NO. 71094-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN STOLTMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED

1. Miranda warnings are required only when a suspect is interrogated while restrained to a degree associated with formal arrest. Here, the defendant made statements during a brief Terry stop, after which he was released. Did the trial court properly conclude that Miranda warnings were not required and the statements were admissible?

2. Under the "plain view" exception to the warrant requirement, an officer may seize items that are immediately recognizable as contraband or other evidence of a crime. Here, Officer Olson initiated a valid Terry stop based on reliable information that the defendant was stealing material to sell as scrap metal and immediately saw, in plain view, a large brass pipe valve that obviously belonged on a large ship and two bags of other metal scrap. The defendant and his accomplice then gave contradictory explanations of its origin. Did the trial court properly conclude that the evidence was properly seized and admissible?

3. A precharging delay violates due process only if allowing prosecution violates fundamental conceptions of justice in

light of the reasons for the delay and the resulting prejudice. Here, a 31-month delay in charging was attributable to the investigating officer's leave to care for a dying parent, and the prejudice to the defendant was not severe. Did the trial court properly deny the motion to dismiss?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged Justin Stoltman with second-degree burglary, second-degree theft, second-degree malicious mischief, and violation of the Uniform Controlled Substances Act (possession of heroin). CP 52-53. The trial court denied Stoltman's motions to dismiss and to suppress statements and evidence. CP 31-37, 38-51, 107-21. A jury convicted Stoltman of all charges except malicious mischief. CP 89, 92, 94-96. The trial court imposed a sentence of six months in work release. CP 100-06.

2. SUBSTANTIVE FACTS[1]

Erik Olson is a law enforcement officer with the Washington State Department of Fish and Wildlife (DFW). RP 10.[2] For several years, Olson frequently obtained accurate tips about fish and wildlife violations from a confidential informant, Malcom Vick. RP 12-14.

Vick called Officer Olson at 9:00 p.m. on July 25, 2010 to report that two men had launched a vessel under the West Seattle Bridge with the stated intention of harvesting crab. RP 14. Since it is unlawful to harvest crab from a vessel at night, Olson came out to investigate. RP 14-15, 66.

At 2:30 a.m., Officer Olson saw a motorized vessel lacking the lights and registration required by law. RP 15, 67. Olson made contact with the two vessel occupants, Justin Stoltman and Tamas Hibszki, and identified himself as a DFW officer. RP 16-17. The men denied that they had been crabbing. RP 18.

Olson noticed a spool of cable about three feet across and two bags in the boat. RP 18, 20. The men claimed that "they were

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[1] As the issues in this appeal all pertain to pretrial orders, the facts recited here are taken mainly from the combined CrR 3.5/3.6 hearing.

[2] The verbatim report of proceedings consists of five volumes, consecutively paginated. This brief refers to the record by page number only.

recycling cabling from abandoned pilings ... over at Jack Block park." RP 18. They said that they intended to sell the cable to a scrap yard. RP 20. Olson asked if he could look in the bags, and the men readily agreed. RP 21. The bags were full of tools, including wire- and bolt-cutters. RP 22, 70. Olson told the men that they were not allowed to harvest or recycle cable from pilings because it could cause the pilings to come apart and pose a serious navigational hazard. RP 20.

Since they had admitted that they stole the cable, Olson told the men that they were not free to leave. RP 21. Olson called the Port of Seattle, and a Port officer arrived about 15 minutes later. RP 22. The officer seized the cable. RP 22. Olson warned Stoltman and Hibszki about the boating infractions and released them. RP 22.

Vick called Officer Olson with another tip the following evening. RP 23. Vick stated that the same men had launched their boat again and had told Vick about their contact with Olson. RP 23. Vick said that Hibszki told him that "the officer ... got lucky and got us, took our cabling, so we've got to go out and get more." RP 23. Vick also stated that one of the men had offered him methamphetamine. RP 35.

Officer Olson expected to find the men near Jack Block Park, where they had claimed to have obtained the cable the night before. RP 24. Olson enlisted the help of Officer Moszeter, obtained a patrol boat, and went out to patrol near the park. RP 24. While he was in the area, Olson examined some pilings and discovered that the cabling was quite different than the material that Stoltman and Hibszki had had the night before. RP 24-25. When the men did not show up at the park, the officers returned to the area where Olson had contacted Stoltman and Hibszki the night before. RP 25-26.

At about 2:30 a.m., Olson saw a vessel without proper lights at the south end of Harbor Island, and approached. RP 25-26, 28. Olson realized that it was the same boat he had seen the night before, and that it still lacked a registration and proper lighting. RP 26. Olson recognized Stoltman and Hibszki, and pulled alongside their vessel. RP 27-28.

Officer Moszeter asked Stoltman and Hibszki where they were headed. RP 28. They claimed that they were just "out for a pleasure cruise." RP 28. The officers immediately noticed a giant brass pipe valve sitting in the middle of the seven-foot boat. RP 29. The pipe valve had obviously come from a larger ship. RP 94.

Moszeter asked if he could look in the men's bags, and they again readily agreed. RP 30. The bag that Stoltman said was his contained seven red metal valve handles. RP 31. Hibszki's bag had various brass and copper fittings that looked like they had been cut from another object. RP 31. Officer Olson believed the items were stolen. RP 95.

Officer Olson asked Stoltman to step onto the patrol boat so that he could speak to him privately about the out-of-place pipe valve. RP 33. Stoltman claimed that the pipe valve was already on the boat when they launched, and he did not know where it came from. RP 33. Stoltman also claimed that he had the red valve handles to give to a friend who collects them, but could not say where he had obtained them. RP 34-35. Stoltman returned to his boat, and Olson asked Hibszki to board the patrol boat. RP 33-34. Hibszki gave a contradictory explanation for the pipe valve, stating that "he and Mr. Stoltman had gone up the Duwamish River and picked it up from a friend of his, who gave it to him at the First Avenue Bridge." RP 34. Hibszki then returned to his boat, and Stoltman came back to the patrol boat. RP 34. Olson informed Stoltman that his story did not match Hibszki's story. RP 34. Stoltman then "basically told me he didn't want to talk to me

anymore, and that was it." RP 34. Stoltman returned to his boat. RP 36.

The officers did not arrest Stoltman and Hibszki, but seized the large pipe valve, the pipe valve handles, and the cut copper and brass fittings as evidence of theft. RP 36. Olson wrote them infractions for the boating safety violations he had warned them about the day before. RP 36. Both men were released after a total detention of about 25 minutes. RP 36-37.

Once the men went on their way, the officers started looking for a vessel painted the same color as the pipe valve. RP 37. Not more than 100 yards away, the officers saw a large freighter that was permanently affixed to the pilings and serves as moorage for other vessels. RP 38-39. The freighter's color matched the large pipe valve. RP 41. The officers boarded the vessel and eventually concluded that the items seized from Stoltman and Hibszki, including the cable, had been taken from the freighter. RP 41-43.

The officers were able to find one palm print inside the freighter, which they took to the lab for analysis. RP 44. At that time, it was impossible to conduct an automated search for palm prints. RP 444. In 2011, technology upgrades allowed the lab to

do so. RP 444. Shortly before trial, the fingerprint lab performed such a search and matched the print to Dave Roberts. RP 45, 444.

Officer Olson located Roberts and offered him immunity from prosecution in exchange for information about the thefts from the freighter. RP 45. Roberts disclosed that he had been "scrapping" on the vessel with both Stoltman and Hibszki, that he had helped remove the large pipe valve, and that he had been scrapping on the vessel two or three times with Hibszki. RP 46-47.

Olson identified the company that owns the freighter and toured the vessel with its representative, Jonathan Anderson. RP 47-48. Anderson pointed out where the stolen items had come from and explained that by removing the valves, the men had released all of the oil from the engine into the bilge, requiring a costly cleanup. RP 48. He had not given Stoltman and Hibszki permission to board or take things from the vessel. RP 49. The damage they caused would cost several thousand dollars to repair, and a replacement for the large pipe valve would cost more than $2,000 alone. RP 49.

Officer Olson arrested Stoltman for theft on November 23, 2010. RP 50. During a search incident to arrest, officers found a

small plastic bag and several needles on Stoltman's person. RP 50. Stoltman admitted that the substance was heroin. RP 51.

Officer Olson did not refer the case to prosecutors for filing charges right away. RP 52. His father was terminally ill, and Olson took time off from work to help care for him. RP 52-53. Olson put his cases on the "back burner" while his father was sick. RP 55. His father died in September of 2012. RP 54. Olson was unable to transfer the case to another DFW officer because there are only 12 such officers in King County and they were all too busy. RP 55. He did not hand the case off to the Seattle Police Department because of a prior bad experience with that department. RP 56. No charges were filed in this case until February 19, 2013. CP 1.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED STOLTMAN'S STATEMENTS TO OFFICER OLSON BECAUSE HE WAS NOT IN CUSTODY FOR MIRANDA PURPOSES.

Stoltman contends that two of his statements to Officer Olson should have been suppressed because he was subjected to custodial interrogation during the July 27 stop without the benefit of

Miranda[3] warnings.[4] This argument fails because Stoltman was not restrained to a degree associated with formal arrest, and was therefore not entitled to Miranda warnings during his brief detention.

In reviewing the trial court's decision after a CrR 3.5 hearing, appellate courts determine whether substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Substantial evidence is that which is sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Miranda warnings must be given when a suspect is subject to custodial interrogation by an agent of the State. State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). When Miranda warnings are not provided in such circumstances, a suspect's statements are presumed involuntary. Id. at 647-48.

"'Custody' for the purposes of Miranda is narrowly circumscribed and requires formal arrest or restraint on freedom of

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[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] Olson challenges admission of his statement that he did not know how the pipe valve came to be in Hibszki's boat and that he had the red valve handles to give to a friend but couldn't say where he got them. Brief of Appellant at 17 n.5.

movement to a degree associated with formal arrest." State v. Ferguson, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995). The inquiry is objective, and asks "not whether a reasonable person would believe he or she was not free to leave, but rather '[w]hether such a person would believe he was in police custody of the degree associated with formal arrest.'" Id. (citing 1 W. LaFave & J. Israel, Criminal Procedure § 6.6, at 105 (Supp. 1991)).

In Berkemer v. McCarty, 468 U.S. 420, 439-40, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), the United States Supreme Court held that a brief seizure of a suspect pursuant to a traffic or Terry[5] stop does not rise to the level of "custody" for the purposes of Miranda. Even though a traffic stop significantly curtails the freedom of action of the driver and passengers, and even though most motorists would not feel free to leave the scene of a traffic stop without being told they might do so, Miranda protections are not required because traffic stops are presumptively temporary and brief, exposed to public view, and "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in Miranda" and its progeny. Berkemer, 468 U.S. at 436-39. Rather, in traffic and Terry stops, officers are permitted to ask the

[5] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

detainee "a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions" without rendering the suspect "in custody" for the purposes of Miranda. Berkemer, 468 U.S. at 439; State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

In Berkemer, an officer observed a motorist weaving and initiated a traffic stop to investigate drunk driving. 468 U.S. at 423. When the motorist exited the car and had difficulty standing, the officer concluded that he would be charged with a traffic offense and was not free to leave. Id. The motorist had slurred speech, failed a field sobriety test, and admitted, in response to questions, that he had consumed drugs and alcohol shortly before driving. Id. The officer placed him under arrest and took him to jail, where he was given an intoxilyzer test and subjected to further questioning, which elicited additional incriminating statements. Id. at 424.

The Supreme Court rejected the argument that the motorist's pre-arrest statements should have been excluded because he "has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest." Berkemer, 468 U.S. at 441. The interval between the stop and arrest was short, and the officer did

not communicate that the stop would be anything but temporary. Id. at 441-42. "[A] single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest." Id. at 442.

The situation in this case is similar. Officers Olson and Moszeter stopped Stoltman and Hibszki's boat to investigate the informant's report that they were stealing cable and that they had offered him drugs. Immediately upon stopping the boat, the officers noticed a large pipe valve that clearly had come from a large ship and was out of place in Hibszki's small boat. The officers asked both men a modest number of questions at a location visible to anyone passing by in order to confirm or dispel their suspicion that the two were involved in theft again. The officers did not indicate that the stop would not be temporary, and indeed, the stop lasted only 25 minutes before both men were allowed to leave. This brief investigatory detention did not curtail Stoltman's freedom to the degree associated with formal arrest.

Stoltman agrees that Officer Olson was permitted to stop the boat, to inquire about what the men were doing, why they had not

remedied boating violations they had been warned about, whether they had stolen more cable, and whether the men had controlled substances. Brief of Appellant at 20-21. Stoltman also agrees that the officers properly extended the duration and scope of the stop when they saw the large pipe valve that further aroused their suspicion. Brief of Appellant at 21. Stoltman contends, however, that Officer Olson exceeded the permissible scope of the investigatory stop when he moved Stoltman to the patrol boat for questioning. He argues that a reasonable person subject to this conduct would not feel free to terminate questioning and leave the scene, and Miranda warnings were therefore required.

But an investigatory detention does not become a custodial arrest for Fifth Amendment purposes simply because a suspect does not feel free to leave. State v. Marcum, 149 Wn. App. 894, 910, 205 P.3d 969 (2009). "Rather, a 'detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of Miranda.'" Id. (citing Heritage, 152 Wn.2d at 218). That is exactly what happened here.

In order to ask the questions necessary to confirm or dispel his suspicions, Officer Olson had each suspect step onto the patrol boat. Stoltman argues that this action converted the Terry stop into an unlawful arrest. But he also acknowledges that transporting a suspect during an investigatory stop is permissible so long as the police are aware of a reported crime and the detention is brief. State v. Moore, 129 Wn. App. 870, 889, 120 P.3d 635 (2005) (citing State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987)). In Wheeler, a burglary suspect was frisked, handcuffed and transported two blocks away in the back of a patrol car for a "show-up" identification. 108 Wn.2d at 235. The Wheeler court found that the detention was a significant physical intrusion, but was justified because "a crime had been reported; a suspect had been stopped; the transportation was for a short distance; [and] the total detention was for but a brief time—no more than 5 to 10 minutes." Id. at 237.

The detention in this case satisfies the Wheeler criteria. Officer Olson knew that Stoltman and Hibszki had committed a theft the day before, and Olson's reliable informant reported that the same men had returned to steal again and had also offered him illegal drugs. Thus, "a crime had been reported." Id. at 237. The

"suspect[s] had been stopped" when Olson recognized them from the previous night. Id. To the extent that Stoltman was "transported" at all, it was an extremely short distance, much more like walking a driver a few steps away from the car than driving a suspect blocks away to be identified by a victim. Further, unlike the suspect in Wheeler, Stoltman was not frisked or handcuffed before he was moved. And the total detention of 25 minutes, while longer than the detention in Wheeler, was a reasonable length of time to investigate, after which Stoltman and Hibszki were both released. The intrusion here was markedly less intrusive than that which was upheld in Wheeler and did not convert the Terry stop into an unlawful arrest.

Further, although Stoltman repeatedly asserts that a reasonable person would not have felt free to terminate questioning and leave under these circumstances, he did exactly that. When confronted with the information that Hibszki's explanation about the large pipe valve contradicted his own, Stoltman told Olson that he did not want to talk anymore and the questioning stopped. RP 34. Stoltman was returned to his boat and he and Hibszki were released. RP 36-37. Stoltman's actual conduct in terminating the

questioning belies his claim that a reasonable person would not have felt free to do so.

Stoltman was not subject to custodial interrogation. Officer Olson did not exceed the permissible scope of a Terry stop. Miranda warnings were not required. The trial court properly admitted Stoltman's statements.

2. THE TRIAL COURT DID NOT ERR IN ADMITTING PHYSICAL EVIDENCE DISCOVERED IN PLAIN VIEW.

Stoltman next contends that Officer Olson improperly seized the stolen property discovered in Hibszki's boat because the items were not immediately apparent as contraband, and therefore the "plain view" doctrine does not excuse the failure to obtain a warrant. But under the circumstances, Officer Olson could reasonably conclude that these items were incriminating evidence of theft. The "plain view" exception therefore applies, and Stoltman's argument fails.

The "plain view" doctrine is an exception to the warrant requirement that allows an officer to seize evidence when the officer has a prior justification for the intrusion and the item seized is immediately recognizable as contraband, stolen property, or

other item useful as evidence of a crime. State v. O'Neill, 148 Wn.2d 564, 583, 62 P.3d 489 (2003); State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 160 (1994); Coolidge v. New Hampshire, 403 U.S. 443, 463-72, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

Stoltman contends that Officer Olson's testimony that he "wanted to determine whether or not" the items were stolen demonstrates that Olson did not immediately recognize the items as contraband. Brief of Appellant at 29 (citing RP 33, 37). Since Olson continued his investigation by looking for the vessel from which the items seized had been stolen, Stoltman argues the situation is like State v. Murray, 84 Wn.2d 527, 527 P.2d 1303 (1974). He is incorrect.

In Murray, officers investigating theft from a school obtained consent to search an apartment for the equipment that had been stolen. Id. at 529. During the search, the officers found a portable television, tilted it to obtain the serial number, and subsequently learned that the television had been stolen, not from the school but from a pharmacy. Id. The officers returned and seized the television. Id. The court held that that the plain view doctrine did not permit seizure of the television because the officers did not know the television was stolen until after they seized the serial

number (which was not in plain view) and checked it with police headquarters. Id. at 535. The court observed that "there was nothing unusual about the location of the television as to its utility and usability in the defendant's premises" such that officers could reasonably infer that the object was stolen. Id. at 534. The court also rejected as pure speculation the officer's testimony that he believed the television was stolen because the defendant probably could not afford a television. Id. at 534-35. Because the officers did not have "the requisite immediate knowledge upon which they could reasonably conclude that they had incriminating evidence before them," the trial court erred in allowing seizure of the television. Id.

This case is not like Murray because Officer Olson had ample information from which to conclude that the pipe valve, valve handles, and cut copper and brass fittings were stolen. First, Olson knew that Stoltman and Hibszki had stolen cable to sell at scrap yards just the day before. Olson also knew from Vick that Stoltman and Hibszki had returned in order to steal more material. Further, unlike the television in Murray, there was something "unusual about the location" of the enormous pipe valve "as to its utility and usability" in the middle of a seven-foot boat. Finally, Officer Olson

had further reason to believe the valve had been stolen because of the contradictory explanations for the valve's presence by Stoltman and Hibszki.[6]

For an item in plain view to be "immediately recognizable" as evidence, it is not necessary that an officer possess certain knowledge that the item to be seized is contraband. State v. Higgs, 177 Wn. App. 414, 433, 311 P.3d 1266 (2013) (citing State v. Gonzales, 46 Wn. App. 388, 400, 731 P.2d 1101 (1986)). Rather, the test is whether, "considering the surrounding circumstances, the police can reasonably conclude that the substance before them is incriminating evidence." Hudson, 124 Wn.2d at 118. Officer Olson had sufficient grounds to reasonably conclude that the pipe valve and other items seized were incriminating evidence of theft. The trial court did not err in ruling that the items seized from Stoltman and Hibszki were admissible.

[6] Stoltman contends that these statements should not be considered in this analysis because they were obtained in violation of Miranda. Brief of Appellant at 32-34. As explained above, Miranda did not apply.

3. THE DELAY IN CHARGING STOLTMAN DID NOT VIOLATE FUNDAMENTAL CONCEPTIONS OF JUSTICE.

Stoltman next contends that the 31-month delay between the date of his crimes and the filing of charges violated his right to due process. Although the trial court correctly concluded that the delay prejudiced Stoltman in some ways, allowing the prosecution of this case did not violate fundamental conceptions of justice. The trial court did not err by refusing to dismiss the charges.

Not every delay in filing charges is a violation of due process. To determine whether a delay has resulted in a due process violation, Washington courts apply a three-prong test. State v. Oppelt, 172 Wn.2d 285, 295, 257 P.3d 653 (2011). "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." Id. "Where the State's reason for delay is mere negligence, establishing a due process violation requires greater prejudice to the defendant than cases of intentional bad faith

delay." Id. at 296. Review of the trial court's determination is de novo. Id. at 290.

Stoltman argues that he suffered actual prejudice as a result of the delay because the confidential informant had died, updated technology allowed Officer Olson to identify a witness who testified against Stoltman at trial, and Stoltman could not plead guilty to a lesser, misdemeanor offense because any such offense was time-barred. CP 118-20; RP 201-02. Stoltman does not contend that the delay was in bad faith, but argues that the reasons for the delay were insignificant compared to the prejudice.

Officer Olson testified about the delay. He explained that his father had been diagnosed with terminal brain cancer in June 2010, not long before Olson encountered Stoltman and Hibszki. RP 52. As his father's condition rapidly deteriorated, Olson became his father's primary caregiver. RP 53. He took significant time off work and put all of his cases "on the back burner" in order to care for his father until his death in September 2012. RP 53-55. During the same period, he also had a new baby. RP 106. By the time of trial, these events still so troubled Officer Olson that the court ordered a

recess so that he could collect himself in order to complete his testimony. RP 205.

Olson also testified that there was no one who would take the case over for him. Although the DFW has a special investigative unit, those officers are responsible for major commercial fish and wildlife crimes and do not handle offenses like these. RP 55. Of the 150 patrol officers in his department, only 12 are in King County. RP 56. They are responsible for their own investigations and would be unable to take on Olson's caseload. RP 56. Olson had handed cases off to Seattle police in the past, but a bad experience led him to believe that that agency would not complete the investigation. RP 56. Additionally, though Olson was away from work a great deal during his father's illness, he did not take a single, lengthy sabbatical that would allow him to anticipate that his cases needed to be passed to another officer or agency. Rather, he tried to keep working and ended up leaving and coming back many times. RP 52, 105-06. He did not intentionally cause the delay in order to gain any advantage. RP 57; CP 120.

Stoltman argues that Olson's personal affairs cannot justify the charging delay and do not "outweigh" the prejudice he suffered

as a result.[7] But our supreme court has indicated otherwise. In State v. Alvin, 109 Wn.2d 602, 746 P.2d 807 (1987), the court observed that "sick leave, compensation time, vacations, and training courses are normal routine in every police department and prosecutor's office[.] ... These personal and administrative affairs are as much a part of the judicial process as investigatory activities. 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." 109 Wn.2d at 606. See also State v. Schifferl, 51 Wn. App. 268, 753 P.2d 549 (1988) (negligent delay in charging that resulted in loss of juvenile court jurisdiction did not violate due process).

As the trial court in this case noted, caring for a dying parent is the type of personal affair that is "part and parcel to the judicial process, especially I would note, when we're dealing with human beings, and police officers are very human." RP 205. In the court's view, "there was a very good reason for Sergeant Olson to place the issue on the back burner[.]" Id.

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[7] As our supreme court observed in Oppelt, it does not make sense to try to balance the reasons for delay against the prejudice to the defendant because the items to be compared are wholly different from each other. 172 Wn.2d at 295 n.8. "It may be more accurate to think of the items as factors that must be considered in determining whether fundamental notions of justice are offended by prosecution." Id.

The trial court is in the best position to determine whether the prejudice resulting from delay affects a defendant's ability to defend against the charges. State v. Stein, 140 Wn. App. 43, 57, 165 P.3d 16 (2007) (citing State v. Haga (Haga II), 13 Wn. App. 630, 634, 536 P.2d 648 (1975)). Here, Stoltman's principal argument was that the delay denied him the ability to plead guilty to a misdemeanor offense instead of the felonies with which he was charged and ultimately convicted. RP 156. But while the State was willing to entertain a plea agreement with reduced charges, there is no right to such an agreement and no guarantee that the parties would have come to an agreement in any event. See State v. Bowerman, 115 Wn.2d 794, 799, 802 P.2d 116 (1990) (statutory right to plead guilty is a right to plead guilty as charged). Further, while reducing the charges to a misdemeanor was no longer an option, the State had offered to resolve the case in drug court, successful completion of which would have obviated Stoltman's conviction altogether. RP 143, 173-74. Stoltman refused because he did not wish to engage in drug treatment.[8] RP 143. Since there was an alternative that would have allowed Stoltman to avoid a

[8] Despite Stoltman's reluctance to enter treatment as part of a drug court resolution to his case, he cited his sincere desire for treatment as the basis for his request for a first time offender waiver at sentencing. RP 642-43.

felony conviction, the loss of the opportunity to consider a misdemeanor guilty plea does not violate fundamental conceptions of justice.

Stoltman also contends that he was prejudiced by the death of the confidential informant and the discovery of Dave Roberts, a new witness against him. But in State v. Haga (Haga I), this Court declined to dismiss murder charges filed five years after the deaths occurred, holding that the defendant did not show actual prejudice even though several witnesses and certain pieces of evidence were no longer available. 8 Wn. App. 481, 486-89, 507 P.2d 159 (1973), appeal after remand at 12 Wn. App. 630, 536 P.2d 648 (1975). Likewise, in Oppelt, the child molestation charge filed six years after disclosure and investigation did not violate due process, even though a key witness had lost her memory, because the lost evidence did not preclude the defendant from presenting his defense. 172 Wn.2d at 296. Here, Stoltman's counsel effectively undermined Roberts's credibility by cross-examining him on his numerous crimes of dishonesty, history of methamphetamine addiction, inability to recall details of his past offenses, and his immunity agreement to testify in this case. See RP 464-83. Counsel also elicited evidence that Roberts had lost his ability to

sell scrap metal directly and needed others to sell on his behalf, which allowed her to argue in closing that Roberts alone had burglarized the freighter and simply transferred the stolen material to Stoltman and Hibszki to sell. RP 477, 577.

The question arising in cases of preaccusatorial delay is whether the delay precluded the defendant from receiving a fair trial. Oppelt, 172 Wn.2d at 296. Under the circumstances here, Stoltman cannot make that showing. The trial court properly denied the motion to dismiss.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Stoltman's convictions.

DATED this 27th day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kevin March, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. STOLTMAN, Cause No. 71094-0 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of June, 2014

Name
Done in Seattle, Washington