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No. 63426-7

King County Superior Court
Cause No.: 08-1-12723-7SEA

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

CITY OF KENT,

Appellant,

v.

DAVINDER S. SANDHU,

Respondent.

BRIEF OF APPELLANT

Michele D. Walker
Prosecuting Attorney
For Tom Brubaker
City Attorney
Attorneys For Petitioner

Michele D. Walker, WSBA#29266
City Attorney's Office
220 Fourth Avenue South
Kent, Washington 98032
(253) 856-5778

ORIGINAL

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RULES

CrRLJ 8.3(b)5,7,8

A. ASSIGNMENT OF ERROR

The trial court erred by dismissing the case against the Respondent because the complaining witness was not physically present in the courthouse, even though the City indicated that it was ready to proceed and the witness was en route to the court. The trial court's failure to consider intermediate remedial steps was an abuse of discretion.

B. STATEMENT OF THE CASE

The City of Kent filed with the Kent Municipal Court(trial court) one count of Assault 4 with Sexual Motivation against Davinder S. Sandhu(respondent) on December 3, 2007. CP 4. An arraignment date was set for January 15, 2008. CP 4. The respondent requested and received a continuance of the arraignment date to February 11, 2008. CP 4. The respondent plead not guilty, and was released on personal recognizance the same day. CP 4. Defense counsel, Robert Leen, filed a notice of appearance on February 19, 2008, and a pre-trial hearing was scheduled for March 3, 2008. CP 4-5. On March 3, 2008, respondent requested and received a continuance of the pre-trial hearing to April 18, 2008. CP 5. The case was then set for trial during the July jury term. CP 5.

On July 15, 2008, the parties appeared at a readiness hearing and requested the case be set for trial on July 22, 2008. CP 5. On the day of trial the City requested a continuance of the trial date due to the victim being out of town until the end of the week. CP 6. The defendant objected to the continuance and moved for dismissal of the case. CP 6. The court reserved ruling on defendant's motion for dismissal because it wanted a reason for the witness being out of town and rescheduled the case for August 5, 2008. CP 6. The parties appeared on that date and the City was able to provide proof of a boarding pass for the victim's trip out of town. CP 6. The defendant renewed his motion to dismiss and the court denied the motion at that time and reserved the issue for a second time. CP 6. Due to defense counsel's schedule and the unavailability of a different witness, the court found good cause for a continuance of the trial date to the September jury term. CP 6.

The parties appeared for trial on September 8, 2008. CP 6-7; 35. The defendant argued to the court that the City was not ready to go forward because the victim was not present. CP 7; 35-36. The City indicated that they were ready to go forward with the trial and that the prosecutor had just spoken with the victim and that she was on her way to court. CP 7; 36. The City then discussed issues having to do with the

prior continuances of the case and the reasons for those continuances. CP 36-38. The City was able to provide proof to the court that the victim had been subpoenaed for the trial date and that she was aware of the date. CP 38-39. The court inquired why the victim had not appeared at 9:00 a.m. as was indicated on the subpoena. CP 39. The City indicated that they placed the victim "on-call", but also indicated that the prosecutor had had a phone conversation with the victim ten minutes prior and that she was on her way. CP 39. The defendant again moved for dismissal due to a disregard for "the defendant's time, their attorney's time, the court's time" and because the City was not ready to go forward. CP 40. The City responded by pointing out that a jury had not been selected nor had opening statements occurred. CP 40. The City presented additional arguments and explanations as to why the City was, in fact, ready to proceed and why the victim was not physically present in the courtroom but rather, on her way to court. CP 40-42. The court then inquired of its clerk whether the prospective jurors were present and ready to proceed. CP 42. The clerk indicated that the jurors were being checked in but technically ready. CP 42. Judge Robert McSeveney then dismissed the case because the case originated in September of 2007, the victim's subpoena required the victim to be present at 9:00 a.m. and because she

was not present, the City was not able to proceed. CP 42-43. The court indicated that the City does not have the discretion to tell its witnesses what time to appear or not in lieu of a subpoena. CP 43. The City argued that dismissal of the case was premature and an extreme remedy. CP 44. The court discussed some outstanding warrants for the victim out of other jurisdictions and indicated that the presence of these warrants indicated a tendency of the victim not to appear for court dates. CP 44-45. The court granted defendant's motion to dismiss by stating:

But if your witness had been here we could have got – we could have started this trial. And we've got other cases that need to proceed to jury. My biggest concern is that witness was not here at 9:00 when they were subpoenaed to be here. It's now 9:45. And I think the City has an obligation to get your witnesses here ready to go. You know, I guess it's a command decision at your point, but I'm going to dismiss the case.

CP 46.

The City of Kent appealed the ruling to King County Superior Court where the trial court's dismissal of the case was affirmed. CP 73-74. The City of Kent then filed a motion for discretionary review with this court and review was granted.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PREMATURELY DISMISSED THE CASE WITHOUT CONSIDERING ALTERNATIVE REMEDIES.

A trial court's decision to dismiss, whether within or outside the confines of the rule(s), must be reviewed based upon an abuse of discretion standard. State v. Koerber, 85 Wash.App. 1, 2, 931 P.2d 904 (1996). A trial court may not dismiss under CrRLJ 8.3(b) unless a defendant show by a preponderance of the evidence arbitrary action or government misconduct and prejudice affecting the defendant's right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 683 (2003). [CrRLJ] 8.3(b) is designed to protect against arbitrary action or governmental misconduct, and not to grant courts the authority to substitute their judgment for that of the prosecutor. State v. Cantrell, 111 Wn.2d 385, 390, 758 P.2d 1 (1988). A trial court's authority to dismiss under CrRLJ 8.3(b) has been limited to "truly egregious cases of mismanagement or misconduct by the prosecutor." Koerber, 85 Wash.App. at 5. Dismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps. Koerber, 85 Wash.App. at 4.

The court erred in dismissing this case. While it was obvious that

the City's victim was not physically present in the court at the time the trial began, there is no information that the City was not able to otherwise proceed with the trial. The court ruled that the City was not ready to proceed to trial due to the victim not being present at 9:00 a.m., however, the City indicated otherwise. CP 36-41. The City indicated that they were ready to proceed by way of picking the jury and presenting opening statements on the case. CP 44. Moreover, the City indicated that they had had personal contact with the victim a mere 10 minutes prior and confirmed that she was in fact, on her way to the court. CP 38; 41.

The defendant provided no evidence of any prejudice to him in presenting his defense caused by the victim not being present at that particular point in the trial. The only statement by the defendant that vaguely intimates prejudice was regarding the victim's disregard for the time of the defendant, the attorneys or the court. CP 40. Moreover, he failed to show by a preponderance of the evidence, and the trial court failed to articulate, any arbitrary action or governmental misconduct on the part of the City that supported the ultimate dismissal. The trial court only stated that because the witness "was not here at 9:00 when they were subpoenaed to be here," the case was dismissed. CP 46

The question in this case is similar to that presented in State v.

Koerber, supra. There the trial court dismissed the case not based on CrRLJ 8.3(b) but rather on the basis of want of the State to prosecute properly due to a witness's unavailability due to illness. In reversing the trial court's dismissal of the case, the panel noted:

The State did not engage in any unfair "gamesmanship," or intentional acts, to prevent the court from administering justice. The State's conduct did not warrant dismissal of its case against Koerber, and was an untenable ground for dismissal. The trial judge ignored reasonable alternatives when he readily ordered the extraordinary remedy of dismissal. Dismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps.

Id. at 4,5.

In State v. Chichester, 141 Wash.App. 446, the dismissal of a case by the trial court was upheld in part, because the trial court did not prematurely dismiss the case, as happened in Koerber. Instead, the trial court was willing to consider alternatives to the dismissal but the State declared itself unready to proceed and essentially invited the court to grant the defense motion to dismiss.

The City conceded that had the victim not been present at the point in the trial where her testimony was to be taken, the court may have a basis to dismiss the case. CP 44. But that was simply not the situation in

this case. Rather than consider the reasonable alternative of proceeding and waiting to see whether the victim appeared to testify, the trial court opted for the extreme remedy of a dismissal. Because other options were available, and because there was no prejudice to the defendant in the presentation of his defense, the trial court's decision was in error, unreasonable and contrary to case law and CrRLJ 8.3(b). The erroneous and unreasonable ruling must not be endorsed by this court, and this case must be remanded to the lower court for trial.

D. CONCLUSION

The appellant, City of Kent, respectfully requests that this Court reverse the ruling of Superior Court finding that Kent Municipal Court did not abuse its discretion in dismissing the case against Respondent. The appellant, City of Kent, respectfully requests that this Court reverse the ruling of Kent Municipal Court dismissing the case based on the perceived inability of the City to proceed to trial. The appellant further asks that this Court remand this case back to Kent Municipal court for trial.

RESPECTFULLY SUBMITTED, this 8th day of October, 2009.

By: 
MICHELE D. WALKER, WSBA#29266
Prosecuting Attorney
City of Kent

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

REC'D

OCT 09 2009

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

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No. 62407-5-1

STATEMENT OF
ADDITIONAL
AUTHORITIES
(THIRD)

Pursuant to RAP 10.8, appellant respectfully cites the following authority related to appellant's issue regarding RCW 43.43.7541 (DNA collection fee) and RCW 10.01.040 ("savings statute"):

State v. Christensen, 153 Wn.2d 186, 195, 102 P.3d 789, 793 (2004) (courts may resort to dictionary definitions for guidance when faced with undefined plain statutory terms).

Black's Law Dictionary 661 (7th ed. 1999) ("forfeiture" defined as "the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty" or "[s]omething ([especially] money or property) lost or confiscated by this process, a penalty;" forfeiture may be civil or criminal).

DATED this 9TH day of October, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051
Attorneys for Petitioner

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