September 13, 2011, and a trial for September 15, 2011. The

defendant's attorney, the probation officer in charge of the case, the prosecutor and the court all missed the fact that each of these dates was set after the defendant's eighteenth birthday. Had any party noticed this fact and mentioned it, the court could have entered an order extending jurisdiction, and that would be the usual practice.

15. On July 25, 2011, the prosecutor sent an offer to the defendant's attorney than included a recommendation of deferred disposition upon a plea to two of the charges. This offer stated that it expired on August 9, 2011. After consultation with his attorney, the defendant agreed to accept this offer and his attorney told him that he could do so at his scheduled pretrial on August 9, 2011.

16. After sending the offer on July 25, 2011, the prosecutor finally noticed that the defendant was about to turn eighteen-years-old. She then sent an e-mail to the defendant's attorney so stating. The defendant's attorney did not read this e-mail until after the defendant's eighteenth birthday. As a result, when the defendant appeared for pretrial on August 9, 2011, the trial court dismissed the charges on the basis that the juvenile court had lost jurisdiction.

17. The state later filed a new information with the same charges in Cowlitz County Superior Court along with the probable cause statement dated August 26, 2010. The defendant later appeared pursuant to a summons, at which time the court appointed a new attorney to represent the defendant.

18. The defendant's new attorney filed a motion to dismiss the charges arguing that (1) negligent pre-accusatorial delay had denied him the benefit of juvenile court jurisdiction and a juvenile deferred sentence, and (2) that trial counsel's failure to move to extend juvenile court jurisdiction had denied him the right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

19. Juvenile court defense counsel's failure to note the defendant's age at arraignment and failure to then move to extend jurisdiction fell below the standard of a reasonably prudent attorney.

20. Had juvenile court defense counsel timely moved to extend

jurisdiction, the court could have granted the motion without objection from the state or the probation department and the defendant could later have entered into the plea agreement with the state and obtained a deferred sentence. This is in line with standard practice.

21. Juvenile court defense counsel's failure to note the defendant's age at arraignment and failure to then move to extend jurisdiction caused prejudice to the defendant through (1) the loss of juvenile court jurisdiction, and (2) the loss of an opportunity to obtain a deferred sentence.

CONCLUSIONS OF LAW

1. In *State v. Lidge*, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989), the Washington Supreme, in reliance upon the decision of the United States Supreme Court in *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), set a three part test to determine whether preaccusatorial delay by the State in filing charges violates an individual's right to due process under circumstances in which juvenile court jurisdiction is lost as a result of the delay. This test provides as follows: (1) that the defendant show prejudice resulting from the delay; (2) that there are reasons for the delay which the court must consider; and (3) where the State can justify the delay, that the court engage in balancing the State's interest against the prejudice to the accused.

2. In the case at bar, the defendant has shown prejudice from the state's delay in filing the charges against him. First, he has shown the prejudice that arises from the loss of juvenile court jurisdiction. Second, he has shown the prejudice that arises from the loss of a juvenile deferred sentence, which would have also been a significant benefit to him. The prosecutor's offer of deferred disposition was extant at the time the defendant turned 18.

3. The court finds the state's reasons for the delay in filing the information in juvenile court to be unjustified. Specifically, the only reason the state has identified for the delay is its repeated requests for information about restitution that the Woodland Police Department had already provided in its initial reports and probable cause statement.

4. Even were the state able to justify the delay in filing, the balancing between the State's interest in proceeding with the case is outweighed by the prejudice to the defendant. Specifically, the crimes are non-violent Class C felonies from which the victims could seek civil remedies from the defendant. As such, they are relatively minor compared to the vast majority of felony offenses that the prosecutor charges. By comparison, the effect of the felony convictions upon the defendant, who has no prior felonies, is significant and outweighs the state's interest.

5. The court finds that juvenile defense attorney's failure to move to extend juvenile court jurisdiction fell below the standard of a reasonably prudent attorney and caused prejudice to the defendant. As a result, this failure denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, and constitutes a separate and distinct basis for dismissing the charges in this case.

CP 106-111.

Following entry of these findings and dismissal of the charges, the state filed a Notice of Appeal.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS EACH OF THE TRIAL COURT'S FINDINGS OF FACT.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings by applying the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, the state has assigned error to the following findings of fact: 7, 10, 11, 12, 13, 14, 15, 16, 19, 20, and 21. As the following explains, substantial evidence supports each and every one of these findings.

(1) The State's Failure to Argue that Substantial Evidence Does Not Support Finding of Fact 7 Precludes Review.

In its first assignment of error, the state argues that Finding of Fact

No. 7 is not supported by substantial evidence. *See* Brief of Appellant, 1. However, the state has presented no argument in support of this claim. *See* Brief of Appellant, 9-13. An appellate court will not consider an assignment of error that is unsupported by argument or citation of authority. *See* RAP 10.3(a)(6); *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004).

However, ever were this not the case, substantial evidence does support this finding, which states as follows:

> 7. The Cowlitz County Prosecutor's Office received the report, supporting materials and probable cause statement on September 15, 2010. The prosecutor assigned to the case then contacted the Woodland Police department to request more photographs and information about the reporting parties.

CP 107.

In fact, Document No. 5 attached to the Affirmation of Counsel in this case was a Woodland Police Department Narrative Report of the investigation in this case and it bears a stamp indicating that the Cowlitz County Prosecutor's office received the report on September 15, 2010. Thus, the first half of this finding is supported by substantial evidence. The second sentence in this finding is supported by the Affidavit of Ms Skalisky in which she made this very claim. Thus, Finding of Fact No. 7 is supported by substantial evidence.

(2) Substantial Evidence Supports Finding of Fact 10.

Finding of Fact No. 10 states as follows:

> 10. Between December 10, 2011, and June 16, 2011, the prosecutor exchanged a number of e-mails with the Woodland Police department, seeking "more information, specifically in regards to restitution amounts owed to the victims." See Affirmation of Lacey Skalisky, Deputy Prosecuting Attorney. The state made these repeated requests in spite of the fact that the police reports and the probable cause statements already provided contained a detailed statement of the damages each victim has sustained.

CP 108.

In the opening brief of appellant, the state argues that substantial evidence does not support this finding because the probable cause statement only "referenced a single offense of Malicious Mischief" and it "did not list any other counts of malicious mischief in the 'Offense' section." Opening Brief of Appellant at 8. However, while the state's argument is incorrect. The statement "Offense: Malicious Mischief 2," was only given in the informational section of the document, was not given under oath, and was not part of the actual "Probable Cause Statement." CP 5. The actual probable cause begins on page 2 of the document with the header "PROBABLE CAUSE STATEMENT," and it contains the factual statements given under oath. Indeed, it is extra-ordinarily detailed for a probable cause statement as it runs for almost four pages of single spaced, typed text in which Officer Keller sets out the facts for each of the five alleged offenses, including the date, time, defendants involved, damages, victims and other supporting evidence. *See* Probable Cause Statement at CP 6-10. Thus, substantial

evidence supports this finding.

(3) Substantial Evidence Supports Finding of Fact 11.

In the opening Brief of Appellant, the state argues that substantial evidence does not support Finding of Fact 11 because "it states the defendant was charge[d] [with] five counts of malicious mischief, when he was charged with one count of malicious mischief in the second degree and five counts of malicious mischief in the third degree." This finding of fact states as follows:

> 11. On June 16, 2011, over 10 months after receiving the reports in this case, the Cowlitz County Prosecutor's Office prepared an information charging the defendant with five counts of malicious mischief. # 11-8-00242-2. There was also filed the investigating officer's probable cause statement dated August 26, 2010. Nothing had been added to the probable cause statement after the date it was originally signed.

CP 108.

The state's argument at this point makes a distinction without a difference. The information filed in adult court in this case does charge five counts of malicious mischief as the finding states. Although it is true that one count was a felony and four were misdemeanors, the point of the finding is threefold: (1) that the state charged five counts, (2) that the five counts charged were the same five counts identified in the original probable cause statement prepared in August of 2010, and (3) that the probable cause statement prepared in August of 2010 and eventually filed in juvenile court

was identical to the probable cause statement the state filed in adult court. The state did not assign error to these latter facts and they stand as verities on appeal. *State v. Hill, supra.*

(3) Substantial Evidence Supports Finding of Fact 12 Except the Scrivener's Error Substituting "21" for "18."

In this case, the state claims that substantial evidence does not support Finding of Fact No. 12 because it claims that the state served the defendant with a summons to appear in court on July 12, 2011, which was "19 days before he turned 21-years-old," whereas it was really 19 days before he turned 18-years-old. The state is entirely correct on this point. That portion of Finding of Fact No. 12 which states "21" was a scriveners error and should have read "18." However, since the state only assigns error to the number "21" in Finding of Fact 12, all of the other factual allegations are verities on appeal. *State v. Hill, supra.*

(4) Substantial Evidence Supports Findings of Fact 13 and 14.

Findings of Fact 13 and 14 state as follows:

> 13. On July 12, 2011, the defendant appeared on the summons, at which time the juvenile court appointed Tierra Busby to represent him. The court then put the matter over one week for arraignment. Although the normal procedure during the first appearance would have been for the court to extend jurisdiction for an offender such as the defendant who was close to turning eighteen years of age, the court did not do so in this case. Neither the court, the prosecutor and the probation officer in charge of the case mentioned that the defendant would be eighteen years old within a few weeks.

> 14. On July 19, 2011, the defendant appeared with his attorney and entered a plea of not guilty. The defendant's attorney did not note his birth date, although it was stated on the information. The court then set a pretrial of August 9, 2011, a readiness review of September 13, 2011, and a trial for September 15, 2011. The defendant's attorney, the probation officer in charge of the case, the prosecutor and the court all missed the fact that each of these dates was set after the defendant's eighteenth birthday. Had any party noticed this fact and mentioned it, the court could have entered an order extending jurisdiction, and that would be the usual practice.

CP 108-109.

The state argues that substantial evidence does not support that portion of these finding wherein it states "what the normal procedure of the court is," or where it states that "the defendant's age was not mentioned at the initial appearance." Brief of Appellant at 10, 12. In fact, this argument is in error for three reasons. First, Ms. Busby testified to the normal procedures concerning extending jurisdiction, contrary to the state's claim. Second, the trial court is entitled to determine facts both from the evidence and the lack of evidence in a case. In this case, Ms Skalisky presented an affidavit to her involvement in this case, including a statement about the defendant's initial appearance. She did not claim that the defendant's age was mentioned during that hearing, and the trial court was entitled to find that such information was not stated.

Third, under ER 203, a trial court is entitled to take judicial notice of its own files and procedures as well as the record in the case presently before

it or in proceedings engrafted, ancillary, or supplementary to it. *In re Adoption of B.T.,* 150 Wn.2d 409, 78 P.3d 634 (2003). Thus, in the case at bar, even had Ms Busby not testified to the Juvenile Court's standard practice in determining the age of a defendant and the standard practice in extending jurisdiction, the trial court was entitled to take judicial notice of this fact.

(5) Substantial Evidence Supports Finding of Fact 15, Except that Potion Stating "Two" Charges Instead of "All" Charges .

The state assigns error to that portion of Finding of Fact 15 in which it states that the prosecutor in the juvenile court proceeding offered a deferred disposition upon the defendant's plea to "two of the charges." Brief of Appellant at 11. This state is correct in this assignment. The finding should have read that the prosecutor in the juvenile court proceeding offered a deferred disposition upon the defendant's guilty plea to "all of the charges." However, once again, this is a distinction without a difference or legal effect. As the unchallenged portion of the finding states, "[a]fter consultation with his attorney, the defendant agreed to accept this offer and his attorney told him that he could do so at his scheduled pretrial on August 9, 2011." Whether two or five counts, the point is that the defendant wanted to accept the state's offer and thereby take advantage of both juvenile court jurisdiction and a deferred disposition.

(6) Substantial Evidence Supports Finding of Fact 16.

The state challenges that portion of Finding of Fact 16 in which it states that "[t]he defendant's attorney did not read this e-mail until after the defendant's birthday." Brief of Appellant at 11. The e-mail referred to is the one the prosecutor sent to the defense attorney once she determined that the defendant was about to turn 18-years-old. The state's argument on lack of substantial evidence is based upon that portion of Ms. Busby's testimony in which she stated that "I vaguely recall it . . . I don't know when it might have been received by me." RP 37. However, Ms. Busby's testimony taken in its entirety did allow the court to infer that she did not read the state's e-mail until after it was too late. Indeed, she stated that it was critical to retain juvenile court jurisdiction, that it would have been standard practice to do so, that the defendant wanted to accept the state's offer, that once she saw that he had turned 18 she called to see if the court had extended jurisdiction. RP 26-27. Thus, the court had evidence from which it could conclude that she had not read the e-mail until after the defendant's 18th birthday.

(6) Substantial Evidence Supports Those Facts Stated in Findings of Fact 19 and 21.

Findings of Fact No. 19 and 21 state as follows:

> 19. Juvenile court defense counsel's failure to note the defendant's age at arraignment and failure to then move to extend jurisdiction fell below the standard of a reasonably prudent attorney.
>
> . . .

> 21. Juvenile court defense counsel's failure to note the defendant's age at arraignment and failure to then move to extend jurisdiction caused prejudice to the defendant through (1) the loss of juvenile court jurisdiction, and (2) the loss of an opportunity to obtain a deferred sentence.

CP 110.

In its brief, the state concedes that substantial evidence supports the factual statements that defendant's counsel failed to note the defendant's age at arraignment and failed to move to extend jurisdiction, and that this failure resulted in the loss of juvenile court jurisdiction. Brief of Appellant at 12-13. Rather, the state argues that the remainder of the findings are really conclusions of law. The state is correct, at least as concerns Finding 19, and Respondent will address the state's legal arguments against these conclusions of law in Arguments II and III herein.

(6) Substantial Evidence Supports Finding of Fact 20.

Finding of Fact 20 states the following:

> 20. Had juvenile court defense counsel timely moved to extend jurisdiction, the court could have granted the motion without objection from the state or the probation department and the defendant could later have entered into the plea agreement with the state and obtained a deferred sentence. This is in line with standard practice.

CP 110.

The state challenges this finding as "hypothetical" and unsupported in the record. The state's argument is incorrect. Ms Busby testified in detail

about her failure to note that the defendant was turning 18-years-old and her failure to seek to extend jurisdiction, as well as her attempts to ameliorate the error once she discovered it. RP 19-22, 26-27. She also specifically testified that she would have moved to extend jurisdiction had seen noted the defendant's age properly. RP 38. In addition, as with Finding of Fact 4, the court was entitled to take judicial notice of the procedures normally followed in its court. Thus, substantial evidence does support this finding.

II. ARRAIGNMENT PRIOR TO THE DEFENDANT'S EIGHTEENTH BIRTHDAY DOES NOT PRECLUDE DISMISSAL FOR PRE-ACCUSATORIAL DELAY IF, AS IN THE CASE AT BAR, THE STATE FILED BEFORE THE CASE COULD PROPERLY BE RESOLVED IN JUVENILE COURT.

As part of the due process rights guaranteed under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, a defendant is entitled to dismissal of a criminal charge if the state's unexcused intentional or negligent preaccusatorial delay in filing that charge caused prejudice. *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995). In *State v. Lidge*, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989), the Washington Supreme, in reliance upon the decision of the United States Supreme Court in *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), set a three part test to determine whether preaccusatorial delay by the State in filing charges violates an individual's right to due process under circumstances in which juvenile court jurisdiction is lost as a

result of the delay. This test provides as follows:

> (1) that the defendant show prejudice resulting from the delay;
>
> (2) that there are reasons for the delay which the court must consider; and
>
> (3) where the State can justify the delay, that the court engage in balancing the State's interest against the prejudice to the accused.

In balancing the interest of the State against the prejudice to the accused, the standard the court set in *Lovasco* is "whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *State v. Calderon*, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984) (quoting *United States v. Lovasco*, 431 U.S. at 790). In addition, while a defendant has no constitutional right to be tried in a juvenile court, *State v. Sharon*, 33 Wn.App. 491, 655 P.2d 1193 (1982), the loss of juvenile court jurisdiction is the loss of a significant benefit to the defendant and it alone meets the first element of prejudice in a claim of preaccusatorial delay. *State v. Calderon*, *supra*.

For example, in *State v. Frazier*, 82 Wn.App. 576, 918 P.2d 964 (1996), a sheriff's deputy arrested an 18-year-old male on a charge that he and a number of other young men had committed a series of burglaries in Kitsap County. The person arrested named a number of participants in the offenses, including the defendant. The deputy later finished his investigation and wrote his report of the offenses. However, it took him eight weeks

before he forwarded that report to the prosecutor's office. Eight weeks after the prosecutor received the report, the defendant turned 18-years-old. It then took the prosecutor's office another 12 months before it filed a charge against the defendant. After charging, the defendant moved to dismiss, arguing that the state's negligent failure to file charges before the defendant turned 18-years-old denied him due process.

The court later held a hearing on the defendant's motion, during which the state did not offer any argument or reason for either the deputy's delay in sending the report to the prosecutor, or the prosecutor's delay in filing a charge. Based upon this failure, the court ruled that the state's interest in proceeding with the prosecution did not outweigh the defendant's due process rights. As a result, the court dismissed the charges. The state then appealed, arguing that while the delay was negligent, it was not intentional, and that only intentional preaccusatorial delays could for the basis for dismissal of a criminal charge. The court rejected this argument, noting that a number of prior cases had held that both intentional and negligent preaccusatorial delay can for the basis for dismissal if the defendant's due process right in the timely administration of justice outweighs the state's interest in the prosecutor at issue. Finding that the trial court did not abuse its discretion in dismissal, the court of appeal affirmed.

In the case at bar, the facts supporting the defendant's argument for

dismissal under the three factors established in *Lidge* were even more compelling than the facts in *Frazier*. In *Frazier*, the delay between the officer finishing his report and the defendant turning 18-years-old was only 16 weeks. In the case at bar, the delay between the officer finishing his report and the defendant turning 18-years-old was over eleven months. In *Frazier*, the delay between the prosecutor receiving the officer's report and the defendant turning 18-years-old was only 8 weeks. By contrast, in the case at bar, the delay between the prosecutor receiving the officer's report and the defendant turning 18-years-old was over ten months. In *Frazier*, the court's balancing test had to take into account that the state had brought three class B felony charges against the defendant. Even given this fact, the court found that the equities balanced in favor of dismissal. By contrast, in the case at bar, the balancing test only has to take into account that the state has brought a single class C felony charge and five misdemeanors against the defendant. While the state does have an interest in prosecuting this offense, the state's interest is not nearly as compelling as it was in *Frazier*.

Two other facts support the argument for dismissal in this case. The first is that the prosecutor stood by and said nothing at arraignment when the court set a pretrial and a trial date that were both past the defendant's 18th birthday. The second is that the prosecutor then sent a plea offer that stated that it was open until the August 9th pretrial, which the state knew was past

the defendant's 18th birthday. At a minimum, both of these facts support a conclusion that the state acted negligently in bringing this case before the court. These facts also support a conclusion that the state at least negligently attempted to induce the defendant to refrain from acting until after his 18th birthday and after the court lost jurisdiction. Either one of these conclusions supported the court's decision to dismiss the charges.

While there are a number of differences between the facts in the case at bar and *Frazier,* which facts make the argument for dismissal more compelling in this case than they were in *Frazier*, there is one salient fact that is the same in both cases. That is the fact that the state had no excuse for the delay in *Frazier* and the state has no excuse for the delay in the case at bar. The state appears to promote the position that its statement of the "need for further investigation" can somehow act as a magic incantation that defeats an argument of pre-accusatorial delay. This claim simply does not bear up in the light of the facts presented and found by the trial court. Indeed, in this case it is curious indeed that when the state filed against the defendant in adult court, it used the exact same probable cause statement the Woodland Police Department had provided almost a year previous and that probable cause statement being one of the most detailed that this court has reviewed.

One might also ask how the state can rely upon a claim that the case needed "further investigation" when it had previously referred the case to the

Juvenile Probation Department for diversion review, or why the state charged in juvenile court without that "further investigation" every having been done. The fact of the matter is that the investigation in this case was as nearly complete at the time the Woodland Police Department sent it to the prosecutor as a case could be. Thus, in the same manner that the trial court in *Frazier* properly dismissed the charges based upon unexcused preaccusatorial delay, so in the case at bar the trial court properly dismissed the charges against the defendant for preaccusatorial delay. The trial court was correct in its finding that pre-accusatorial delay denied the defendant his right to due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

III. DISMISSAL WITH PREJUDICE IS THE APPROPRIATE REMEDY WHEN, AS IN THE CASE AT BAR, TRIAL COUNSEL'S ERRORS DENIED THE DEFENDANT JUVENILE COURT JURISDICTION.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686,

80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the state concedes that defendant's juvenile court defense attorney "was ineffective in not making a motion to the court to extend jurisdiction." Brief of Appellant at 21. However, this was not the only way that counsel's conduct fell below the standard of a reasonably prudent attorney. Had counsel reviewed the defendant's age, she could have

noted the case for hearing prior to the defendant's birthday so the defendant could accept the state's offer, which he had wanted to do. Thus, trial counsel was ineffective in two different ways. Neither does the state argue that the defendant was not prejudiced. Rather, what the state argues is that the defendant is not entitled to a remedy.

In making an argument that the defendant is not entitled to a remedy the state relies upon *In re Dalluge*, 152 Wn.2d 772, 100 P.3d 279 (2004). In that case, the court held that the appropriate remedy for a defendant who was improperly remanded without a required declination hearing is to remand for a declination hearing, and to grant the defendant a new trial as an adult if the result of the declination hearing would have been the retention of juvenile court jurisdiction.

The problem with the state's argument is that there is a fundamental distinction between *Dalluge* and the case at bar. In *Dalluge*, the defendant did have a meaningful remedy, which was retrial. In the case at bar, the state argues that the defendant has no remedy at all, other than the right to go to trial, which he had whether or not juvenile court erred in the failure to take the steps necessary to retain juvenile court jurisdiction. As the following explains, the appropriate remedy on the court's finding of ineffective assistance of counsel is the remedy the trial court employed in this case: dismissal with prejudice. Otherwise, the defendant's right to effective

assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, would become a nullity. Since it is now impossible to remand this case back to juvenile court so the defendant can obtain the benefit of the state's original offer in juvenile court, the only remedy available is to order dismissal of the charges with prejudice.

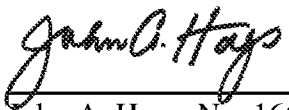
CONCLUSION

The trial court did not err in its findings of fact or conclusions of law.

As a result, this court should affirm the decision of the trial court.

DATED this 24th day of September, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Appellant, vs. CHRISTOPHER MAYNARD, Respondent.	NO. 43204-8-II AFFIRMATION OF OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On September 24th, 2012, I personally placed in the United States Mail and/or e-filed the following documents to the indicated parties:

1. BRIEF OF APPELLANT

SUE BAUR
COWLITZ CO. PROS ATTY
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KELSO, WA 98626

CHRISTOPHER MAYNARD
10904 NW 23RD #A
VANCOUVER, WA 98689

Dated this 24th day of September, 2012, at Longview, Washington.

/S/

Cathy Russell
Legal Assistant to John A. Hays
Attorney at Law

HAYS LAW OFFICE

September 24, 2012 - 3:32 PM

Transmittal Letter

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Case Name: State vs. Maynard

Court of Appeals Case Number: 43204-8

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- ○ Motion: ____
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- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
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  Hearing Date(s): _____
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- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Cathy E Russell - Email: jahayslaw@comcast.net

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