

62074-6

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NO. 62074-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID A. OPPELT, Jr.,

Appellant.

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BRIEF OF RESPONDENT

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I. COUNTER-ASSIGNMENT OF ERROR

The trial court erred in entering conclusion of law no. 1:

The court finds that Bertha Olson's inability to recall the type of lotion used and who applied it to the victim's genital area as well as Bertha Olson's medical condition that affects her memory is sufficient to satisfy the defendant's burden of showing actual prejudice resulting from the delay in this case.

II. ISSUES

(1) To establish a due process violation on the basis of pre-charging delay, the defendant must show that the delay resulted in actual prejudice. Can this burden be satisfied by speculation that a State's witness might have given testimony that would have provided some additional support for a defense theory?

(2) Is a due process violation established by negligent pre-charging delay?

(3) Does the State's interest in prosecution outweigh the prejudice to the defendant, where any prejudice was speculative, and the defendant was still able to obtain a fair trial?

(4) In view of the speculative showing of prejudice, did the trial court abuse its discretion in denying the defendant's motion to dismiss under CrR 8.3(b)?

(5) At sentencing, defense counsel successfully objected to one proposed sentencing condition. She told the court that she

was not objecting to other proposed conditions. Can objections to those conditions be raised on appeal?

III. STATEMENT OF THE CASE

In May, 2001, 8-year-old A.R. was living with Bertha and Floyd Olson. 6/10 RP 86. She spent a week or more at the home of the defendant, David Oppelt, Jr. 6/10 RP 89-90. One morning, she awoke to discover that the defendant was taking off her shorts and underwear. He started rubbing her private area. It hurt because of his fingernails. She pretended to be asleep. The defendant stopped when Bonnie, a friend of A.R.'s mother, came into the room. 6/10 RP 92-96.

Later the same day, A.R. went to sleep on the couch. When she awoke, she again found that the defendant had unbuttoned her clothes and pulled them down. Again, he started rubbing her vaginal area. 6/10 RP 100-01.

That evening, A.R. returned to the Olson's house. She told Ms. Olson that her private area hurt. Ms. Olson asked her if anything had happened. A.R. told her that the defendant had touched her private area. 6/10 RP 104; 6/10 RP 51-52. Ms. Olson reported this to A.R.'s mother, who called police. 6/10 RP 57.

A.R. was subsequently examined by a forensic nurse and a nurse practitioner. 6/10 RP 50-52; 6/11 RP 157-60. She was also interviewed by a child interviewer, to whom she repeated the disclosures. 6/11 RP 203.

Bonnie Bortles testified that on May 14, 2001, she went to the defendant's house to pick up some papers. The door was answered by A.R.'s 4-year-old brother. Ms. Bortles went upstairs and found the defendant in bed with A.R. The defendant was lying on his back, with his hands outside of the blanket. A.R. had the blanket over her head. She didn't respond to anything that went on. 6/11 RP 111-17.

The defendant testified that he had never touched A.R. improperly. 6/12 RP 68. On the morning when Ms. Bortles came to his house, he had been asleep in his own bed. A.R. sometimes slept in his bed, but he wasn't aware that she was in the bed on that occasion. 6/12 RP 60-62. The defendant regularly fought with A.R.'s mother. A.R. was aware of this, and was frightened by it. 6/12 RP 57-59.

Other facts will be described in connection with specific issues.

IV. ARGUMENT

A. THE DEFENDANT FAILED TO ESTABLISH A DUE PROCESS VIOLATION RESULTING FROM PRE-CHARGING DELAY.

1. Facts.

a. Background.

Everett police concluded their investigation of this case in August, 2001. The detective's report said that it would be sent to the Prosecutor for review. The Snohomish County prosecutor, however, has no record of having received that report. On June 4, 2007, a CPS worker contacted the prosecutor to inquire about the case. The prosecutor then obtained the report and started reviewing the case. 1 CP 146-48. The information was filed on November 26, 2007. 1 CP 187.

The defense filed a motion to dismiss because of pre-charging delay. 1 CP 164-80. Defense counsel submitted her declaration in support of this motion. 1 CP 136-44. The prosecutor submitted her declaration in response. 1 CP 145-52. The court considered the motion on the basis of these two declarations. No witnesses testified at the pre-trial hearing.

At the end of the hearing, the court determined that there had been a negligent delay in filing charges. 1 CP 93, finding no.

18. The court concluded that this resulted in prejudice due to a loss of memory on the part of Ms. Olson. 1 CP 94, conclusion no. 1. It rejected other claims of prejudice. 1 CP 54-55, conclusions nos. 2-3. Applying a balancing test, the court concluded that the prejudice was insufficient to prevent the defendant from receiving a fair trial. 1 CP 95, conclusions no. 6-7.

b. Evidence at pre-trial hearing.

On May 16, 2001, A.R. told Bertha Olson that her pee-pee hurt. Ms. Olson asked if someone had been touching her privates. A.R. said that "Bugsy" had rubbed her privates with his hand and put his finger in it. The next day, Ms. Olson told A.R.'s mother, who contacted police. 1 CP 136-37. A.R. was examined by a nurse that day. The nurse observed redness and swelling in the labia majora. In a follow up examination on May 23, a different nurse observed very slight redness. 1 CP 137.

Ms. Olson was questioned by police and provided a written statement. According to an affidavit submitted at the pre-trial hearing, Ms. Olson's written statement said that she put some lotion on A.R.'s privates. The statement did not identify what this

lotion was.¹ The detective's summary of Ms. Olson's oral statements said that she gave the lotion to A.R. to put on herself.

On May 15, 2008, Ms. Olson was interviewed by a defense investigator, Kathy Heitt. Prior to this interview, Ms. Olson was not provided with a copy of her statement to police. She had not reviewed that statement since 2001. 1 CP 148. Defense counsel's affidavit described this interview as follows:

Bertha told Kathy that she didn't remember that Floyd [Olson] had picked up A.R. the night that she made the allegations; rather, she thought that Floyd wasn't even living with her at the time of A.R.'s accusations. She also couldn't remember being in North Dakota just before A.R. told her that David had touched her privates. Bertha does remember A.R. making the allegations, but she doesn't remember anything about the lotion that was applied to A.R.'s genitals. Bertha said that she doesn't even remember talking to a police officer about the allegations that A.R. made against David.

1 CP 140.

¹ The affidavits of both counsel referred to this written statement. 1 CP 136-37, 150. The statement was not, however, introduced at the hearing on the motion to dismiss. It was introduced at the child hearsay hearing. Child hearsay ex. 3. At trial, it was used in cross-examination but not offered as evidence. 6/11 RP 79.

The statement is dated May 19, 2001. With regard to the application of the lotion, it says: "I told her that I would put some lotion on her privates. . . We went to the bedroom and put lotion on her privates." Ex. 3 at 2. The statement is thus unclear as to who applied the lotion.

Ms. Olson was subsequently interviewed by the prosecutor.

According to the prosecutor's affidavit:

[A]fter reviewing her statements and excerpts from the police reports reciting her statements to police officers, Mrs. Olson said that the statement and report are relatively accurate, although she states that she did not actually put the lotion on A.R. as it says in her written statement, but rather gave the lotion to A.R. to put on herself, as it says in the detective's summary of her statement to him. Mrs. Olson also said that she believed the lotion she asked A.R. to put on was Vagisil and said she would not have asked A.R. to put a perfumed lotion on her private area.

1 CP 148.

On the basis of these affidavits, the court entered the following conclusion of law:

The court finds [sic] that Bertha Olson's inability to recall the type of lotion used and who applied it to the victim's genital area as well as Bertha Olson's medical condition that affects her memory is sufficient to satisfy the defendant's burden of showing actual prejudice resulting from the delay in this case.

1 CP 54, conclusion no. 1.

The court explained this conclusion in its oral decision:

[T]he court would focus on the issue with the type of lotion even though the State is arguing that that could benefit the defense, because they can argue it. They are precluded, though, from making a specific argument that we know it's this type of lotion and this type of lotion would definitely cause the redness and just taking that issue and having it be resolved.

Certainly, the defense at this point is precluded from any certainty with respect to that. And, clearly, we have a key witness whose memory is compromised, I don't think there can really be any serious debate about that, by the passage of time and the development of the medical condition which affects that memory.

6/8 RP 34-35.

The court proceeded to balance the State's interest in prosecution against the prejudice shown to the defendant. In applying this balancing, the court concluded that "the delay in prosecution will likely weigh against the State's interests more than the defendant's interests." 1 CP 95, conclusion no. 6.

Based on the above, the defendant has not met his burden of proving that he cannot receive a fair trial. The prejudice shown is just as likely to make it more difficult for the State to prove its case and is outweighed by the State's interest in prosecuting the defendant.

Id., conclusion no. 7

c. Evidence at trial.

At trial, A.R. testified that when she complained about pain in her vaginal area, she or Ms. Olson put some kind of lotion on it. "It was white, but it was like vitamin, vitamin something, like. That's all I can remember." 6/10 RP 104-05. Ms. Olson testified that she put Vagisil on A.R.'s genitalia. She would not use a perfumed lotion or a body lotion on a child's genitalia. 6/10 RP 51, 54-55.

On cross-examination, she said that she was unsure whether she or A.R. applied the lotion. 6/10 RP 79.

Ms. Olson was cross-examined about her statement to the defense investigator that she was unsure what the lotion was. 6/10 RP 87-89. Ms. Olson was also cross-examined about her lack of memory of various events around the time of the disclosure. 6/10 RP 80-83, 89-90. She testified that her medical condition causes her to forget things. 6/10 RP 61-63.

Darra Moore, a forensic nurse, testified that she examined A.R. on May 17, 2001. 6/10 RP 47-49. She observed that A.R.'s labia majora were red and swollen. 6/10 RP 51. Debra Vuillemot, a pediatric nurse practitioner, conducted a follow-up exam on May 23. 6/11 RP 143-44, 150. At that time, A.R.'s labia were only a little bit red. When Ms. Vuillemot applied a warm water wash, A.R. complained that it hurt. 6/11 RP 158.

Ms. Vuillemot testified that the redness and swelling could be caused by many different things. It could be caused by sexual abuse. It could be caused by bubble baths, which A.R. said she sometimes had. It could be caused by improper wiping. It could also be caused by use of a lotion. 6/11 RP 165-67. This kind of irritation "comes up quite a bit" in children of that age. 6/11 RP 179.

There was no way to know what caused it in this case. 6/11 RP 168-69. Ms. Moore testified that a perfumed cream could cause the irritation, but that Vagisil would not. 6/10 RP 63.

During trial, the defense sought to renew its motion to dismiss for pre-accusatorial delay. The trial judge was unsure whether that motion should be heard by him or by the judge who had heard the pre-trial motion. He asked the parties to contact the other judge to determine whether she had retained jurisdiction. If she had not, he was willing to hear the motion. Defense counsel agreed with this “logistical plan.” 6/12 RP 6-7. She did not, however, raise the issue again.

2. The Defendant Failed To Satisfy His Burden Of Establishing Prejudice.

The defendant claims that pre-charging delay resulted in a due process violation. The statute of limitations is the primary protection against possible prejudice resulting from pre-trial delay. United States v. Marion, 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). Nevertheless, “the Due Process Clause has a limited role to play in protecting against oppressive delay.” United States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). Delay will violate due process only if it “violates those

fundamental conceptions of justice which lie at the base of our civil and political institutions.” Id. at 790.

The Washington Supreme Court has applied a three-prong test for determining the existence of a due process violation:

First, the defendant must show the charging delay caused prejudice. If the defendant shows prejudice, the court then examines the State’s reasons for the delay. Finally, the court balances the delay against the defendant’s prejudice to decide if the delay violates the fundamental conceptions of justice

State v. Salavea, 151 Wn.2d 133, 139, 86 P.3d 125 (2004). Here, the defendant’s showing fails each prong of this test.

a. In light of the contradictory conclusions entered by the pre-trial judge and that judge’s inability to consider the evidence actually introduced at trial, this court should review the issue of prejudice de novo.

To establish a due process violation, the defendant must show that the charging delay caused prejudice. Salavea, 151 Wn.2d at 139; Lovasco, 431 U.S. at 790. The prejudice must be actual, not speculative. State v. Potter, 68 Wn. App. 134, 140, 842 P.2d 481 (1992). The burden to prove prejudice is “a heavy one.” United States v. Manning, 56 F.3d 1188, 1994 (9th Cir. 1995). Few defendants succeed in establishing prejudice. Lovasco, 431 U.S. at 796-97.

In the present case, the pre-trial judge entered contradictory conclusions as to prejudice. On the one hand, she concluded that the defendant satisfied his burden of showing actual prejudice. 1 CP 94, conclusion no. 1. On the other hand, she concluded that he had not satisfied his burden of proving that he could not receive a fair trial. 1 CP 95, conclusion no. 7. These issues are the same. “[D]ue process requires dismissal of a charge if it is shown at trial that precharging delay caused substantial prejudice to a defendant’s right to a fair trial.” State v. Chavez, 111 Wn.2d 548, 558, 761 P.2d 607 (1988). The judge’s conclusion that the defendant *could* receive a fair trial negates her conclusion that he suffered prejudice.

Ordinarily, the trial judge is considered to be in the best position to determine whether the defendant suffered actual prejudice. Potter, 68 Wn. App. at 141. This is because of her “unique opportunity to judge witness credibility and to sense the atmosphere of the trial.” State v. Haga, 13 Wn. App. 630, 634, 536 P.2d 648, review denied, 86 Wn.2d 1007 (1975), cert. denied, 425 U.S. 959, 96 S. Ct. 1740, 48 L. Ed. 2d 204 (1976). In the present case, however, the conclusion of prejudice was entered at a pre-trial hearing. Neither Ms. Olson nor any other witness testified at

that hearing. 1 CP 136-44, 145-52. The defense did not seek a ruling on this subject from the trial judge. 6/12 RP 7.

Under these circumstances, the reasons for deferring to a trial judge's ruling are entirely absent. The pre-trial judge who entered the conclusion concerning prejudice was not familiar with the "atmosphere of the trial." She had no particular opportunity to assess witness credibility. So far as the record shows, she has never even seen Ms. Olson. "[I]t is difficult to imagine how a pretrial showing of prejudice would not in almost all cases be to some significant extent speculative and potential rather than actual and substantial." United States v. Crouch, 84 F.3d 1497, 1516 (5th Cir. 1996) (en banc), cert. denied, 519 U.S. 1076, 117 S. Ct. 736, 136 L. Ed. 2d 676 (1997).

This court is in a *better* position than the pre-trial judge to assess prejudice. This court knows what testimony was given by the witnesses at trial; the pre-trial judge did not. This court is hampered by never having seen Ms. Olson or the other witnesses – but the pre-trial judge had the same impediment. Even if this court wished to defer to the judge's conclusions, there would be no way to determine which of the contradictory conclusions is entitled to deference. Consequently, this court should apply the normal rule

governing review of conclusions of law – they are reviewed de novo. State v. Chamberlin, 161 Wn.2d 30, 162 P.3d 389 (2007).

b. Prejudice cannot be established by speculation that a witness might have given testimony favorable to the defense.

The pre-trial judge held that prejudice had been established by Ms. Olson’s “medical condition that affects her memory” and her “inability to recall the type of lotion used and who applied it to the victim’s genital area.” 1 CP 54, conclusion no 1. Neither of these facts is sufficient to establish prejudice.

The possibility that memories will fade is not in itself enough to demonstrate prejudice. State v. Bernson, 40 Wn. App. 729, 764, 700 P.2d 758 (1985). The defendant must show that the loss of memories meaningfully impaired his ability to defend himself. This requires evidence of how the witness would have testified had her memory not dimmed. United States v. Sherlock, 962 F.2d 1349, 1354 (9th Cir. 1989), cert. denied, 506 U.S. 958, 113 S. Ct. 419, 121 L. Ed. 2d 342 (1992).

Ms. Olson was the first person to whom the victim disclosed the abuse. She testified that the victim described the abuse and identified the defendant as the perpetrator. 6/11 RP 51-53. With regard to this testimony, the defendant’s main objective was to

discredit it. The charging delay gave him a way to do so. In closing argument, defense counsel strongly attacked Ms. Olson's testimony on the basis of her poor memory. That loss of memory did not impair the defense; it enhanced it. 6/12 RP 120-23.

The pretrial judge believed that the defense was impaired by the loss of potential testimony concerning the lotion that was applied to the victim's vaginal area. As the evidence developed at trial, the issue of the lotion became largely irrelevant. A nurse practitioner testified that genital irritation was common in young girls. 6/11 RP 179. It could result from sexual abuse, but it could also result from many innocent causes. 6/11 RP 165-66. There was no way to determine the cause of the irritation in this case. 6/11 RP 168-69. Thus, completely apart from any evidence about the lotion, the defense succeeded in refuting any claim that the irritation was indicative of sexual abuse.

Additional evidence concerning the identity of the lotion would have added essentially nothing to this showing. The pretrial court was concerned that Ms. Olson might have testified that the lotion was something that would cause irritation. 6/5 RP 34. Even if that hypothesis were correct, it would beg the question: why was the lotion applied in the first place? The only evidence was that the

lotion was applied because the victim's genitals were irritated. 6/10 RP 104-05; 6/11 RP 51. The irritation might theoretically have been *aggravated* by the lotion, but it could not have been *caused* by the lotion. It must have been caused by some prior event – such as sexual abuse, or bubble baths, or poor hygiene. Even if there had been additional evidence about the identity of the lotion, the defense would have been back to the same situation – explaining that the irritation could result from many innocent causes.

In any event, the court's concern is based totally on speculation. Ms. Olson testified that the lotion was Vagisil. 6/11 RP 55. The defense was able to attack this testimony on the basis of her lost memory. 6/12 RP 121-22. The delay thus worked to their benefit. The delay would be detrimental only if, at some earlier time, Ms. Olson would have said that the lotion was something else. There is no evidence that she ever said or would have said such a thing. A court could always speculate that some witness, if questioned earlier, might have given evidence opposite to her trial testimony. Speculation about missing testimony is not enough to establish prejudice. Potter, 68 Wn. App. at 142-43.

On a comparable record, this court overturned a finding of prejudice in State v. Ansell, 36 Wn. App. 492, 675 P.2d 614 (1984).

In that case, there was a 3½ year delay between the alleged sex offense and the filing of charges. The trial court found that the defendant was prejudiced because of several factors, including the loss of witness memories. This court held that this possibility was not sufficient to demonstrate that the defendant could not receive a fair trial. Even giving “great weight” to the trial court’s finding of prejudice, this court found that there was insufficient evidence to support it. Id. at 498-99.

Similarly in the present case, the record does not support the pre-trial judge’s conclusion that the delay resulted in prejudice. That conclusion rests on unsupported speculation that a witness would have given testimony favorable to the defense. There is no factual basis for this speculation. The judge herself concluded that “the delay in prosecution will likely weigh against the State’s interests more than the defendant’s interests.” 1 CP 55, conclusion no. 6. The events of trial bore out this prediction. The defendant has failed to show that the delay deprived him of a fair trial. Since there was no showing of prejudice, there is no due process violation. Salavea, 151 Wn.2d at 139.

3. A Negligent Pre-Trial Delay Is Not Sufficiently Egregious To Establish A Due Process Violation.

If the defendant succeeds in establishing prejudice, the next step is to establish the reason for the delay. The pre-trial judge found that the delay was negligent. 1 CP 93, finding no. 18. The State does not challenge this finding. Nevertheless, negligence is insufficient to establish a due process violation.

The United States Supreme Court has not specifically defined the circumstances under which prejudicial delay will violate due process. Lovasco, 431 U.S. at 796-97. In other contexts, however, it has held that due process is not implicated by official negligence. Davidson v. Cannon, 474 U.S. 344, 106 S. Ct. 668, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986) (negligent failure to protect prisoner from other inmates); Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662(1986) (negligently creating conditions that exposed prisoner to physical harm).

[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscious shocking level.

County of Sacramento v. Lewis, 523 U.S. 833, 849-50, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). Reckless conduct may or may not be sufficient to establish a due process violation, depending on the context. Compare id. at 853-54 (holding that reckless conduct in police pursuit does not constitute due process violation), with id. at 849-50 (dicta stating that deliberate indifference to medical needs of pre-trial detainee would constitute due process violation). The Pennsylvania Supreme court has applied this analysis in the context of pre-charging delay. Commonwealth v. Scher, 569 Pa. 284, 313 n. 15, 803 A.2d 1204 (2002), cert. denied, 538 U.S. 908, 123 S. Ct. 1488, 155 L. Ed. 2d 228 (2003); see In re Taylor, 132 Wn. App. 827, 834, 134 P.3d 254 (2006), review denied, 159 Wn.2d 1006 (2007) (citing Lewis in holding that due process was not violated by delay in initiation of sexually violent predator proceedings).

The Washington Supreme Court has never decided whether a negligent pre-charging delay can violate due process. In one case, the court said: "It has been suggested that negligently failing to bring charges promptly may also establish a constitutional violation." State v. Calderon, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984). Subsequent cases, relying on Calderon or its progeny,

have said that negligent delay “may” violate due process. Salavea, 151 Wn.2d at 139; State v. Dixon, 114 Wn.2d 857, 865, 792 P.2d 137 (1990); State v. Lidge, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989); State v Alvin, 109 Wn.2d 602, 746 P.2d 807 (1987). The Supreme Court has never found a due process violation resulting from pre-trial delay, even when the defendant suffered prejudice from the loss of juvenile jurisdiction. Dixon, 114 Wn.2d at 864 (“Washington courts have never vacated a conviction due to a loss of juvenile court jurisdiction”).

Subsequent to Dixon, Division Two of this court held that due process was violated by a negligent delay that resulted in the loss of juvenile jurisdiction. State v. Frazier, 82 Wn. App. 576, 818 P.2d 964 (1996). The court acknowledged that the weight of authority was to the contrary. Id. at 590 n. 14 (citing 10 cases holding negligent delay insufficient).² The court believed, however,

² The footnote in Frazier also cites three cases holding that negligent delay did or could violate due process. Howell v. Barker, 904 F.2d 889 (4th Cir.), cert. denied, 498 U.S. 1016, 111 S. Ct. 990, 112 L. Ed. 2d 595 (1990); United States v. King, 593 F.2d 269 (7th Cir. 1979); United States v. Townley, 665 F.2d 579 (5th Cir.), cert. denied, 456 U.S. 1010, 102 S. Ct. 2305, 73 L. Ed. 2d 1307 (1982). All of these cases were decided prior to the U.S. Supreme Court’s decision in Lewis. Townley has been overruled. United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996) (en banc), cert. denied, 519 U.S. 1076, 117 S. Ct. 736, 136 L. Ed. 2d 676 (1997). As for

that it was bound to follow the decision of the Washington Supreme Court. Id. at 591.

This analysis was wrong for two reasons. First, as already discussed, the Washington Supreme Court has never resolved this issue. It has only suggested or assumed that negligence *may* be sufficient to establish a violation.

Second, this is an issue of Federal constitutional law. The United States Supreme Court has resolved this issue, by holding that negligence is insufficiently egregious to violate due process. Lewis, 523 U.S. at 849-50. With regard to issues of Federal law, decisions of the U.S. Supreme Court are binding on Washington courts. Tricon, Inc. v. King County, 60 Wn.2d 392, 394, 374 P.3d 174 (1962); Cooper v. Aaron, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). This court should therefore reject the holding of Frazier. Because the delay in the present case was only negligent, it did not violate due process, regardless of other factors.

Howell, a different panel of the same court has expressed doubts about the validity of its holding. Jones v. Angelone, 94 F.3d 900, 904-05 (4th Cir. 1996).

4. Since Any Prejudice To The Defendant Was Speculative, The Pre-Trial Judge Correctly Concluded That The State's Interest In Prosecution Outweighed That Prejudice.

The pre-trial judge balanced the prejudice to the defendant against the State's interests in prosecution. In conducting this balancing, the court pointed out that the delay was likely to weigh against the State's interests more than the defendant's. Based on this, the judge concluded that the defendant had not met his burden of proving that he cannot receive a fair trial. 1 CP 95, conclusions no. 6-7.

The defendant claims that if the State fails to justify the delay, no balancing is proper. This court has held to the contrary. Even when a delay is shown to be negligent and prejudicial, balancing must be carried out:

After the defendant has made the requisite showing of prejudice, the trial court must analyze whether the prejudice warrants dismissal of the prosecution. In its analysis, the court must consider the reasons for the delay and the degree of prejudice to the defendant. That is, the State's reasons for the delay must be balanced against the resulting prejudice to the defendant.

State v. Schifferl, 51 Wn. App. 268, 272, 753 P.2d 549 (1988).

This conclusion is implicit in the balancing test. Investigative delay does not violate due process, even if it results in prejudice. Lovasco, 431 U.S. at 796. If there has been no deliberate or

negligent delay, there is no violation. Dixon, 114 Wn.2d at 866. Since justified delay is *not* subject to balancing, the only thing that *is* subject to balancing is delay that is not adequately justified.

In the present case, as discussed above, the prejudice to the defendant was speculative at best. The defendant could and did mount a vigorous defense to the charges. The delay and resulting loss of memory was used as the basis for a strong attack on State's witnesses. 6/12 RP 120-23, 129-31. Negligence, although unfortunate, is at best a weak basis for finding a due process violation. See Lewis, 523 U.S. at 849-50. In view of all the factors, the pre-trial judge correctly found that the State's interest in prosecution outweighed any prejudice to the defendant.

B. SINCE ANY PREJUDICE RESULTING FROM THE DELAY DID NOT MATERIALLY AFFECT THE DEFENDANT'S RIGHT TO A FAIR TRIAL, THE COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO DISMISS UNDER CrR 8.3(B).

The defendant argues that the trial court should have dismissed the case under CrR 8.3(b). To justify dismissal, the defendant must show that there was (1) "arbitrary action or governmental misconduct" and (2) "prejudice affecting the defendant's right to a fair trial." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Dismissal of charges is an extraordinary remedy available only where there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial.

Id. at 653. The trial court's decision will be reviewed for manifest abuse of discretion. Id. at 654.

This rule can authorize dismissal on the basis of unjustified pre-trial delay. Like the due process standard, however, dismissal requires a showing of actual prejudice. A speculative showing of prejudice is insufficient to justify dismissal. State v. McConville, 122 Wn. App. 640, 647, 94 P.3d 401 (2004).

As discussed above, the showing of prejudice in the present case was speculative at best. Even if some prejudice was demonstrated, the trial court correctly concluded that it did not prevent the defendant from receiving a fair trial. 1 CP 95, conclusion no. 7. The defendant could and did mount a vigorous defense, which was aided by arguments based on the lapse of time. The court did not abuse its discretion in denying the motion to dismiss under CrR 8.3(b).

C. SINCE THE DEFENDANT WAIVED OBJECTIONS TO PROPOSED SENTENCING CONDITIONS AT TRIAL, HE CANNOT RAISE THOSE OBJECTIONS ON APPEAL.

The pre-sentence report proposed several conditions of community custody. 2 CP ____ (Docket no. 67, Pre-Sentence

Investigation at 9-10). At sentencing, defense counsel objected to one of these conditions: the one that would preclude the defendant from frequenting establishments where alcohol is the chief commodity for sale. The prosecutor did not oppose this objection. The court agreed not to impose this condition. 7/16 RP 29-30.

In connection with this objection, defense counsel stated: "As far as the other drug related conditions, those are all things that are illegal anyway, so I don't have any objection to that." 7/16 RP 29. On appeal, the defendant nevertheless argues that these conditions were improper.

This argument should not be considered. When a defendant affirmatively elects not to take advantage of the mechanism for asserting a right, he thereby waives objection to the alleged violation of that right. The objection cannot thereafter be raised on appeal. This is true even if the issue is of constitutional magnitude. For example, a defendant's withdrawal of his motion to suppress evidence waives any claims of unlawful seizure. State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983).

Here, the mechanism for asserting the defendant's rights was by objecting to proposed sentencing conditions. Defense counsel was aware of this mechanism. She successfully objected

to one proposed condition. She affirmatively stated, however, that she was not objecting to the others. As a result, the challenge cannot be raised on appeal.

If the issue can be raised, the State agrees that the condition related to pornography was improper. As the defendant points out, this condition is identical to the one later condemned in State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

The State also agrees that the conditions relating to drug use were not shown to be “crime-related.” Both the pre-sentence report and the defendant’s psychosocial assessment said that the defendant was abusing drugs around the time of the crime. 2 CP ____ (docket no. 66, Psychosocial assessment at 5); 2 CP ____ (docket no. 67, Presentence investigation at 6, 8). These reports do not, however, demonstrate any connection between that abuse and the crime.

V. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on August 28, 2009.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: C. Blarum #19354, for
SETH A. FINE, #10937
Deputy Prosecuting Attorney
Attorney for Respondent

Filed in Open Court

6/9, 2008

SONYA KRASKI
COUNTY CLERK

By [Signature]
Deputy Clerk



CL12848640

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

OPPELT JR., DAVID ALLEN

Defendant.

No. 07-1-03476-0

FINDINGS OF FACT AND CONCLUSIONS OF LAW
DENYING DEFENSE MOTION TO DISMISS FOR
PREACCUSATORIAL DELAY

On JUNE 5, 2008 a hearing was held on the defendant's motion to dismiss for preaccusatorial delay. The court considered the declarations of Rachel Forde and Cindy Larsen and the affidavit of probable cause and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. The investigation into the allegations in this case began in May 2001.
2. The investigation was complete on August 2, 2001.
3. Everett Police Detective Jensen believes he referred the case to the Snohomish County Prosecutor's office in August 2001.
4. The Snohomish County Prosecutor's office has no record of receiving the case from Everett Police Department.
5. On June 4, 2007, a CPS worker inquired of the Prosecutor's Office about the case.

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6. The Prosecutor's Office contacted Everett Police Department and received a copy of the reports on June 5, 2007.
7. The case was assigned to Deputy Prosecuting Attorney Ed Stemler on June 12, 2007.
8. Ed Stemler left the special assault unit on June 25, 2007 and the case was assigned to Deputy Prosecuting Attorney Cindy Larsen.
9. During the months of June and July the Prosecutor's office attempted to contact the victim.
10. An appointment was eventually scheduled for July 26, 2007.
11. The victim did not appear for that appointment and additional attempts were made to contact the victim.
12. After another failed attempt at an interview, new appointment was eventually made and the Deputy Prosecutor met with the victim on September 6, 2007.
13. During this period, the Everett Police Department made contact with the witnesses listed in the original report to make sure that the witnesses were available and able to testify.
14. Charges were filed on November 26, 2007 and the defendant was set for arraignment on December 6, 2007.
15. The defendant failed to appear on December 6, 2007 and a warrant was issued.
16. The warrant was quashed and the defendant arraigned on January 14, 2008.
17. The court finds that the delay in filing was not intentional and there was no malfeasance on the State's part, the case appears to have "slipped through the cracks".
18. The court finds that the delay in filing charges was negligent.
19. The Court finds that witness Bertha Olson has, in-between 2001 and the present time, begun to suffer from hypothyroidism and this has affected her memory.

20. Witness Bertha Olson is able to remember the victim's disclosure of the abuse, what the victim said, and that she took the victim to the hospital, but remembers little else.
21. Bertha Olson allegedly either put lotion on the victim's genital area or told the victim to put lotion on her genital area approximately one day before the victim was examined by a SANE nurse.
22. Bertha Olson believes the "lotion" was vagisil, but does not specifically remember.
23. Bertha Olson is also having trouble remembering if her husband, Floyd, was living with her at the time of this incident, but this can be established through other witnesses.
24. In between 2001 and 2007, Detective Jensen's field notes were lost or destroyed.
25. It is unknown, ^{if} ~~but unlikely that~~ there would be anything helpful to the defense in those notes.
26. The State has the following interests in prosecuting this case: the administration of justice, accountability, protecting society, the victim and other children from serious offenses like those in this case.

II. CONCLUSIONS OF LAW

1. The court finds that Bertha Olson's inability to recall the type of lotion used and who applied it to the victim's genital area as well as Bertha Olson's medical condition that affects her memory is sufficient to satisfy the defendant's burden of showing actual prejudice resulting from the delay in this case.
2. The court finds that the loss of Detective Jensen's field notes is not sufficient to show actual prejudice as it is only speculative that the notes would have been helpful to the defense.

3. The court finds that the defense's inability to interview the victim at the time of the report is also insufficient to show actual prejudice as it is only speculative that she would have said something other than what she is saying now.
4. Having met his initial burden of showing that the delay in this case caused actual prejudice to his defense, the court moves to the next prong, which is the reason for the delay.
5. The court finds that the delay between August 2001 and June 2007 resulted from the case "slipping through the cracks" between the Everett Police Department and the Snohomish County Prosecutor's Office. The court finds this delay was negligent, and not intentional.
6. The court then moves to the third prong of the test, which is the Balancing of the State's interests in prosecution against the prejudice shown to the defendant. In this case the court finds that the State's interests outweigh the prejudice shown to the defendant for the following reasons: the loss of Bertha Olson's memory, the issue with the lotion, and the delay in prosecution will likely weigh against the State's interests more than the defendant's interests; the defense will still be able to argue that the lotion applied may have caused the redness on the victim's genitalia, the issue about Floyd can be reconciled by other witnesses, the loss of the field notes is unlikely to have actually prejudiced the defendant, the State will have much more of a challenge in proving this case due to the passage of time.
7. Based on the above, the defendant has not met his burden of proving that he cannot receive a fair trial. The prejudice shown is just as likely to make it more difficult for the State to prove its case and is outweighed by the State's interest in prosecuting the defendant.

8. Therefore, the defendant's motion to dismiss under the Due Process clause, the Washington State Constitution, and CrR 8.3(b) is denied.

DONE IN OPEN COURT this 6th day of June, 2008.

Allyson
JUDGE FORDE

Presented by:

Cindy A. Larsen
CINDY A. LARSEN, #26280
Deputy Prosecuting Attorney

Copy received this 6th day of June, 2008.

Rachelle Forde
RACHELLE FORDE, #37104
Attorney for Defendant

David Allen Oppelt Jr.
DAVID ALLEN OPPELT JR.
Defendant

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

THE STATE OF WASHINGTON,

Respondent,

v.

DAVID A. OPPELT, Jr.,

Appellant.

No. 62074-6-1

AFFIDAVIT OF MAILING

2009 AUG 31 11:11:11
STATE OF WASHINGTON
CLERK OF COURT

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 28th day of August, 2009, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

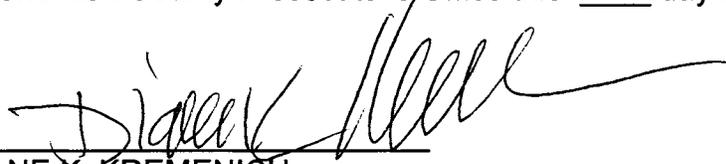
WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 28th day of August, 2009.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit