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

STATE OF WASHINGTON,	)	
	)	No. 62128-9-I
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
	)	
PETER T. SHIRLEY,	)	
	)	
Appellant.	)	FILED: June 15, 2009

Schindler, C. J. — We review the denial of a motion to dismiss a criminal prosecution under Criminal Rules 8.3 and 4.7 for a manifest abuse of discretion. Peter Shirley was charged with possession of cocaine. The State's failure to identify the forensic scientist who tested the cocaine before the trial date did not require the trial court to dismiss the case when over 30 days remained before expiration of the time for trial period under the court rules and a short continuance could remedy the problem of belated disclosure. We affirm.

FACTS

In May 2007, Peter Shirley was arrested for suspected drunken driving.[1] The arresting officer found several packets of what he suspected was cocaine on Shirley's person. Shirley acknowledged that the substance was cocaine, but said he had not used any and intended only to party with it later. The officer

[1] Because the transcripts of the jury trial have not been provided for this appeal, these facts are drawn from the documentary record and verbatim report of the pretrial proceedings.

also conducted a field test of the substance that indicated it was cocaine.

The State charged Shirley with possession of cocaine.

After several stipulated continuances, an omnibus hearing was held on March 26, 2008. The agreed order memorialized that, absent a plea, the State would amend the charges to add a count of driving under the influence. It also indicated that provision of expert reports was still pending and that witness interviews were to be complete by March 15. At that time, the prosecution had not identified any particular forensic chemist as having tested the substance recovered from Shirley, and had not received or provided any laboratory reports.

The matter was sent to a trial department of the superior court on March 26. After the court granted the State's motion to add the driving under the influence charge, the prosecutor stated that she still had not received the laboratory report regarding the suspected cocaine and did not know the analyst's name. She indicated that she anticipated receiving the report that morning, and would provide it to defense counsel as soon as she received it.

Defense counsel responded by asking the court to dismiss the possession of cocaine count under CrR 8.3 and CrR 4.7, or alternatively, to achieve the same result by suppressing the results of any laboratory test. Counsel argued that even though more than 30 days remained under the time for trial rules, Shirley would be prejudiced by any continuance because counsel's busy trial schedule and vacation plans would require a new trial date beyond that period. He contended the identity of the laboratory analyst was critical to

determine whether evidence regarding improprieties in the state crime laboratory in driving under the influence breath tests could be used to impeach the particular scientist that analyzed the substance Shirley possessed. The court indicated it would grant a continuance if one was requested, but found dismissal was not justified.

Counsel raised the issue again later in the morning after the court concluded preliminary hearings under CrR 3.5 and 3.6. When the court again indicated its willingness to continue the trial but not to dismiss, counsel suggested that his client might also be prejudiced by any continuance because the prosecutor had mentioned the possibility of amending the simple possession of cocaine count to a higher charge of possession with intent to deliver. The prosecutor responded that she did not believe the State could fairly do so since no notice of such an amendment had been given at the omnibus hearing.

Over the noon recess, the prosecutor learned the name of the analyst who tested the cocaine and provided it to the defense, but still had not received the laboratory reports. Following the recess, after further discussion on the record and a private conference with his client, defense counsel indicated that he would seek a continuance based on the prosecutor's representation that the charge would not be amended. The court then granted a motion to continue to April 21.

After further continuances, which were all agreed, the matter went to trial. The state did not seek to amend the possession charge. Shirley was convicted

of possession of cocaine and acquitted of driving under the influence.

Shirley appeals.

ANALYSIS

Shirley claims the trial court abused its discretion when it did not dismiss his case under CrR 8.3(b) and CrR 4.7. We disagree.

Before dismissal is appropriate under Criminal Rule 8.3(b),[2] the defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting the defendant's right to a fair trial." State v. Michielli, 132 Wn.2d 229, 239-240, 937 P.2d 587 (1997). The government's misconduct need not be evil or dishonest. Simple mismanagement is sufficient. State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). However, the defendant must show that actual prejudice, not merely speculative prejudice, affected his right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). We review the trial court's decision for an abuse of discretion. Michielli, 132 Wn.2d at 240.

Likewise, dismissal under CrR 4.7(h)(7)(i) for discovery violations is discretionary and is reviewable only for manifest abuse of discretion. State v. Ramos, 83 Wn.App. 622, 636, 922 P.2d 193 (1996). Dismissal is an extraordinary remedy available only when the defendant has been prejudiced by

[2] Criminal Rule 8.3(b) states:

> 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.

the prosecution's action. State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). The burden is on the defendant to establish prejudice requiring dismissal by a preponderance of the evidence. Cannon, 130 Wn. 2d at 328-29.

Shirley contends the trial court erred by failing to find the State's conduct here constituted case mismanagement under CrR 8.3 for failing to test the cocaine earlier. He also argues the court should have found a discovery violation under CrR 4.7 for the prosecutor's failure to learn and disclose the identity of the analyst before the scheduled trial date. The State disputes both claims. It is unnecessary to resolve these issues, however. Even assuming that the State's conduct here was deficient, Shirley has failed to show prejudice to his right to a fair trial that required dismissal under either CrR 8.3(b) or CrR 4.7(h)(7)(i).

Shirley renews the two claims of prejudice that he argued in the trial court. He first contends that he was forced into an unfair "Hobson's choice" between his right to adequate trial preparation and his speedy trial rights. See State v. Sherman, 59 Wn.App. 763, 769, 801 P.2d 274 (1990). But more than thirty days were available before the time for trial period expired. Defense counsel's initial claim that any continuance would necessarily violate Shirley's rights because of counsel's trial schedule and vacation plans was wholly conclusory. Counsel made no showing that he had any other trial scheduled that would necessarily take priority over Shirley's trial, and, as discussed above, ultimately agreed to a continuance within the period then provided by the time for trial rules.[3]

The circumstances here do not resemble the egregious facts in the cases Shirley relies on, in which substantial prejudice was apparent. See Sherman, 59 Wn. App. at 769 (time for trial period expired on day of motion to dismiss); Michielli, 132 Wn. 2d at 244-45 (new charges added only three days before trial that would require continuance beyond expiration, and which were based on facts long known to the State); State v. Dailey, 93 Wn.2d 454, 455-56, 610 P.2d 357 (1980)(prosecutor repeatedly ignored orders to produce bill of particulars, refused to disclose identities of eleven known witnesses and allowed evidence to be destroyed); State v. Brooks, 149 Wn.App. 373, 388, 203 P.3d 397 (2009)(upholding dismissal where, after a previous continuance, the trial court found a "total failure to provide discovery in a timely fashion," which included the report of the lead case detective, the 60-page victim's statement and disclosure of two new witnesses, all of which had been available for weeks).

Instead, the facts here are analogous to other cases involving belated scientific testing that was anticipated from the inception of the proceedings, and the results of which were not a surprise. See Cannon, 130 Wn.2d at 328-29, (defendant on notice from outset of proceedings that the State would rely on forensic evidence from blood samples and paint chips); State v. Woods, 143 Wn.2d 561, 584, 23 P.3d 1046 (2001)(no showing of prejudice requiring dismissal from belated DNA test results when no "new facts" were interjected

[3] Shirley has not provided a verbatim record of the subsequent agreed motions to continue that extended the trial date beyond that period. The record also does not show that the analyst the State disclosed on March 26 was actually involved in any of the problems with the state breath testing program counsel discussed when he first brought his motion to dismiss.

into the proceedings as a result of the delays).

As for his claim of prejudice from the potential for the amendment of charges, Shirley refers to the prosecutor's and trial judge's comments, which he maintains did not entirely foreclose the possibility of a later motion to amend the information to allege a higher charge. But he overlooks the record showing his counsel expressly conditioned the continuance to April 21 on his understanding that there would be no amendment, which the prosecutor had agreed would appear to be unfair given the failure to give notice in the omnibus order. Moreover, the trial judge indicated that he would not be favorably inclined towards any motion to amend absent material new facts. Under these circumstances, the trial court could properly find Shirley's claim of prejudice from the potential for amended charges too speculative to compel the extraordinary remedy of dismissal. Rohrich, 149 Wn.2d at 657.

Finally, Shirley contends that the trial court erred by failing to enter detailed findings of fact and conclusions of law regarding his motion to dismiss. He has cited no authority, however, requiring such findings when the trial court denies motions to dismiss under CrR 8.3 or CrR 4.7. And the record here is sufficiently developed to allow us to fully consider the issues raised without formal findings of the type Shirley contends are required.

Shirley fails in his burden to show prejudice to his right to a fair trial that required the extraordinary remedy of dismissal under either CrR 8.3 or CrR 4.7. The trial court did not abuse its discretion by denying the motion to dismiss.

We affirm.

Schindler, C.J.

WE CONCUR:

Leach, J.

Grosse, J.