No. 33158-0

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

THE HONORABLE JUDGE LINDA TOMPKINS

BRIEF OF RESPONDENT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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II. STATEMENT OF FACTS

On September 17, 2014, Scott Williams was arrested and booked into the Adams County jail on suspicion of a DUI and attempt to elude a police vehicle. (CP 3-4). The alleged driving incident was one continuous event, beginning in Spokane County, passing through Lincoln County and ending in Adams County. (11/20/15 RP 4; CP 45). Mr. Williams had a first appearance in Adams County, where the court found probable cause for the charges and set a bond. (CP 28-29). Mr. Williams was unable to post bond and remained in jail. (CP 6).

On September 22, the Adams County prosecutor filed an information charging Mr. Williams with attempting to elude a pursuing police vehicle and felony driving under the influence. (CP 30-31). On October 6, he was arraigned and assigned counsel. (CP 27; 11/20/14 RP 3). At the arraignment, the omnibus hearing was set for October 27 with a trial date of November 18 and a 60-day speedy trial expiration date of December 5. (11/20/14 RP 3; CP 33).

On October 23, 2014, the Spokane County Superior Court issued a warrant for Mr. Williams, filing an information charging Mr. Williams with the same alleged criminal conduct as the Adams County information. (CP 6). The Spokane prosecutor added a third charge: first degree driving with license suspended or revoked. (CP 8).

On October 27, the Adams County prosecutor requested a continuance of the omnibus hearing, as it needed to confirm charges had been filed in Spokane County. (CP 36). On October 28, Adams County dismissed the case against Mr. Williams. He was transferred to the Spokane jail on October 30. (11/20/14 RP 6).

Mr. Williams made a first appearance in Spokane Superior Court October 31, 2014. (CP 9). At that hearing, John Whaley of the Spokane Public Defender's Office represented him. The court set November 4 as the date for arraignment on the charges. (CP 13).

On November 4, 2014, Mr. Reid of the Spokane Public Defender's office represented Mr. Williams. Because Mr. Williams had been arrested on these charges on September 17, defense counsel asked the court to set a constructive arraignment date of October 1[1] and to maintain the court dates, which had been previously set in Adams County. (11/4/2014 RP 4;6 CP 14). Defense counsel pointed out that although the jurisdiction had changed, Mr. Williams should not be forced to waive his right to a speedy trial. The court granted an expedited trial setting, based on the time for trial that had elapsed while Mr. Williams remained in the Adams County jail. (11/4/14 RP 3).

[1] CrR 3.3 arraignment means the date determined under CrR 4.1. CrR 4.1(a)(1) provides in pertinent part that a defendant shall be arraigned not later than 14 days after the date the information or indictment is filed. Here, the charges in Adams County were filed on September 22 and the arraignment was held October 6 was the final date of the 14 day timeframe. The court and parties agreed to a constructive arraignment date of October 1 based on the date of the arrest rather than filing the information.

The State did not object to the setting of the arraignment date. When asked if the State had any response to setting the constructive arraignment date and trial schedule, the prosecutor answered, "No your Honor. That's exactly what we need, I believe." (11/4/14 RP 4-5). The court set the last date to hear suppression or dismissal motions as November 13, a pretrial conference on November 14, the last date for hearing motions to change the trial date on November 20 and trial to commence on December 1. (CP 14).

The following day, defense counsel David Loebach, from the Spokane Public Defender's Office filed his notice of appearance to represent Mr. Williams and immediately requested discovery. (11/14/14 RP 6-7; CP 15). Mr. Loebach received discovery on November 18, 2014. (11/20/14 RP 9).

At the November 14 pretrial conference, Mr. Loebach informed the court that he wanted to maintain the same dates as set by the court earlier, but to extend the pretrial date to the following week. The trial date remained the same. (11/14/14 RP 6-7). Defense counsel wished to review why the jurisdiction had been changed, and needed time to research the case, stating he did not believe Mr. Williams should be forced to waive his speedy

trial rights because the State had chosen to change the jurisdiction. (11/14/14 RP 6-7).

The court again questioned the State's attorney on its position regarding the timeline. The prosecutor replied, "Well, Judge, I think Ms. Olsen [prosecutor] recognizes the strange posture of this case. I think at this point we'll just ---we're certainly not objecting to continuing the pretrial date. We'll have to look and see what's going to happen with the trial date at the next hearing." (11/14/14 RP 7-8).

At the November 20 hearing defense counsel asked Judge Tompkins for a dismissal under *State v. Michielli* . (11/20/14 RP 3). Counsel outlined for the court all the pertinent dates specifically noting that on November 4th Mr. Williams had objected to that date as his new arraignment date as he had already been arraigned on the charges on October 6 in Adams County. (11/20/14 RP 6). Counsel received discovery in the matter on November 18, and because of the set dates, the opportunity to file a motion to suppress had passed on November 13. (11/20/14 RP 9). In order to declare trial readiness, Mr. Williams would have had to waive making a suppression motion. (11/20/14 RP 9).

Counsel argued that the case involved a DUI, required investigation of the search warrant information, interviews of numerous law enforcement witnesses, as well as expert witnesses. Counsel also showed the penalty for Mr. Williams was potentially lengthy, a flat 60 months. (11/20/14 RP 10-11).

Counsel addressed the pertinent action of the State, arguing that Mr. Williams had been charged in Adams County and had already made it to an omnibus hearing before there was any discussion to transfer the matter to Spokane County. Once Spokane County filed charges and Adams County dismissed its case, Mr. Williams was forced to acquire new representation. Counsel argued that Mr. Williams was placed in the position of being forced to choose between two fundamental rights: speedy trial and effective assistance by a prepared attorney. (11/20/14 RP 11-14).

Recognizing it was an extraordinary remedy under CrR 8.3, counsel reiterated the danger of diminishing the speedy trial rule because of a "whim or decision of the State." Counsel argued the decision to change jurisdiction adversely impacted the ability of the defendant to be prepared and ready for trial within the 60 days. (11/20/14 RP 14).

In contrast, the State's argument rested on whether the date of arraignment was actually the 4th of November or the 6th of October. (11/20/14 RP 17-18). The State wrongly assumed defense counsel had not made an objection at the November 4 hearing. (11/20/14 RP 18;22). It further argued the case could be investigated and tried within two weeks. (11/20/14 RP 24).

The court denied the motion to dismiss, but held that if defense counsel acquired the transcript of the November 4 hearing, to show the court had set a constructive arraignment date of October 1, the court would take another look at the motion to dismiss. (11/20/14 RP 31). With that ruling, defense counsel requested a continuance, over Mr. Williams' objection. (11/20/14 RP 32). Counsel requested a second continuance on January 15, again over Mr. Williams' objection, setting trial to February 17, 2015. (1/15/15 RP 9-11).

On January 22, the court heard a motion to reconsider the earlier dismissal motion. (1/22/15 RP 34). The November 4 transcript showed the original arraignment date was indeed October 6 in Adams County. (1/22/15 RP 38). The Spokane court had agreed to keep the Adams County arraignment date and the State had not objected to the date. At this same hearing the State

agreed this was not a change of venue, but rather, a dismissal in Adams County after Spokane County filed its own charges. The record showed there was no order changing venue and no new commencement date. (1/22/15 RP 45-47).

The court granted the order to dismiss. (1/22/15 RP 52). The court specifically stated that regardless of why Adams County dismissed and Spokane County filed charges, "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*." (1/22/15 RP 52). The court found the issue was preserved in the November 4 hearing, and the State had not objected, but in fact agreed with the dates. (1/22/15 RP 53). The court concluded that "the choice of dismissal and refilling caused too much of an ambiguity in the charges, the type of evidence, the discovery and rendered it impossible to prepare for trial" within the speedy trial rules. (1/22/15 RP 53; CP 86). An order for dismissal was entered with the requisite written findings of fact and conclusions of law. (CP 79-80). The State appealed. (CP 83).

III. ARGUMENT

A. Substantial Evidence Supports The Trial Court's Findings of Fact.

Criminal Rule 8.3(b) requires a trial court to "set forth its reasons in a written order" when dismissing a case pursuant to that rule. CrR 8.3(b). Where a finding of fact is challenged, the reviewing court goes no further than to determine whether there is substantial evidence to sustain that finding. *Govett v. First Pac.Inv.Co.,* 68 Wn.2d 973, 413P.2d 972 (1966). Substantial evidence is that quantum of evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Brown v. Superior Underwriters,* 30 Wn.App. 303, 306, 632 P.2d 887 (1980).

Moreover, in determining the sufficiency of evidence, a reviewing court need only consider evidence favorable to the prevailing party. *Bland v. Mentor,* 53 Wn.2d 150, 155, 385 P. 2d 727 (1963). The reviewing court assumes the trial court's findings are correct, and the party claiming error bears the burden of showing that a finding of fact is not supported by substantial evidence. *Nguyen v. City of Seattle,* 179 Wn. App. 155, 163, 317 P.3d 518 (2014). Even when substantial but disputed, evidence supports the findings of fact, the reviewing court will not disturb the

trial court's ruling. *State v. Smith,* 84 Wn.2d 498, 505, 527 P.2d 674 (1974).

Unchallenged findings of fact are treated as verities on appeal. *State v. O'Neill,* 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Here, the State has assigned error only to finding of fact no. 15.

> "There was no misconduct by the State, but the 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).

1. "Arbitrary"

In its brief, the State has argued that its actions were not "arbitrary" and provides a definition of "arbitrary" from administrative law decisions. (Br. of Appl. at 12-13). The State cites to cases which were administrative agency decisions, reviewed for "arbitrary and capricious" action by the agency. When referring to a judicial decision, "arbitrary" means founded on prejudice or preference rather than reason or fact, and is often termed *"arbitrary and capricious*." BLACK'S LAW DICTIONARY 100 (7th ed. 1999).

With respect to arbitrary decisions by a prosecutor, case law points to the necessity for a reasonable justification for a decision.

State v. Worthey, 19 Wn.App. 283, 288, 576 P.2d 896 (1978); *State v. Pettit,* 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).

Unchallenged finding of fact No. 7 states:

> "On October 28, 2014, Adams County dismissed the charges against Mr. Williams, *in order for* Spokane County to prosecute."

(CP 85).

The decision to have Adams County dismiss and Spokane County to refile charges against Mr. Williams was based on the individual preference of the prosecutors. The charges could have been brought in any of the three counties. In *Worthey,* the prosecutor filed an information seeking enhancement of the defendant's punishment to life imprisonment as a habitual criminal. *Worthey,* 19 Wn.App. at 283. On review, the Court noted that the decision to file the habitual criminal charge was made after review of cases of other felons who qualified for the charge, advice from law enforcement officers about Worthey's spiraling crimes, and the prosecutor's reasoned conclusion that Worthey's repetition of criminal conduct aggravated his guilt and justified the heavier penalty.

Similarly, in *State v. Pettit,* the Court held that a prosecutor has wide discretion to charge or not charge an individual. *Pettit,* 93 Wn.2d at294. However, the Court added, "The discretion lodged in the office necessarily assumes that the prosecutor will exercise it after an analysis of all available relevant information." *Pettit,* 93 Wn.2d at 295. Here, the State has not and cannot produce any rule or statute that prevented Mr. Williams being tried in Adams County. Similarly, no rule or statue required that Mr. Williams be tried in Spokane County. Nor has the State presented any reasoned analysis of why the case should have moved to Spokane. Finding of Fact No. 6 provides the only "reason": "because the State preferred to prosecute the charges in Spokane rather than Adams County."(CP 85). The facts of this case demonstrate the decision by the State to move the prosecution was arbitrary. The trial court's written finding is supported by substantial evidence.

2. The Arbitrary Decision To Move The Prosecution To Spokane County Resulted In An Unfair Circumstance Forcing Mr. Williams To Make An Impossible Choice Between Exercising His Speedy Trial Right And Being Competently Prepared For Trial.

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 purpose of the rule is to see that one charged with a crime is fairly treated. *State v. Satterlee,* 58 Wn.2d 92, 361 P.2d 168 (1961). The unchallenged findings of fact are significant in this case because they show the facts and circumstances surrounding the events, which led to the prejudice of Mr. Williams' rights, which materially affected his right to a fair trial.

Mr. Williams was jailed on September 17, arraigned on October 6, and his trial set for November 18, 2014 in Adams County. (Finding of Fact 4: CP 85). Unable to make bond, Mr. Williams was held in custody in Adams County. (Finding of Fact 2: CP 85). The sixtieth day after the October 6, 2014 arraignment was December 5, 2014. (Finding of Fact 4: CP 85). Because he remained in custody, the speedy trial rule required that he be tried within 60 days of arraignment.

Aware that Mr. Williams had been charged in Adams County, the Spokane County prosecutor filed an information charging him with a DUI, attempt to elude, and driving with a suspended license, *all arising from the same driving incident that was the basis for the Adams County charges.* (Finding of Fact 5: CP 85). The trial court also made Finding of Fact 6, which reads in pertinent part: "The State [Adams County] requested a continuance of the omnibus hearing which (sic) (*while the trial date remained the same)* for the State to transport Mr. Williams to Spokane County *because the State preferred to prosecute the charges in Spokane rather than Adams County."* (CP 85)(Emphasis added).

Moreover, once in Spokane, the State agreed to the court dates for the case, aware that Mr. Williams was concerned about his right to a speedy trial: agreeing to a constructive arraignment date, and an expedited trial setting based on the time for trial that had elapsed while Mr. Williams was held in Adams County. (Finding of Fact 6: CP 86).

Having filed a notice of appearance on November 5, Mr. Williams' attorney of record did not receive discovery until November 20. Trial was set for December 1. (Findings of Fact

5,6.10: CP 86). Mr. Williams remained in custody. (Finding of Fact 14: CP 86).

The matter had already proceeded to the omnibus hearing in Adams County. The decision to dismiss prosecution in one county and renew it in another County had the effect of requiring the defendant to obtain new counsel, and to research for a different defense: it was a different county, different law enforcement officers, different witnesses, and included the original need of challenging the search warrant, toxicology results, as well as interviews of expert witnesses.

The trial court disagreed with the State's argument that defense counsel should be able to prepare a defense for a felony DUI and attempt to elude within the remaining two weeks for speedy trial. (1/22/15 RP 52).

The arbitrary action of changing jurisdictions resulted in an unfair circumstance in which Mr. Williams had to waive his right to a speedy trial to preserve his fundamental right to effective assistance of counsel. The record demonstrates substantial evidence supports the court's finding of fact 15.

B. <u>The Court's Findings of Fact Support The Conclusions of Law</u>

When an appellant challenges conclusions of law not based on the law itself, but rather claiming that the findings do not support the court's conclusions, appellate review is limited to determining whether the trial court's findings are supported by substantial evidence and whether those findings support the conclusions of law. *Nguyen v. City of Seattle,* 179 Wn.App. at 166. As discussed above, ample evidence in the record supports the court's findings.

CrR 8.3(b) allows the court, in the furtherance of justice, to dismiss a 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. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Here, based on the findings of fact, the trial court rightly concluded that:

1. "T]he 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' right to a fair trial.
2. The State's choice of dismissal and filing refilling 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).

In *Brooks* the Court noted that because a criminal defendant has separate constitutional rights to a speedy trial and to effective assistance of counsel, the State cannot force a defendant to choose between the two. *State v. Brooks,* 149 Wn.App. 373, 387, 203 P.3d 397 (2009). A defendant being forced to waive his speedy trial right is not a trivial event. "This court, 'as a matter of public policy[,] has chosen to establish speedy trial time limits by court rule and to provide that failure to comply therewith requires dismissal of the charge with prejudice.'" *State v. Michielli,* 132 Wn.2d 229, 245, 937 P.2d 587 (1997). Similarly, one cannot have a fair trial with counsel who is not adequately prepared. *Id.*

Here, the State has argued that because Mr. Williams' attorney had to ask for a continuance while they waited for the November 4 transcript (over the defendant's objection) the new speedy trial date was March 5, 2015. Thus, the State argues Mr. Williams' attorney had more than enough time to prepare for trial. (Br. of Appellant at 21). However, the State's arbitrary decision to move jurisdiction *caused* defense counsel to need to request a

continuance, which caused him to miss the December 5 trial date. This Court should not consider the requested continuances that occurred as a result of the State's action as a justification for prejudicing Mr. Williams fundamental right to a fair trial.

The State had options to prevent prejudicing Mr. Williams rights: it could have left the prosecution in Adams County or returned the prosecution to Adams County. Similarly, It could have asked the court to release Mr. Williams from custody to extend the speedy trial time from 60 to 90 days. *State v. Wilson,* 149 Wn.2d 1, 12, 65 P.3d 657 (2003). It is not an abuse of discretion for a judge to release a defendant in order to extend the time for trial. *State v. Chavez-Romero,* 170 Wn.App. 568, 578, 285 P.3d 195 (2012).

C. The Trial Court Did Not Abuse Its Discretion In Dismissing The Charges Against Mr. Williams.

An appellate court reviews the trial court's decision on a motion to dismiss for manifest abuse of discretion, which occurs if the trial court's decision is manifestly unreasonable or is based on untenable grounds. *State v. Martinez,* 121 Wn.App. 21, 30, 86 P.3d 1210 (2004). A decision is based on untenable grounds if it rests on facts unsupported by the record or was reached by

applying the wrong legal standard. *State v. Rohrich,* 149 Wn.2d at 654. The trial court did not abuse its discretion.

Here, it is clear the record amply supports the trial court's findings of fact. The State moved the prosecution of Mr. Williams without any reasoned justification for the change. The State agreed to the original arraignment date and trial schedule. Defense counsel did not receive discovery until two weeks before trial. The trial judge rightly did not believe Mr. Williams' attorney could prepare an adequate defense within the remaining two weeks for speedy trial.

The State complains the trial court failed to consider an intermediate remedial step prior to dismissal, that is, releasing Mr. Williams from custody to extend the speedy trial period to 90 days. (Brief of Appl. at 25). However, the record is devoid of any request or motion by the State for the court to consider such a step.

The trial court's findings of fact support its conclusion of law: the change of jurisdiction created an ambiguity in the charges, the evidence, and the discovery, and forced Mr. Williams to either go to trial unprepared or give up his right to a speedy trial. The State's decision to change the jurisdiction, coupled with the fact that change forced him to waive his speedy trial right in order to prepare

a defense, can be considered arbitrary and sufficiently prejudicial to meet the requirements of CrR 8.3(b). *See Michielli,* 132 Wn.2d at 245.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Williams respectfully asks this Court to affirm the trial court's dismissal of the charges in the furtherance of justice pursuant to CrR 8.3(b).

Respectfully submitted this 19th day of October 2015.

/s/ Marie J. Trombley, WSBA 41410
Attorney for Scott Williams
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Scott Williams, do hereby certify under penalty of perjury under the laws of the United Statesand the State of Washington, that a true and correct copy of the Respondent's Brief was sent by electronic service, by prior agreement between the parties on October 19, 2015 to:

EMAIL: SCPAappeals@spokanecounty.org
Lawrence Haskell, Prosecuting Attorney for Spokane County
Jessica A. Pilgrim, Deputy Prosecuting Attorney

/s/ Marie J. Trombley, WSBA 41410
Attorney for Scott Williams
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net