33158-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

SCOTT M. WILLIAMS, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF APPELLANT

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2. Substantial evidence does not support the trial court's finding of fact 15, that the State's action resulted in unfair circumstances forcing Mr. Williams to make an impossible choice between exercising his speedy trial right and being competently prepared for trial.

3. Substantial evidence does not support the court's finding that the State's action prejudiced the rights of Mr. Williams, listed as Conclusions of Law 1 and 2.

4. The trial court's constructive arraignment date in Spokane should have been October 6, 2014.

II. ISSUES PRESENTED

1. Whether the trial court abused its discretion in finding arbitrary action and prejudice sufficient to justify a dismissal of the charges against Mr. Williams under CrR 8.3(b).

2. Whether substantial evidence existed to support the trial court's finding of fact or resulting conclusion of law that the State's action of transferring the case from Adams County to Spokane County was an arbitrary action.

3. Whether substantial evidence existed to support the trial court's finding of fact or resulting conclusion of law that the State's action resulted in prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

4. Whether the trial court abused its discretion when it dismissed the State's case against Mr. Williams under CrR 8.3, where alternate intermediate remedial steps existed to cure any potential prejudice.

III. STATEMENT OF THE CASE

On September 17, 2014, Mr. Scott M. Williams was stopped and arrested in Adams County for driving under the influence and attempt to elude a police vehicle. During the events leading up to his arrest, Mr. Williams had driven continuously through three counties, beginning in Spokane County then continuing through Lincoln and Adams Counties.

Because of qualifying prior offenses, Mr. Williams was initially charged with felony DUI and attempt to elude a police officer. Mr. Williams made his first appearance in front of Judge Dixon on September 18, 2014. CP 28-29. There, the Court found probable cause for the felony DUI and attempt to elude, and set bond at $80,000. CP 28-29. Adams County subsequently filed formal charges on September 22, 2014, charging one count of attempting to elude a pursuing police vehicle and one count of felony driving under the influence. CP 27, 30-31.

Mr. Williams was booked and arraigned in Adams County on those charges on October 6, 2014. CP 33; 1 RP 4. At his arraignment, Mr. Williams, who was unable to post bond, remained in custody. Trial dates were accordingly set within the 60-day time-for-trial rule, with trial set for November 18, 2014. CP 33. It was at this arraignment that Mr. Williams was also assigned counsel. CP 33.

In the interim, because all of the events underlying the charges began and occurred in Spokane County before continuing on and into Lincoln and Adams Counties, the respective prosecutors in Adams and Spokane Counties decided that Spokane would be the more appropriate place to charge and try Mr. Williams. CP 41. Thus, on October 24, 2014, just 18 days after Mr. Williams's arraignment in Adam's County, the State refiled the charges in Spokane County. CP 34. Spokane County, like Adams County, charged Mr. Williams with eluding and felony DUI, and added a charge of first degree driving while license suspended. CP 34-35. As a result of Spokane's taking over the case, Adams County dismissed their charges against Mr. Williams.

Mr. Williams was transported to Spokane and arraigned on the Spokane charges on November 4, 2014. RP 3-5. At this arraignment, Mr. Williams was represented by appointed defense counsel Mr. Reid who requested trial dates consistent with the Adam's county "booking" date of

October 6, 2014. Defense counsel also requested a "constructive arraignment" date of October 1, 2014[1], a trial date of November 24, 2015, and a pretrial date of November 14, 2014, believing this would keep Mr. Williams within time limits set forth under the time-for-trial rule.[2] Defense counsel acknowledged that this put pretrial out 10 days, and trial out 20 days. Notwithstanding this, they requested those dates nonetheless. The State did not object to this constructive arraignment date or the trial date that was requested by the defense. RP 4. In accordance with the defense's request, the court set the last date to hear suppression or dismissal motions on November 13, 2015, pretrial conference on November 11, 2014, the last date for hearing motions to change trial date on November 20, 2014, and the trial on December 1, 2014.[3]

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[1] It is noteworthy that Mr. Williams was never arraigned on the DWLS 1 charge, which was not brought by Adams County; however, the amended charges in Spokane added that charge. *See* 2RP 7.

[2] Mr. Williams's arraignment in Adams County was October 6, 2014. Sixty days from October 6, 2014, would have been December 5, 2014. Sixty days from defense counsel's requested "constructive arraignment" date of October 1, 2014, would have been November 30, 2014.

[3] The court's oral ruling asserts that it set trial for November 24, 2015, but the resulting order indicates that trial was actually set for December 1, 2014. *Compare* RP 4, *with* CP 14. However, in Adam's County, arraignment for Mr. Williams was October 6, 2014, and the trial was set for December 5, 2014. The constructive arraignment date should

Mr. Loebach, also court-appointed counsel, filed a notice of appearance on behalf of the defendant on November 5, 2015. The parties appeared before the court again on November 14, 2014. RP 6. At this hearing, the defense requested a continuance of the pretrial date only since Mr. Loebach had not yet received discovery and was considering bringing a motion. Mr. Loebach specifically requested that the trial date remain unchanged. The State did not object to defense's request for a continuance of the pretrial date, so the court continued the pretrial for one week. RP 6-8; CP 16.

On November 18, 2014, nearly two weeks before trial was set to commence and speedy trial was set to expire, Defendant, through his counsel Mr. Loebach, moved the court to dismiss the charges based on CrR 8.3. CP 17-37. The defendant posed the issue in his motion as "[w]hether the case should be dismissed under CrR 8.3(b) because the State's mismanagement has caused violations of Mr. Williams' right to a speedy trial and right to counsel?" CP 20. In his motion, the defendant argued that the State's action of changing venue caused him prejudice because his new attorney in Spokane County would have to request a continuance to be adequately prepared for trial, and this in turn required

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have been set as October 6, 2014, since that was the date of Mr. Williams's arraignment in Adams County. CP 33.

that the defendant choose between his time-for-trial right and his right to adequate legal representation. In other words, because the State changed venue moving the charges from Adam's County to Spokane County, and because this change in venue caused the defendant to also have a change of counsel - his attorney being a public defender in each county - the State caused defense counsel in Spokane not to have adequate time to prepare for trial within the time-for-trial time requested by the defendant and set by the court. Defendant argued this scenario was similar to that in *State v. Michielli*.132 Wn.2d 229, 240, 937 P.2d 587 (1997). CP 19-26.

On November 20, 2014, the court heard argument on the motion to dismiss. Mr. Williams was on day 45 of his speedy trial clock, based on the constructive arraignment date of October 6, 2014 - the date he was arraigned in Adams County. 2RP 3. However, at oral argument, the parties had no tangible proof that the previous judge in Spokane County had officially set a constructive arraignment date. Notwithstanding that, the parties argued their respective sides of the 8.3(b) matter. In the end, the court denied the defendant's motion to dismiss, reasoning:

> This progression does not rise to the level of mismanagement that we saw in the … I want to say Michelli (sic) case. It really does not add as a matter of law the kind of circumstances that the Court would need to find for dismissal.

2RP 30.

However, the court allowed defense counsel to re-note the motion as to whether there was evidence of earlier court proceedings setting a constructive arraignment date. At that point, defense counsel moved to continue the matter, citing that defense counsel had a scheduling conflict, not that defense counsel needed more time to prepare for trial. Specifically, on December 1, 2014, the date Mr. Williams was scheduled for trial, defense counsel had two other trials scheduled. CP 56–57.

The court granted defense counsel's motion to continue, thereby excluding the period until the next trial date under CrR 3.3(e)(3). Thus, when the parties appeared again before the court on January 22, 2015, Mr. Williams was still on day 45 of his speedy trial clock.

On January 22, 2015, there again was a hearing on the CrR 8.3(b) matter. In the interim, defense counsel was able to secure a transcript indicating that a prior Spokane judge had in fact adopted a constructive arraignment date of October 1, 2014.[4] The parties re-argued their position. The argument centered on the prejudice to Mr. Williams for having to choose between his speedy trial right and his right to prepare an adequate defense. The oral record was noticeably devoid of how the State's actions were either arbitrary or arose to the level of misconduct or

[4] Again, the State argues this was in error, as the Adams County arraignment took place on October 6, 2014. However, the disparity between the dates would not be dispositive in this matter.

mismanagement. The court dismissed the State's matter against Mr. Williams, despite there being lack of argument or discussion. The court held in pertinent part in its findings of fact and conclusions of law:

> 15. There was no misconduct by the state, but [t]he decision of the State to move the proceedings from Adams County to Spokane County was an arbitrary action that resulted in unfair circumstances forcing Mr. Williams to make an impossible choice between exercising his speedy trial right and being competently prepared for trial.

CP 86.

Additionally, the court laid out its conclusions of law as follows:

> 1. The arbitrary action of the State resulted in a violation of CrR 8.3(b) that prejudiced the rights of Mr. Williams and materially affected Mr. Williams's right to a fair trial.
>
> 2. The State's choice of dismissal and filing/refiling created too much of an ambiguity in the change of evidence, and the discovery and rendered it impossible to be able to prepare for trial within the confines of the defendant's speedy trial rights.

The State timely appealed to this court on February 11, 2015. CP 83.

IV. ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING ARBITRARY ACTION AND PREJUDICE SUFFICIENT TO JUSTIFY A DISMISSAL OF THE CHARGES AGAINST MR. WILLIAMS UNDER CrR 8.3(B).

CrR 8.3(b) permits a trial court, on its own motion, to dismiss the prosecution's case when certain criteria are met. Specifically, CrR 8.3(b) provides:

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

Under the rule, it is the defendant's burden to prove by a preponderance of the evidence two things: (1) arbitrary action or governmental misconduct; and, (2) resulting prejudice affecting the defendant's right to a fair trial. *State v. Martinez*, 121 Wn. App. 21, 29, 86 P.3d 1210 (2004). "Absent a showing of arbitrary action or governmental misconduct, a trial court cannot dismiss charges under CrR 8.3(b)." *Michielli*, 132 Wn.2d at 240. Washington courts have been careful to note that "CrR 8.3(b) is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their judgement for that of the prosecutor." *Michielli*, 132

Wn.2d at 240. (Internal quotation marks omitted) (quoting *State v. Cantrell*, 111 Wn.2d 385, 390, 758 P.2d 1 (1988).

Even if the defendant can meet his burden of proof, our appellate courts have cautioned that "[d]ismissal under CrR 8.3(b) is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially prejudice the rights of the accused." *State v. Martinez*, 121 Wn. App. at 30.

A trial court's power to dismiss charges under CrR 8.3 is reviewed for abuse of discretion. *Michielli*, 132 Wn.2d at 240. A trial court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." *Michielli*, 132 Wn.2d at 240 (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). "A decision is based on untenable grounds 'if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" *Martinez*, 121 Wn. App. at 30 (quoting *Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). *See*, *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (the trial court abuses its discretion in basing its ruling on an erroneous view of the law); *see also*, *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

In the present case, the court abused its discretion, in part, when it based its decision on facts unsupported by the record.

B. SUBSTANTIAL EVIDENCE DOES NOT EXIST TO SUPPORT THE COURT'S FINDING OF FACT THAT THE STATE'S ACTION IN THIS CASE WAS ARBITRARY.

Where a trial court has rendered a judgment complete with findings of fact and conclusions of law, the reviewing court uses a two-step process. First, the appellate court reviews the findings of fact. Second, the appellate court determines whether the findings of fact support the conclusions of law. *See*, *State v. Nelson*, 89 Wn. App. 179, 181, 948 P.2d 1314 (1997); *Martinez*, 121 Wn. App. 21.

Regarding the findings of fact, unchallenged findings of fact are verities on appeal. However, where an appellant has assigned error to certain facts, those facts are reviewed for substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). Substantial evidence is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

In the present case, substantial evidence does not support the court's finding of fact that the State's action was arbitrary. The trial court heard oral argument on two separate days and laid out findings of fact and

conclusions of law in a written order. In its findings of fact the court found in pertinent part:

> 15. There was no misconduct by the state, but The [sic] decision of the State to move the proceedings from Adams County to Spokane County was an arbitrary action that resulted in unfair circumstances forcing Mr. Williams to make an impossible choice between exercising his speedy trial right and being competently prepared for trial.

CP 86.

Additionally, the court laid out its conclusions of law in relevant part as follows:

> 1. The arbitrary action of the State resulted in a violation of CrR 8.3(b) that prejudiced the rights of Mr. Williams and materially affected Mr. Williams's right to a fair trial.
>
> 2. The State's choice of dismissal and filing refiling created too much of an ambiguity in the change of evidence, and the discovery and rendered it impossible to be able to prepare for trial within the confines of the defendant's speedy trial rights.

CP 86–87.

As is evident from the written order that the court did not find governmental misconduct, but instead concluded that the State's action was "arbitrary." CP 82; 2 RP 56–57. Arbitrary action is "willful and unreasoning action in disregard of facts and circumstances." *See, Snider v Board of County Commissioners of Walla Walla County, WA*, 85 Wn. App. 371, 376, 932 P.2d 704 (1997); *Washington Waste Sys., Inc. v. Clark*

County, 115 Wn.2d 74, 81, 794 P.2d 508 (1990) (citing *State v. Ford*, 110 Wn.2d 827, 830, 755 P.2d 806 (1988); *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858-59, 576 P.2d 888 (1978)). Additionally, Black's Law Dictionary defines "arbitrary" in part as "founded on prejudice or preference rather than on reason or fact." BLACK'S LAW DICTIONARY 119 (9th ed. 2004). On the other hand, "[w]here there is room for two opinions, an action taken after due consideration is not arbitrary …" *See, Abbenhaus v. City of Yakima*, 89 Wn.2d at 858-59, 576 P.2d 888.

The record is devoid of any evidence that the State's action of moving the charges against Mr. Williams from Adams County to Spokane County was arbitrary. In fact, the opposite is true; the record supports a conclusion that the State's actions were supported by logic and tactic, and the trial court acknowledged as such.

In the present case, the defendant's motion to dismiss contained no argument regarding arbitrary action of the State. In fact, there is a noticeable absence of argument regarding the first prong of 8.3(b). Instead, the defense argued that the action of the State dismissing the charges in Adams County and refiling those charges in Spokane County resulted in prejudice, but not that those actions were arbitrary, nor that those actions amounted to misconduct. *See, e.g.*, CP 19–26.

Additionally, although it was the defendant who bore the burden of proving the State's action was either arbitrary or amounted to misconduct, the State in its response brief proffered a logical explanation for the reason for the refiling of charges in Spokane:

> Because all of the events underlying the charges began and occurred in Spokane County before continuing on and into the other two counties, the respective prosecutors decided that Spokane would be the more appropriate place to charge and try the defendant.

CP 41.

Furthermore, at oral argument on the motion to dismiss held on November 20, 2014, the defense laid out the facts for the court acknowledging the plausible reasons for the State's actions, asserting:

> The facts involved in the case brought proper jurisdiction for any of the counties that were involved – Spokane, Lincoln and Adams were all involved in the events, Your Honor – but it was properly begun in the Adams court jurisdiction.
>
> At the time that Spokane had filed their charges and issued their warrant, Adams County decided to relinquish their jurisdiction. And, Your Honor, I don't have the specifics as to why that had occurred, although there is a suggestion in the state's response brief that prosecutors conferred and decided that Spokane County was a more appropriate place because of the majority of the events happening there…
>
> Now, in the state's argument, they are indicating that they made a tactical decision and that it was intentional to go ahead and move the charges over to Spokane…

> And, Your Honor, it's really irrelevant if that was the reason for the change of venue. It could have been a more malicious thing. It could have been, well, we weren't happy with Adams County's prosecution of this case and we wanted – that's complete speculation to say that, and that would be a much more malicious situation. But here it doesn't matter. It could have just been an error by the state in making sure that it moved from one jurisdiction to the other.
>
> The egregiousness of the state action is not really what's at issue. What's at issue is that the state conducted an action that then had a profound detrimental impact on Mr. Williams…

2RP 4, 12–13.

In essence, the defendant's argument both in his brief and at oral argument was that the State's action resulted in prejudice. But that isn't the standard. The standard for the first prong of 8.3(b) is that the State's action itself must be either arbitrary or amount to misconduct. At oral argument the State pointed out to the court that the defendant had failed to meet that prong: "There's nothing that's been done in this case that's horribly wrong. I would say there's nothing – they can't point to one thing that's been done wrong. Period." 2RP 21.

At the end of oral argument on November 20, 2014, the court denied the defendant's motion to dismiss under CrR 8.3(b), agreeing with the State, and held:

> This progression does not rise to the level of mismanagement that we saw in the -- I want to say Michelli (sic) case. It really does not add as a matter of law the kind of circumstances that the Court would need to find for dismissal.

2RP 30.

Although the court denied the defendant's motion to dismiss under CrR 8.3(b), it asserted that the "whole question of adequate time to prepare is one that does cause the Court some pause," and with that the court granted leave to the defendant to re-note if a transcript could be made available with respect to the constructive arraignment date issue. 2RP 30–31.[5]

As aforementioned, the parties again appeared before the court on January 22, 2015, for oral argument on the same motion to dismiss under 8.3(b). By that time, the defendant was able to secure a copy of the prior transcript revealing that a constructive arraignment date had in fact been set in prior proceedings. The oral argument primarily centered on the prejudice prong of 8.3(b). Specifically, the defendant argued that prejudice resulted because of a sacrifice of his speedy trial right under the time-for-trial rule in order to be adequately prepared for trial, similar to the circumstance in *Michelli*. However, no additional argument or

[5] At this time, the parties did not have a transcript of prior proceedings; specifically, the proceeding setting the constructive arraignment date.

information came about with respect to the State's choice to move the charges to Spokane. At the end of the oral argument, the court held:

> It requires a finding of arbitrary action or governmental misconduct. I don't find that this was misconduct. I think there was a good faith determination that for whatever reasons – evidentiary, law enforcement, whatever, resources-based, perhaps – that Spokane was the better venue from the standpoint of the state, that particular determination as it relates to the defendant's ability to prepare for a trial and know the charges and know what's confronting him result in an unfair circumstance that is arbitrary. It was based on a decision of none of his making, if you will.
>
> Under these facts, I must grant the order to dismiss.
>
> For that reason, the Court, again, is concerned that the choice of dismissal and refiling caused too much of an ambiguity in the charges, the type of evidence, the discovery and rendered it impossible to prepare for trial.

2 RP 52–53.

It is clear that the court was concerned about the defendant's argument. Because of the change in venue, his counsel would be required to request a continuance to adequately prepare for trial. However, as aforementioned, the standard is not simply that the State's *action* caused the defendant to request a continuance to prepare, but rather that the State's *arbitrary* action caused the defendant to choose between either being adequately prepared for trial or his speedy trial right. Here, there is an utter lack of evidence supporting the court's finding of fact that the

State's action was arbitrary. In fact the court itself, as well as the defense, gave reasons for the State's decision to move the matter from Adams to Spokane County. Indeed, the court stated in its oral ruling, "I think there was a good faith determination that for whatever reasons – evidentiary, law enforcement, whatever, resources-based perhaps – that Spokane was the better venue from the standpoint of the state." 2RP 52–53. Instead, the court erroneously stated that the *result* was arbitrary. 2RP 52–53.

Substantial evidence does not support the trial court's finding of fact that the State's action in this case was arbitrary. The record is devoid of evidence supporting the court's written ruling that the State's action was arbitrary. Indeed, based on the facts presented by both parties, and as articulated by the court in its oral ruling, the State had several good reasons for moving the matter from Adams to Spokane County.

Under 8.3(a), it is the defendant's burden to prove by a preponderance of the evidence two things: (1) arbitrary action or governmental misconduct; and, (2) resulting prejudice affecting the defendant's right to a fair trial. *Martinez*, 121 Wn. App. at 29. "Absent a showing of arbitrary action or governmental misconduct, a trial court cannot dismiss charges under CrR 8.3(b)." *Michielli*, 132 Wn.2d at 240. In the present case, substantial evidence does not support the court's finding of fact or resulting conclusion of law that the State's action was

arbitrary. Absent that element, the court could not dismiss. The court abused its discretion when it dismissed based on facts not supported by the record. Additionally, it may be that the court did not apply the correct legal standard when it held "the State's choice of dismissal and filing or refiling created *too much of an ambiguity in the charges, the evidence, and the discovery* and rendered it impossible to be able to prepare of trial within the confines of the defendant's speedy trial rights." Order of Dismissal, CP 87. How the charges, evidence, and discovery were rendered ambiguous by the State refiling charges is unclear, at best.[6]

C. SUBSTANTIAL EVIDENCE DOES NOT EXIST TO SUPPORT THE COURT'S FINDING OF FACT THAT THERE WAS RESULTING PREJUDICE FROM THE STATE'S ACTION AFFECTING THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

Substantial evidence does not support the trial court's finding of fact that the State's action resulted in unfair circumstances, forcing Mr. Williams to make an impossible choice between exercising his speedy trial right and being competently prepared for trial, where a reasonable amount of time remained on the defendant's speedy trial clock and

[6] *See*, *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (the trial court abuses its discretion in basing its ruling on an erroneous view of the law); *see also*, *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

nothing is reflected in the record explaining why defense counsel could not have prepared in the amount of time he had.

To begin with, at the time of the court's dismissal under 8.3(b), there was no violation of the defendant's speedy trial right under the time for trial rule. As previously discussed, Spokane Court adopted a constructive arraignment date of October 1, 2014. The actual constructive arraignment date should have been October 6, 2014, since that was the date of the Adams County arraignment. With the constructive arraignment date of October 6, 2014, when the parties came before the court to argue the 8.3(b) motion on November 20, 2014, Mr. Williams was only on day 45 of his 60 day speedy trial clock, at worst.[7]

When the defendant failed to prevail on his motion to dismiss, defense counsel moved to continue the trial date of December 1, 2014, over the defendant's objection, because of a scheduling conflict - defense counsel had two other trials scheduled for the date of December 1, 2014. CP 56–57. The court granted the motion and set the new trial date to January 26, 2015. CP 59.

Prior to the January trial date, the defendant brought a motion for reconsideration of the motion to dismiss under CrR 8.3(b). The parties

[7] Mr. Williams was incarcerated at all relevant points of these proceedings. *See*, CrR 3.3(b)(1)(i).

came before the court on that motion on January 22, 2015. 2RP 34. Under the time for trial rule CrR 3.3(e)(3), the interim period was excluded from calculation based on the court's good cause continuance on defense's motion. Thus, when the parties appeared on January 22, 2015, Mr. Williams was still on day 45 of his 60 day speedy trial clock. Moreover, under CrR 3.3(b)(1)(ii) and CrR 3.3(b)(5), Mr. Williams's new speedy trial time would not have expired until March 5, 2015. Those rules - CrR 3.3(b)(1)(ii) and (b)(5) - provide that a defendant who is detained in jail shall be brought to trial within the *longer* of 60 days after the commencement date, or 30 days after the end of any excluded period such as a good cause continuance under CrR(e)(3).[8]

Because Mr. Williams still had thirty days on his speedy trial clock, there was not substantial evidence to support the court's finding of fact 15 that Mr. Williams was forced on January 22, 2015, to choose between exercising his speedy trial right and being competently prepared for trial.

Additionally, the court's finding that Mr. Williams could not be competently prepared for trial within the 30 remaining days is not

[8] It is important to remember that the court on January 22, 2015, granted defense counsel's good-cause continuance, not on the basis that the defendant could not be ready in time, but rather because defense counsel had a scheduling conflict. CP 56–57.

supported by the record. The record is devoid of any explanation from defense counsel explaining why he could not be competently prepared for trial in the time remaining - 30 days - especially given the amount of time defense counsel had up to this point to prepare.[9]

Moreover, it should be noted that there was not substantial evidence to support the finding of fact that the State's action *caused* any prejudice because there was a causal disconnect at this point between the State's *action* of moving the charges from Adams County to Spokane County and Mr. Williams's attorney's ability to prepare for trial. By the time Mr. Williams's attorney was arguing that the State's action of moving the matter to Spokane County had *reduced* his amount of time to prepare for trial, he had by then the same amount of time to prepare for trial as he would have had if the matter had been originally brought in Spokane or had it remained in Adams County.

Mr. Williams was arraigned in Spokane on November 4, 2014. CP 14. Thus, if this case had been tried without a constructive arraignment date, Mr. Williams's commencement date would have been the date of the Spokane arraignment - November 4, 2014. With that commencement date, Mr. Williams's speedy trial clock would have been up 60 days from

[9] It is noteworthy that although the DUI was a felony in this case, this is merely because of the amount of priors. DUIs are regularly prepared for at the district court level in as little as a week.

that date - on January 5, 2015[10]. Thus, when defense counsel came before the court on the second motion to dismiss under CrR 8.3(b) on January 22, 2015, they had the benefit of two and a half weeks *more* than they would have had if the trial had been brought initially in Spokane County. In other words, if defense counsel had asserted there was not enough time to prepare for trial, it would not have been anything caused by the State because defense had the full 60 days to prepare had the case remained in Adams County or been brought originally in Spokane County.

The additional time afforded to defense counsel between the original December trial date and the January trial date was not of the State's doing. Defense counsel requested a continuance on November 20, 2014, not because of any action on the part of the State, but rather because of defense counsel's scheduling conflict.

The record simply lacks evidence regarding what had been done by the defendant to prepare for trial, or what was needed for the attorney to prepare for trial. Moreover, why the defendant's case was transferred from John Whaley of the Spokane County Public Defenders Office, who represented the defendant on October 31, 2014,[11] to Derek Reid, also of

[10] January 3, 2015 was a Saturday, so speedy would have terminated on January 5, 2015.
[11] CP 10-13.

the Public Defenders Office, on November 4, 2014,[12] and then to David Loebach, again, of the same office, who filed a separate notice of appearance on November 5, 2015. CP 16. Perhaps these three attorneys could jointly try a DUI type case with a month preparation?

Thus, substantial evidence did not exist to support the trial court's finding of fact 15, and resulting conclusion of law that the State's action resulted in unfair circumstances forcing Mr. Williams to make an impossible choice between exercising his speedy trial right and being competently prepared for trial where plenty of time remained on the defendant's speedy trial clock, and the defense failed to indicate why they could not be competently prepared for trial in the 60 days they would have been required to be prepared in had the matter remained in Adam's County or been originally brought in Spokane County.

D. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE STATE'S CASE AGAINST MR. WILLIAMS UNDER CRR 8.3(B), WHERE ALTERNATE INTERMEDIATE REMEDIAL STEPS EXISTED TO CURE ANY POTENTIAL PREJUDICE.

Dismissal of a criminal case is an extraordinary remedy, one of last resort; therefore, a trial judge abuses discretion by ignoring intermediate

[12] CP 14, 1 RP 1-5,

remedial steps. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003); *State v. Koerber*, 85 Wn. App. 1, 4, 931 P.2d 904 (1996).

In *Wilson*, the trial court dismissed the prosecution's case for failure to arraign a witness interview prior to the 60-day expiration of a defendant's speedy trial date under the time-for-trial rule for incarcerated defendants. *Wilson*, 149 Wn.2d at 1. Our Supreme Court reversed the trial court's dismissal of the case, asserting that the trial court could have ordered the defendant in that case to be released in order to extend the speedy trial expiration from 60 to 90 days. *Id*. at 12. The Court held that the trial court's failure to consider such an intermediate remedial step and instead employ the extraordinary remedy of dismissal was an abuse of discretion.

In the present case, the parties came before the trial court on the motion to dismiss on November 20, 2015. 2RP 3. As previously mentioned, by this point the defendant, based off of his requested constructive arraignment date of October 6, 2014, was at day 45 of speedy trial. The trial court denied the motion to dismiss, and defense counsel moved to continue the trial date from December 1, 2014, to January 26, 2015. CP 56, 59. Because that time period was excluded under CrR 3.3(b)(5), when the parties again came before the court for the hearing on the motion to dismiss on January 22, 2015, Mr. Williams was still at

day 45. Additionally, as aforementioned, it is noteworthy that under the time-for-trial rule 3.3(5), Mr. Williams's speedy trial clock had at least 30 days after the excluded period before it would expire.[13] At this point, the court had several intermediate remedies: first, the court could have set trial within the next 15 to 30 days as permitted by the rule; or second, as was the remedy in *Wilson*, the court here could have released Mr. Williams to extend his speedy trial clock from 60 to 90 days.

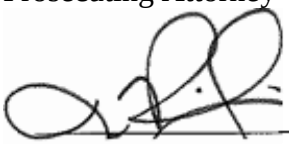
The court's failure to consider these intermediate remedial steps prior to dismissing under CrR 8.3, was an abuse of discretion.

V. CONCLUSION

For the reasons stated above, this court should reverse the trial court's dismissal of the State's case and remand for further proceedings.

Dated this 17 day of July, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



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Attorney for Appellant

[13] CrR 3.3(b)(5) provides:

Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

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

STATE OF WASHINGTON, Respondent, v. SCOTT MICHAEL WILLIAMS, Appellant,	NO. 33158-0-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 17, 2015, I e-mailed a copy of the Brief of Appellant in this matter, pursuant to the parties' agreement, to:

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(Date)	**(Place)**	**(Signature)**