68852-9

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NO. 68852-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL W. McCONNELL,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The ten-year statute of limitations for first degree rape begins to run from the date of commission or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later. On June 24, 1998, E. was raped; the crime was reported to law enforcement on that same day. On November 23, 1998, a DNA profile of the suspect was identified from a sample recovered from E.'s underwear. No match was found in the databank. On January 7, 2011, a second DNA profile of the suspect was obtained from the sample recovered from E.'s underwear. The DNA profile was entered into the databank and a match to defendant was found. On March 25, 2011, the State charged defendant with first degree rape. Was defendant charged within the statute of limitation?

2. Pre-accusatorial delay can result in a due process violation even where the statute of limitations has not expired. Defendant has not shown actual prejudice from the pre-accusatorial delay. The reason for the delay was that the suspect's identity was unknown. Once the suspect's identity was known charges were timely filed. Did allowing the prosecution of defendant violate fundamental conceptions of justice?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On June 24, 1998, E. was working to prepare for the upcoming session of summer-school at an elementary school. After lunch she returned to her classroom, locked the door and remained inside. While sitting at the desk she was surprised by a voice saying, "Okay, here we go. Get down on the floor." E. faced the person who spoke and observed that he was dressed in all black, including black boots, black gloves, a black stocking hat, and some black material covering the lower portion of his face, leaving only his eyes and nose visible. The suspect was pointing a handgun at her. E. complied by lying face down on the floor. The suspect demanded money and E. told him where to find her purse. He took cash from her purse and asked about the jewelry on her hand. He allowed her to keep her wedding rings. The suspect told E. not to move, scream, or look at him or he would "blow your fucking head off." CP 353-354.

The suspect knelt beside E., put his hand between her legs and rubbed her genital area. The suspect then told E. to remove her pants and underwear. The suspect held the gun to E.'s head while he digitally penetrated her vagina. When the suspect anally

penetrated her with his penis E. screamed. The suspect placed the gun to E.'s head and cocked it, reminding her of the consequences. After anally raping E. the suspect ordered her to roll onto her back and vaginally raped her. The suspect dressed, tore the phone from the wall, and told E. that he would shoot her if he saw her outside before he was gone. The suspect then left the classroom. E. reported the crime to law enforcement that same day. Deputy Sheriffs responded to the location, contacted E. and collected several items of evidence including E.'s underwear. A K-9 track was attempted from the portable classroom, but grew stale in an area where bicycle tracks were found. After a thorough investigation the perpetrator was not located or identified. CP 270-271, 354.

B. DNA TESTING.

On November 23, 1998, using restriction fragment length polymorphism (RFLP) DNA testing, a DNA profile of the suspect was identified from a sample recovered from E.'s underwear. No match was found in the Washington State Patrol (WSP) convicted felon databank. CP 285-287, 341, 353-355.

On August 11, 2003, Deputy Wilkins submitted an Authorization for Release of Property based on his belief that the

statute of limitations had run. Because of Deputy Wilkins mistaken belief that it was no longer of evidentiary value and to free up space in the property room the evidence was destroyed.[1] CP 270-272, 341.

In 2010, Detective Scharf was investigating a 1995 cold homicide case that occurred in the same area where crime in the present case occurred in 1998. A suspect in the cold homicide case, Danny Giles, was known to ride a bicycle. Detective Scharf asked if the WSP Crime Lab could compare Giles DNA to the sample from the alleged rape of E. Detective Scharf learned that the DNA from 1998 was tested using RFLP, that DNA was now tested using short tandem repeat (STR) analysis, and that the 1998 DNA sample would need to be retested using STR analysis to run a comparison. Detective Scharf made a request and the sample was retested. CP 273-274; 282-284, 342.

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[1] Defendant wrongly claims that the State acknowledge that all the evidence except for "a single sperm cell" was destroyed. Appellant's Brief 4. First, significantly more than one sperm cell was extracted for DNA testing. RP (11/28/11) 34-36, 48-55. Second, there was a sufficient amount of extracted DNA for testing by the defense in 2011. CP 325; RP (11/28/11) 29. Third, defendant supports the claim by citing to the prosecutor's argument at sentencing. Counsel's remarks, statements and arguments are not evidence, and any remark, statement or argument which is not supported by the evidence or the law should be disregard. State v. Lougin, 50 Wn. App. 376, 383, 749 P.2d 173, 177 (1988); State v. Papadopoulos, 34 Wn. App. 397, 401, 662 P.2d 59 (1983). Further, counsel is permitted reasonable latitude in arguing inferences from the evidence. Id.

When the WSP Crime Lab started using STR DNA analysis in 2000, there were 957 unknown profiles in the RFLP DNA databank. Transition from RFLP to STR analysis required the training of WSP Crime Lab forensic scientists in the new procedure while still maintaining biological evidence screening and DNA casework services. Training is a consistent theme for new advances. Dealing with current cases and working on backlogged cases is also a consistent theme at the WSP Crime Lab. There has been a consistent trend of incoming case requests outpacing completed case requests for DNA service resulting in a backlog of about 1000 requests. Cases required for court dates and imminent public safety threats are given higher priority. Cases with the older RFLP DNA profiles are classified as closed and processed for STR DNA analysis when such a requests is received from another agency. Due to resource limitations no systematic process for evaluating old RFLP cases for suitability for performing STR analysis has been employed. CP 268-269.

On January 7, 2011, using DNA STR analysis, a DNA profile was obtained from the sample recovered from E.'s underwear. The DNA profile was entered into the Combined DNA Index System

(CODIS) databank and a match was found with defendant.[2] The State charged defendant with first degree rape on March 25, 2011. CP 282-284, 342, 356-357.

On March 31, 2011, DNA was extracted from a reference sample collected from defendant. The DNA profile from defendant's reference sample matched the suspect DNA profile obtained from E.'s underwear, conclusively identifying defendant as the suspect in this case. "The estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is 1 in 19 quadrillion." CP 279-281.

C. PROCEDURAL HISTORY.

On November 28, 2011, the trial court heard defendant's motion to dismiss. The parties agreed to present most of the evidence through affidavits and declarations. The only witness was Donald Riley, Ph.D. RP (11/28/11) 2-6, 27-57.

On December 20, 2011, the trial court gave its oral ruling denying defendant motion to dismiss. The trial court entered written Findings and Conclusions on January 8, 2013. CP 265; State's Designation CP ___ (sub# 77, Findings and Conclusions

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[2] Defendant's DNA profile was entered into the CODIS database in 2001, following his convictions on unrelated crimes in October and December 2000. CP 341.

Supporting Order Denying Defendant's Motion to Dismiss); RP (12/20/11) 1-4.

On February 10, 2012, the case proceeded to bench trial on stipulated evidence. CP 39-200, 201-245, 246-264; RP (2/10/12) 1-11.

On May 21, 2012, defendant was found guilty of First Degree Rape and sentenced to 161 months. CP 19-34, 38; RP (5/21/12) 1-32.

Defendant was unknown to his victim. At sentencing E. stated, "To this day, I have no idea who he is, how he found me, or why he did this to me. He is a complete stranger to me." RP (5/21/12) 13-14.

Defendant timely appealed. CP 2-18.

III. ARGUMENT

A. STATUTE OF LIMITATIONS.

The State may not prosecute a crime after the applicable period of limitations has passed. State v. Contreras, 162 Wn. App. 540, 544, 254 P.3d 214, review denied, 172 Wn.2d 1026, 268 P.3d 225 (2011); State v. Glover, 25 Wn. App. 58, 61, 604 P.2d 1015 (1979). Statute of limitations rulings are reviewed de novo.

Contreras, 162 Wn. App. at 544, citing State v. Flores, 164 Wn.2d 1, 10, 186 P.3d 1038 (2008).

The crime in the present case was committed on June 24, 1998, and reported to law enforcement the same day. At that time, the statute of limitations for violations of RCW 9A.44.040 was ten-years, if the offense was reported within one year of commission. Former RCW 9A.04.080(1)(b)(iii) (effective June 11, 1998). Absent a change in the law, the statute of limitations in the present case would have run on June 24, 2008. However, prior to the expiration of the period of limitation, the applicable statute of limitations was changed. "When the Legislature extends a criminal statute of limitation, the new period of limitation applies to offenses not already time barred when the new enactment was adopted and became effective." State v. Hodgson, 108 Wn.2d 662, 666-667, 740 P.2d 848 (1987). The statute of limitations for first degree rape now runs "from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing, whichever is later." RCW 9A.04.080(3) (effective June 7, 2006).

Interpretation of a statute is a question of law reviewed de novo. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009);

State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). "The purpose of statutory construction is to give content and force to the language used by the Legislature. When interpreting a criminal statute, a literal and strict interpretation must be given. Plain language does not require construction." State v. Wilson, 125 Wn.2d 212, 216-217, 883 P.2d 320 (1994) (citations omitted). Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. State v. Moeurn, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010); Engel, 166 Wn.2d at 578; Wentz, 149 Wn.2d at 346. "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Engel, 166 Wn.2d at 578, citing State v. Jacobs, 154 Wn.2d 596, 600–601, 115 P.3d 281 (2005). Since a legislative body is presumed not to use nonessential words, a reviewing court gives meaning to every word contained in the statute in ascertaining legislative intent. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002); State v. Cook, 125 Wn. App. 709, 723, 106 P.3d 251 (2005).

The statutory phrase at issue here is "date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing." RCW 9A.04.080(3). The imperative word is "conclusively." Conclusive means "putting an end to debate or question especially by reason of irrefutability." http://www.merriam-webster.com/dictionary/conclusive. The word "conclusively" would be unnecessary if the suspect's identity was established when DNA was extracted and a unique profile was identified. The legislature's intent by including the word "conclusively" means more than obtaining a unique DNA profile.

Defendant was conclusively identified as the suspect in this case when his DNA was matched to the DNA recovered from the victim's underwear. The trial court correctly concluded that the ten-year period of the statute of limitations did not begin until the suspect's identity was "conclusively established" when defendant's DNA profile was matched to the suspect's DNA profile.[3] CP ___ (sub# 77, Findings and Conclusions Supporting Order Denying Defendant's Motion to Dismiss); RP (12/20/11) 3.

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[3] There were two DNA tests matching the suspect's DNA to defendant's DNA: 1/7/11 and 3/31/11. The trial court declined to decide which date the suspect's identity was conclusively established since under both dates the case was timely filed. CP ___ (sub# 77, Findings and Conclusions Supporting Order Denying Defendant's Motion to Dismiss); RP (12/20/11) 4.

B. PRE-ACCUSATORIAL DELAY.

Pre-accusatorial delay is analyzed under the Fifth Amendment's guarantee of due process. United States v. Lovasco, 431 U.S. 783, 788–790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); State v. Oppelt, 172 Wn.2d 285, 289, 257 P.3d 653 (2011). Pre-accusatorial delay can result in a due process violation even where the statute of limitations has not expired. Lovasco, 431 U.S. at 789; Oppelt, 172 Wn.2d 288-289. In a case involving pre-accusatorial delay, a court's due process inquiry evaluates "the reasons for the delay as well as the prejudice to the accused." Lovasco, 431 U.S. at 790. Washington courts apply a three-prong test:

> (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.

Oppelt, 172 Wn.2d at 295. The underlying question in deciding whether a pre-accusatorial delay violates a defendant's due process rights is whether the delay violated the fundamental conceptions of justice. Oppelt, 172 Wn.2d at 295.

1. Actual Prejudice.

"Prejudice ... must be specially demonstrated and cannot be based upon speculation." State v. Platz, 33 Wn. App. 345, 348, 655 P.2d 710 (1982), quoting State v. Haga, 8 Wn. App. 481, 489, 507 P.2d 159 (1973) (Haga I). Defendant argues that the destruction of evidence prejudiced him by preventing further examination, analyzes, and investigation. Appellant's Brief 12-14. Many of the items collected as evidence were likely neutral in value. It is possible that the destruction of evidence in the present case actually benefited defendant. The opportunity to investigate other *possibilities* does not equate with being deprived of *actualities*.

Whether destruction of evidence constitutes a due process violation depends on the nature of the evidence and the motivation of law enforcement. State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011) review denied, 173 Wn.2d 1026, 272 P.3d 852 (2012). The State's failure to preserve "material exculpatory evidence," requires the dismissal of criminal charges. Groth, 163 Wn. App. at 557. However, "material exculpatory evidence" is a very narrow category:

> In order to be considered "material exculpatory evidence", the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). None of the destroyed evidence had apparent exculpatory value without testing or analysis.

On the other hand, "Potentially useful" evidence is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Groth, 163 Wn. App. at 557, citing Arizona v. Youngblood, 488 U.S. 51, 57, 109 S.Ct. 333, 102 L.ED.2d 281 (1988). Since none of the destroyed evidence had apparent exculpatory value without testing or analysis, it was only "potentially material." The State's failure to preserve evidence that is merely "potentially useful" does not violate due process unless the defendant can show bad faith on the part of police. Youngblood, 488 U.S. at 58; Wittenbarger, 124 Wn.2d at 477; Groth, 163 Wn. App. at 557.

"The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the

police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Groth, 163 Wn. App. at 558; Youngblood, 488 U.S. at 58. Thus, a defendant must show the destruction "was improperly motivated." Groth, 163 Wn. App. at 559; Wittenbarger, 124 Wn.2d at 479. Defendant has not made such a showing. There is no indication that the sheriff's office knew of any exculpatory aspect of the evidence or that its destruction in 2003 was improperly motivated.

The evidence in the present case was destroyed because a detective erroneously thought it was no longer of evidentiary value and wanted to free up space in the property room. CP 270-272. To the extent any conclusions can be drawn from the record, it appears the sheriffs' office negligently destroyed evidence of which any exculpatory value was not apparent. This does not meet the standard of bad faith required under Youngblood and Wittenbarger. Groth, 163 Wn. App. at 559. Since defendant has not shown the evidence was destroyed in bad faith, there was no due process violation. Groth, 163 Wn. App. at 558. The trial court correctly found that the delay in the present case was not caused by governmental mismanagement or negligence. CP ___ (sub# 77,

Findings and Conclusions Supporting Order Denying Defendant's Motion to Dismiss).

2. Reason For Delay.

The reason charges were not filed prior to 2011 was that the suspect's identity was unknown. Once the suspect's identity was known charges were timely filed.

The victim reported the crime to law enforcement on the same day she was raped, June 24, 1998. Using RFLP DNA testing, a DNA profile of the suspect was identified from a sample recovered from E.'s underwear on November 23, 1998. No match was found when the suspect DNA profile was compared with the WSP convicted felon databank. CP 285-287; 353-355.

On January 7, 2011, using DNA STR typing analysis, a DNA profile for the suspect was obtained from the sample recovered from E.'s underwear. The STR DNA suspect profile was entered into the CODIS databank and a match was found identifying defendant as the suspect. On March 25, 2011, the State charged defendant with first degree rape. CP 282-284, 356-357.

Defendant argues that the "reason for the delay was the State's multiple instances of negligence." Appellant's Brief 14-15. Defendant first claims that the State was negligent by not filing

charges in 1998 based on a DNA profile with no identified suspect. Defendant cites no authority for this proposition. Where no authority is cited in support of a proposition, the court may assume that none exists. City of Seattle v. Muldrew, 69 Wn.2d 877, 420 P.2d 702 (1966). It was not negligence for the State to defer charging a crime before the suspect's identity was known.

Defendant next argues that the State was negligent by not occasionally comparing the 1998 suspect DNA profile to check for matches with new entries to the databank. Again, defendant cites no authority for this contention. Muldrew, 69 Wn.2d at 877. However, there was no evidence that the 1998 suspect DNA profile was not occasionally compared to the databank. Rather, the evidence was that the 1998 suspect DNA profile was extracted by RFLP DNA testing, the method of testing used by the WSP Crime Lab in 1990's. In 2000 the WSP Crime Lab began using STR DNA analysis and the CODIS database. Defendant was convicted on unrelated charges in October and December 2000, and STR DNA analysis was used to identify defendant's DNA profile. That profile was entered into CODIS in 2001. CP 267-269; 341. Comparisons of the 1998 suspect RFLP DNA profile to the WSP convicted felon databank would not have found a match to defendant's STR DNA

profile entered into CODIS in 2001. Therefore, the fact that no match was found does not support defendant's claim that the 1998 suspect DNA profile was not occasionally compared to the databank to check for matches with new entries.

Defendant additionally argues that the State was negligent by not retesting the sample recovered from E.'s underwear using STR DNA analysis until 2010. Consistent themes at the WSP Crime Lab are training procedure for new advances while dealing with current cases and working on backlogged cases. Incoming DNA case requests outpace completed case request for service resulting in a backlog of about 1000 request. Higher priority is given cases required for court dates and with imminent public safety threats. Cases with the older RFLP DNA profiles are classified as closed and processed for STR DNA analysis when a request for such is received from another agency. There are over 900 unknown profiles in the RFLP DNA databank. Due to resource limitations no systematic process for evaluating old RFLP cases for suitability for performing STR analysis has been employed. CP 268-269. Defendant fails to show how using the WSP Crime Lab system for processing DNA testing requests was negligence or that

using a different system would have identified defendant as the suspect in the present case sooner.

It is undisputed that the WSP Crime Lab processed defendant's DNA like all other DNA requests. The Court is "reluctant to interfere with standard investigatory procedures by requiring special treatment for [a class of] suspects." State v. Calderon, 102 Wn.2d 348, 354, 684 P.2d 1293 (1984). The State was not negligent in failing to adopt special procedures for processing defendant's DNA. State v. Alvin, 109 Wn.2d 602, 605, 746 P.2d 807 (1987); State v. Anderson, 46 Wn. App. 565, 570, 731 P.2d 519 (1986).

In 2010, while investigating an unrelated 1995 cold homicide case, Detective Scharf learned that in 1998 RFLP was used to test DNA and that DNA was now tested using STR. In order to run a comparison with the DNA of a suspect in the cold homicide case, the 1998 DNA sample from the alleged rape of E. had to be retested using STR. A request was made and the sample was retested on January 7, 2011. The comparison matched defendant. CP 273-274; 282-284. Clearly, the happenstance of Detective Scharf's investigation of an unrelated case resulting in the

identification of defendant as the suspect in the present case was neither negligent nor was it the reason for any delay.

Finally, defendant argues that a reason for the delay was the State negligently destroying evidence in 2003.[4] Appellant's Brief 14. Defendant does not explain how the destruction of evidence caused the delay. It is failed logic to conclude that because evidence was destroyed during the period of delay, therefore, the destruction of evidence was the reason for the delay.

3. Weighing The Reason And Prejudice.

Defendant has only shown potential prejudice; he has not shown actual prejudice resulting from the delay in identifying and prosecuting him for the crime he committed on June 24, 1998. Washington Courts have found that much greater losses of evidence than in the present case did not establish prejudice or that the government's interest in prosecution outweighed any prejudice. See State v. Gee, 52 Wn. App. 357, 367-368, 760 P.2d 361 (1988) (absence of witness outweighed by state's interest in delaying charge to preserve identity of an informant); State v. Howard, 52 Wn. App. 12, 17-19, 756 P.2d 1324 (1988) (no prejudice from 118 month delay in filing or failing to preserve evidence); State v.

[4] The significance of the State's destruction of evidence is addressed above. See III.B.1.

Bernson, 40 Wn. App. 729, 735, 700 P.2d 758 (1985) (loss of business records and dimming of memories); State v. Ansell, 36 Wn. App. 492, 675 P.2d 614 (1984) (loss of work records, loss of crime scene—mobile home had moved, absence of witnesses and memory loss by others, ability to challenge child's competence years after incident); Platz, 33 Wn. App. at 348 (loss of one witness and loss of memory by another to speculative to demonstrate prejudice); Haga, 8 Wn. App. at 488-489 (Haga I) (loss of potential defense of diminished capacity, death of one witness, unavailability of a second witness, loss of several evidentiary items, and memory losses suffered by at least six witnesses); State v. Haga, 13 Wn. App. 630, 633, 536 P.2d 648 (1975) (Haga II) (same, plus three additional claims of lost evidence or memories). In all of the above cited cases, the potential prejudice to the defendant was much greater than the speculative prejudice to the defendant in the present case.

Additionally, the burden of requiring an expedited system outweighs any resulting prejudice to the defendant. Anderson, 46 Wn. App. at 570, (the resulting prejudice to the defendant is not as burdensome as a requirement of the prosecutor to conduct a special screening of all cases). "No suspect has a constitutional

right to expect the judicial process to anticipate routine delays, common in the administrative and investigatory process, which may uniquely affect that individual's case." Alvin, 109 Wn.2d at 606. The State's interest in maintaining an orderly administration of judicial process and not disrupting that process to give special advantage in the system to any particular suspect outweighs any prejudice to defendant. Alvin, 109 Wn.2d at 606. The purported prejudice to defendant is insufficient to outweigh the governmental interest in trying the case. The delay in the present case did not violate fundamental conceptions of justice.

IV. CONCLUSION

For the reasons stated above, the trail court should be affirmed and the appeal denied.

Respectfully submitted on February 28, 2013.

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