

64015-9

64073-9

NO. 64073-9-I

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

STATE OF WASHINGTON,

Appellant,

v.

LEROY OLSEN,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable John M. Meyer, Visiting Judge

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION ONE

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LENELL NUSSBAUM
Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

DIANA LUNDIN
Fox Bowman Duarte
1621 114th Ave. S.E., Suite 210
Bellevue, WA 98004
(425) 451-1995

Attorneys for Respondent

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A. ISSUE PRESENTED

Should this Court affirm the trial court's discretionary ruling excluding the state's expert evidence offered the day of trial -- contrary to the discovery rules, the omnibus order, a pretrial order, and the state's own representations in court that it would not present such evidence and it was ready for trial without such evidence -- when the proposed expert evidence required the defense to obtain an expert to respond?¹

B. STATEMENT OF THE CASE

1. Substantive Facts

On March 23, 2008, Leroy Olsen was driving in Island County when his car left the road and hit a tree. Kimberly Blain, his passenger and fiancée (now Kimberly Olsen, his wife), was injured.

¹ Respondent objects to appellant's statement of Issues, Appellant's Brief at 3, as follows:

1. There is nothing on this record to suggest the state's proposed expert evidence was "routine."

2. There is nothing in the law that requires defense counsel to "accept" or request a continuance, when the state did not request one and the court did not order one.

3. There is no relevance to whether the expert testimony the state proposed was "legally gathered." No one has ever alleged it was somehow illegally obtained.

An acquaintance who came upon the accident found Mr. Olsen standing in the roadway appearing dazed. He told her he swerved to avoid a deer in the road. CP 137.

Medical staff strapped Mr. Olsen to a backboard before transporting both people to the hospital. RP(1/21) 19-20, 27. Mr. Olsen's blood was drawn at 8:30 p.m. RP(8/4) 18.

2. Procedural Facts

a. Charge

Following investigation, on September 22, 2008, the state charged Mr. Olsen with one count of vehicular assault:

On or about March 23, 2008, in the County of Island, State of Washington, the above-named Defendant did operate or drive a vehicle

- (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or
- (b) while under the influence of or affected by intoxicating liquor or any drug; and/or
- (c) while under the combined influence of or affected by intoxicating liquor and any drug,

and did cause substantial bodily harm to another, to wit: Kimberly Blain; contrary to Revised Code of Washington 46.61.522(1)(b).

Deputy Prosecuting Attorney Patrick McKenna signed the felony Information. CP 140-41.

b. Omnibus Hearing, November 3

The Island County judges recused themselves from hearing the case. All pretrial motions were heard in Skagit County Superior Court. The trial was to be held in Island County Superior Court with a judge visiting from Skagit County. Counsel had to coordinate scheduling all hearings with the court administrators of the two respective courts. Supp. CP (Subno. 23).

At the omnibus hearing on November 3, 2008, the court granted the defense motion requiring the state:

17. To advise whether any expert witness will be called and, if so, supply:
 - (a) Name of witness, qualifications and subject of testimony;
 - (b) Report.

CP 131. The prosecutor approved the order. CP 134. Trial was to begin February 3, 2009, with a readiness hearing January 21, 2009. Supp. CP (Subno. 24).

c. Motion to Compel

The state listed four expert witnesses: Washington state trooper B.D. Thompson, Lisa Noble

of the state toxicologist's office, and two medical doctors, Dr. Livermore and Dr. Plastino. CP 126-29.

The defense moved to compel the state to provide all reports from these experts regarding their anticipated testimony and opinions, as required by the omnibus order. CP 101-25. As to Lisa Noble, DPA McKenna responded in writing:

Lisa Noble. Ms. Noble may testify regarding her testing of the defendant's blood, including, but not limited to, the result of the test. Ms. Noble produced a report containing the results of her testing, which has previously been disclosed to the defendant.

CP 86.

d. Pretrial Hearing, January 21

On January 21, 2009, Judge Needy heard pretrial motions in Skagit County. RP(1/21). Deputy prosecutor McKenna noted that he had not yet received all reports from the first responders to the scene. This was a reason for the agreed continuance. RP(1/21) 7.

As to the Motion to Compel, defense counsel specifically noted the only report the state provided from Ms. Noble addressed the results of the blood test. CP 125. He asked if she would be

offering any other opinions. RP(1/21) 10-11. Mr. McKenna explained to the court and counsel, on the record in open court, that he did not have any additional opinions and did not expect any additional expert testimony from Trooper Thompson or Ms. Noble "outside the four corners" of the reports he had provided. RP(1/21) 6-11.

The court said: "I'll hold you to that, unless a new report is created. And, in which case, we'll go from there." RP(1/21) 10.

Ms. Noble's report did not include any reference to retrograde extrapolation. CP 125. Judge Needy specifically asked the prosecutor if there would be any evidence of extrapolation. He noted the blood draw timing and asked if there was "someone who may testify what their opinion was of the [blood alcohol] level at the time of the accident." DPA McKenna answered: "Your Honor, at this point, no." RP(1/21) 12.²

² The record does not support the state's assertion that Mr. McKenna had "not yet explored" the subjects of extrapolation and alcohol toxicology evidence. Appellant's Brief at 18. Indeed, he had been the prosecutor on the case since the charge was filed. CP 140-41, 130-35. The court specifically praised both counsel for their thorough briefing and argument on the motions. RP(1/21) 35.

The court approved the parties' agreement to continue the trial to a date they would arrange with the court administrators. The defendant waived his speedy trial right until August 31, 2009. CP 78; RP(1/21) 5-6. The court set a trial date of August 4, 2009. CP 76-77.

e. Readiness Hearing, July 21

At the readiness hearing July 21, 2009, DPA Colleen Kenimond informed the court without qualification the state was ready to proceed. RP(7/21) 2. The defense also was ready. RP(7/21) 3. The state did not mention expert witnesses or reports. The court confirmed trial to begin Tuesday, August 4. RP(7/21) 8.

f. Notice from State, July 31

Late on Friday, July 31, ten days after saying it was ready for trial and 1-1/2 court days before trial, the state notified defense counsel its expert Lisa Noble would testify about retrograde extrapolation. RP(8/4) 10; CP 59. It did not provide an additional expert report on the topic or any offer of proof. CP 24.

g. Trial, August 4

Skagit County Judge John M. Meyer traveled to Island County for trial on Tuesday, August 4, 2009. The court had assembled 35 jurors. RP(8/4) 4.

In limine, the defense moved to exclude expert evidence of retrograde extrapolation. The court reviewed a transcript of the pretrial hearing from January 21. RP(8/4) 4, 10.

The court concluded the late notice prevented the defense from obtaining an expert witness to respond to this evidence. It granted the motion to exclude the evidence of retrograde extrapolation. RP(8/4) 10-11. The court explicitly stated it was not excluding evidence of the effect of alcohol on the human body, allowing the state to proceed on the alternative legal prong of the charge. RCW 46.61.522, .502(1)(b). RP(8/4) 12.

The state moved the court to dismiss the case on the grounds it could no longer proceed to trial without the retrograde extrapolation evidence.³

³ Despite charging all three prongs of the offense, CP 140-41, the state did not have evidence of the defendant being "under the influence or affected by" alcohol. The state also conceded it had no evidence to mention drugs during trial. RP(8/4) at 4.

RP(8/4) 13. Ms. Kenimond explained the state could not prove the blood draw occurred within two hours of the driving. The accident might have occurred as early as 6:19 p.m. RP(8/4) 12. The blood was not drawn until 8:30 p.m. ("2030" hours). RP(8/4) 18.⁴

The defense moved in the alternative that the court dismiss the charge for violation of discovery rules, CrR 4.7, or for prosecutorial mismanagement, CrR 8.3(b). RP(8/4) 13-14. The court concluded the state had not committed any intentional misconduct. RP(8/4) 19. It did not rule on the motion to dismiss under CrR 4.7.

Both parties declined to request a continuance. RP(8/4) 20.⁵

⁴ This time span is broader than the state represents in its brief. Appellant's Brief at 3-4 ("approximately 6:30 p.m." and "approximately 8:25 p.m.").

⁵ The state did not request a continuance because it did not need one. "Here the State was fully prepared for trial, and could not represent to the Court that it required a continuance." CP 31. The defense noted any continuance would extend the time for speedy trial under CrR 3.3. RP(8/4) 17.

The court granted the motion to exclude the evidence of retrograde extrapolation, and the state's motion to dismiss. RP(8/4) 20.

h. Motion to Reconsider, August 6

Two days later the state moved for reconsideration. CP 25-60. For the first time it produced a summary of Lisa Noble's conclusions regarding retrograde extrapolation. The letter was dated August 5, 2009 -- the day after the court excluded the evidence and granted the state's motion to dismiss. CP 53.

The court denied reconsideration. CP 4-5. It found:

On January 21, 2009, the State -- in direct response to questioning by the Court -- said that extrapolation was not going to be addressed. 1-1/2 work days before trial, over six months after this assurance, the State informed the defense differently. No matter how skilled defense counsel may be, that is late in the game. Who knows whether an expert could have been retained within speedy trial to counteract this testimony. Had the defense known of the State's change in strategy in a timely manner, perhaps a different tack [sic] could have been taken. The defense also had a right to rely on the State's representations to the Court. Ms. Kenimond did nothing wrong; the ball was fumbled on the hand-off from Mr. McKenna. CrR 8.3 actions do not apply here. The Court tailored its remedy here to fit the transgression.

CP 6.

The state appealed. CP 1-3.

C. LEGAL AUTHORITY AND ARGUMENT

1. THE STATE VIOLATED THE TERMS OF CrR 4.7, THE OMNIBUS ORDER, ITS OWN REPRESENTATIONS TO THE COURT, AND THE COURT'S ORDER ON PRETRIAL MOTIONS.

The state claims it did not violate the discovery rules. App. Br. at 18. In fact, it violated the discovery rules, the omnibus order, its own representation to the court and counsel at a pretrial hearing, a pretrial order, and its second representation to the court and counsel at readiness.

a. Criminal Rule 4.7

CrR 4.7 provides in relevant part:

(a) Prosecutor's Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

...
(iv) **any reports or statements of experts** made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

...
(2) The prosecuting attorney shall disclose to the defendant:

...
(ii) **any expert witnesses** whom the prosecuting attorney will call at the hearing or trial, **the subject of their testimony, and any reports** they have submitted to the prosecuting attorney;

...
(h) Regulation of Discovery.

...
(2) *Continuing Duty to Disclose.*
If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall **promptly** notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

...
(7) *Sanctions.*

(i) [I]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, **the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.**

b. State's Possession or Control

The state claims it did not violate the discovery rule because at the time of the omnibus hearing, it did not have in its "possession or control" the expert report on retrograde extrapolation. App. Br. at 18; CrR 4.7(a)(1).

This is not a case in which another party was holding a factual report and hadn't provided it yet. Nor is it a case where the state had requested the report and just hadn't received it yet.

This case involves expert testimony the state had to choose to present; and a report the state had to request. In that respect, it was within the state's "control" as described in CrR 4.7(a). The state also was bound by CrR 4.7(a)(2)(ii), quoted above, requiring disclosure of the substance of any expert's testimony and their reports, regardless of whether it possessed it.

c. Omnibus Order

At the omnibus hearing the court ordered the state to provide precisely this information. CP 131. Certainly the state could have notified the court and the defense that its expert would testify to retrograde extrapolation and it had requested a report. It did not do so.

d. Order to Compel Discovery

"This is not a case where the defense was lying in the weeds on this issue." State v. Brooks, 149 Wn. App. 373, 390, 203 P.3d 397 (2009).

The state is correct: defense counsel Diego Vargas is very experienced in defending DUI cases. He knows the law well. App. Br. at 11-12. To be certain all discovery was provided and he had time to prepare to respond to it, defense counsel agreed to continue the trial for over six months. He specifically moved to compel all expert witness information and reports, and the subject of their testimony. CP 101-25.⁶

Unlike cases the state cites, here the prosecutor affirmatively told the court and defense counsel that he had not requested a report on retrograde extrapolation and did not intend to present such evidence. As the court said, it was entitled to hold the state to its word "unless a new report is created." RP(1/21) 10.⁷

⁶ Knowing the law well is not the same as being a scientific expert. Mr. Vargas knew that if the state presented evidence of extrapolation, he would need an expert to review the state's evidence, consult with counsel, and probably testify at trial. The case would be substantially more complex to try. See discussion below.

⁷ See State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990), discussed infra (where prosecutor agreed to provide discovery held by others, court and defense entitled to rely on state's assumption of task; dismissal affirmed); cf. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (state's approval of jury instruction

The state did not create such a report until a day after trial was to have begun, after the court dismissed the case at the state's request.

The state's concession that its "disclosure ... ought to have been timelier," App. Br. at 19, falls short of what the law required, or what was reasonable in this case.

e. Readiness Hearing

At the readiness hearing, six months after the order to compel and two weeks before trial, the prosecutor announced the state was ready for trial. RP(7/21) 2. She did not announce additional expert evidence. She did not present a report about retrograde extrapolation.

If she was ready for trial, she was familiar with the file. Thus even if she didn't know the precise words her predecessor, Mr. McKenna, had spoken at the January hearing, she knew:

incorporating venue as element of charge required state to prove venue beyond a reasonable doubt, although law didn't require proof of venue; conviction reversed and dismissed for insufficient evidence of this "element" created by state's conduct of case). If the state can be held to the burden of proving a non-existent element, it surely can be held to its representations of what evidence it will present.

- + CrR 4.7 and the omnibus order required her to provide such a report to the defense, CP 131;
- + the defense had filed a motion to compel expert reports and the subject of expert testimony, CP 101-02;
- + the state had responded in writing to the motion to compel, limiting Ms. Noble's testimony to the report it had provided, CP 86; and
- + the state had no report from Ms. Noble or anyone else on retrograde extrapolation.

If the state had no report, obviously it had not provided one to the defense.

f. Violations

This is not a case where the state suddenly discovered new evidence it could not have known about earlier. The state had this case for ten months after charging. Even Ms. Kenimond had the case for several months.⁸

The state's change of strategy 1-1/2 days before trial to present expert evidence on retrograde extrapolation thus contradicted its consistent representations to the court and the defense, despite specific motions and inquiries on the record. The court and defense were entitled to

⁸ Mr. McKenna had left the office in March, 2009. RP(8/4) 13-14.

rely on these representations, and the state was bound by them. See, e.g., State v. Chichester, 141 Wn. App. 446, 170 P.3d 583 (2007) (prosecutor bound by statement ready for trial when readiness was within state's control; dismissal affirmed).

2. CrR 4.7 PERMITS EXCLUSION OF EVIDENCE AS A SANCTION.

The state claims CrR 4.7 does not permit a sanction of excluding evidence. App. Br. at 13-17.

a. The Rule's Plain Language Permits Exclusion of Evidence.

We apply rules of statutory construction to the interpretation of court rules. ... Where the language of a rule is plain and unambiguous, the language will be given its full effect. ... Language in a court rule is unambiguous unless it is susceptible to more than one reasonable meaning.

State v. Guay, 150 Wn.2d 288, 300, 76 P.3d 231 (2003) (citations omitted).

In interpreting a statute, this court looks first to its plain language. ... If the plain language of the statute is unambiguous, then this court's inquiry is at an end. ... The statute is to be enforced in accordance with its plain meaning.

State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citations omitted).

CrR 4.7(h)(7)(i) is plain and unambiguous. The rule provides when a party has violated the

discovery rule, a court may "dismiss the action or enter such other order as it deems just under the circumstances." CrR 4.7(h)(7)(i).

The broad language of the rule allowing the court to impose "such other order as it deems just under the circumstances" ... allows the trial court to impose sanctions not specifically listed in the rule.

State v. Jones, 33 Wn. App. 865, 869, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983).

Clearly dismissal of an action is a more extreme remedy than exclusion of evidence. The catch-all of "such other order as it deems just under the circumstances" on its face includes the option of excluding evidence. Indeed, it is difficult to contemplate what other sanctions this phrase would include, since it explicitly permits providing the discovery, granting a continuance, and dismissal.

b. The Supreme Court Approved Exclusion of Evidence Under CrR 4.7, and Specifically Rejected the State's Authorities.

The Washington Supreme Court affirmed the trial court's exclusion of defense evidence under CrR 4.7, flatly rejecting the very authorities on

which the state relies. State v. Hutchinson, 135 Wn.2d 863, 880, 959 P.2d 1061 (1998).⁹

We construe CrR 4.7 in light of the United States Supreme Court's decision in Taylor v. Illinois,¹⁰ which permits exclusion of defense witness testimony as a sanction for discovery violations. While CrR 4.7(h)(7)(i) does not enumerate exclusion as a remedy, it does allow a trial court to "enter such other order as it deems just under the circumstances." This language allows the trial court to impose sanctions not specifically listed in the rule.

State v. Hutchinson, 135 Wn.2d at 881.

In Hutchinson, the trial court excluded defense expert evidence on the defendant's mental state because the defendant violated discovery rules and court orders, refusing to submit to an evaluation by the state's expert. The Court of Appeals had reversed, holding "CrR 4.7(h)(7)(i) 'unqualifiedly proscribes excluding witnesses as a discovery sanction.'" Id. at 876.

⁹ Citing State v. Glasper, 12 Wn. App. 36, 527 P.2d 1127 (1974); State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991); State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984); and State v. Thacker, 94 Wn.2d 276, 616 P.2d 655 (1980). App. Br. at 14-16.

¹⁰ 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). Taylor upheld exclusion of defense evidence against the constitutional rights of compulsory process, due process, and to present a defense where defense counsel violated the discovery rules in a particularly suspicious way.

The Supreme Court reversed the Court of Appeals and affirmed the exclusion of evidence. It did so although "the impact of witness preclusion in this case was significant." Hutchinson, 135 Wn.2d at 883.

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, ... and the factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Hutchinson, 135 Wn.2d at 882-83.

These factors support the court's decision to exclude the evidence in this case:

(1) *Effectiveness of less severe sanctions.*

The state bears the burden of suggesting a less severe remedy. Brooks, 149 Wn. App. at 393. Here the state declined to request a sanction less severe than exclusion, i.e., a continuance. CP 31. Furthermore, the state already had received a six-month continuance during which it had not provided this discovery.

(2) *Impact of excluding evidence.* The state had charged this crime based on three prongs. The court's order excluding evidence affected only one of those three. The court specifically "tailored its remedy here to fit the [state's] transgression." CP 6. It was the state that then moved for dismissal.

(3) *Extent of surprise or prejudice.* Here the last-minute offer of new expert evidence was a "surprise" because it contradicted the prosecutor's stated position for the previous ten months. More importantly, however, introduction of this evidence at this late date required the defense to locate, retain, consult and probably call to testify, an expert witness. See discussion regarding extrapolation evidence, infra.

(4) *Willful or in bad faith.* The violation was not willful or in bad faith. But it also was not inadvertent. As in Brooks:

- + It was not the case here where the state didn't know what was needed.
- + This was not a case where the defense was lying in the weeds on this issue.
- + It's not a case where the State had any explanation at all for its failure to obtain a report on retrograde

extrapolation during the ten months the case was pending.

See Brooks, 149 Wn. App. at 389-90.

3. CASE LAW UPHOLDS EXCLUSION OR DISMISSAL FOR SIMILAR DISCOVERY VIOLATIONS.

The Washington Supreme Court and the Court of Appeals have approved exclusion of evidence leading to dismissal on facts indistinguishable from this case.

a. State v. Sherman

State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990), involved a theft from the defendant's employer. At omnibus on April 14 the court ordered the state to provide a separate and distinct witness list and all the employer's IRS records for the charging period. As here, the prosecutor approved the order. Trial was to begin July 10.

On July 11, one day after trial was to have begun, the state moved to reconsider the omnibus order. The trial court denied the motion.

On July 20, when the case was called for trial, the state still had not provided the defense with a separate witness list or the IRS records ordered at omnibus.

The defense moved to dismiss under CrR 4.7(h)(7)(i). The court granted the motion, noting some additional reasons. The Court of Appeals affirmed dismissal under CrR 8.3(b).

[I]f there is evidence of arbitrary action or governmental misconduct, we will not reverse absent an abuse of discretion. ... In addition, "governmental misconduct need not be of an evil or dishonest nature; simple mismanagement also falls within [the] standard."

Sherman, 59 Wn. App. at 767. The Court held "the State's failure to produce the IRS records, in and of itself, is a sufficient ground on which to affirm the dismissal." It noted at the April 14 omnibus hearing,

the State agreed to undertake production of the IRS records of the complaining witness. In spite of this agreement, the State failed to produce the records, and then waited until the day after trial was to have begun to seek reconsideration of the order.

Id. at 768. The Court held the defense justifiably relied on the state's agreement to produce this information, although it wasn't in its possession or control.

As in Sherman, here the state agreed -- it would not present evidence of retrograde extrapolation. As in Sherman, the state waited

until 1-1/2 days before trial¹¹ before seeking to change the position it had agreed to. As in Sherman, the defense was entitled to rely on the state's representation of how it would proceed.

The Court of Appeals also rejected the state's argument that the defense should have sought a continuance.

Nor do we find persuasive the State's argument that the defendant should have sought a continuance to allow time for the State to produce the records. Here, the speedy trial expiration date had been extended a total of seven times, and was scheduled to expire again on the day the case was dismissed. To require [the defendant] to request a continuance under these circumstances would be to present her with a Hobson's choice: she must sacrifice either her right to a speedy trial or her right to be represented by counsel who had sufficient opportunity to prepare her defense.

Id. at 769.¹²

¹¹ In Sherman, the state moved to change its position the day after trial was to have begun, but the case wasn't actually called for trial for another nine days. Id. at 765-66.

¹² If a party requests a continuance, he automatically waives any right to object to that continuance. CrR 3.3(f)(2). A continuance further extends the expiration date by excluding the amount of time continued from the calculation of time for trial, CrR 3.3(e)(3); and by allowing yet another 30 days after the end of the excluded period, CrR 3.3(b)(5). See State v. Lackey, ___ Wn. App. ___, ¶ 21, ___ P.3d ___ (No. 37682-2-II, 12/22/09);

b. State v. Dailey

State v. Dailey, 93 Wn.2d 454, 610 P.2d 357 (1980), involved a prosecution for negligent homicide from an automobile accident. At the September omnibus hearing, the court ordered the state to give the defense laboratory reports and names and addresses of all witnesses. The court continued a motion for a bill of particulars because the state said additional pleadings would moot the issue.

In October, ten days before trial, the state still had failed to file such pleadings and had failed to provide the discovery ordered at the September hearing, with no reasonable explanation. With trial to begin November 7, the state delivered the discovery, ordered more than a month earlier, late Friday afternoon, October 28. Dailey, 93 Wn.2d at 455.

The defense motion to dismiss was heard and denied November 2-3. The court offered a continuance, which the defense declined. On November 4, the Friday before Monday trial, the

State v. Saunders, 153 Wn. App. 209, 217, ___ P.3d ___ (2009).

state furnished a supplemental witness list required by the October 28 court order. The previous witness list named only five people. This supplemental list named sixteen. Id. at 456.

The defense again moved to dismiss. As here, the court denied the motion. The court again suggested a continuance. The defense moved to proceed to trial with the original list of witnesses, excluding all additional witnesses named in the supplemental list.

Thereafter the court stated: "This Court's going to rule that you either try it with the original list of witnesses or I'll dismiss it." The State argued it could not try the case with only the witnesses originally listed in the information. The trial court then dismissed the case.

Id.

The state appealed. The Court of Appeals reversed, but the Supreme Court reversed the Court of Appeals and affirmed the dismissal. Notably, the Supreme Court declined to adopt the Court of Appeals position that CrR 4.7(h)(7) did not permit excluding evidence. Dailey, 93 Wn.2d at 457. Ultimately, the Supreme Court affirmed the dismissal under CrR 8.3(b). Id. at 459.

c. State v. Brooks

Similarly in State v. Brooks, supra, the court held pretrial dismissal was an appropriate remedy for the state's mismanagement of discovery, albeit unintentional. The defendants were charged with first degree burglary, first degree robbery, and theft of a firearm.

The state failed to provide discovery before trial, despite several continuances of pretrial hearings. There, as here, the case was passed from one deputy prosecutor to another. Brooks, 149 Wn. App. at 379. There, as here, the defense agreed to a continuance after the omnibus hearing to permit the state to provide the missing discovery. Id. at 401. "Even when the trial court continued the trial a second time to allow the State to provide discovery, the State failed to complete discovery before the first day of trial." Id.

The Brooks court cited CrR 8.3(b) as the basis for dismissing the charges of first degree burglary, first degree robbery, and theft of a firearm; but all the "mismanagement" involved violating CrR 4.7. Id. at 383.

Although the discovery not produced was more voluminous in Brooks than here, the timeframe was much shorter. The case was dismissed March 1, after arraignment on January 2. Id. at 377. Here the state had nearly a year from charge to trial date to prepare its case and provide discovery. Its failure to do so warranted dismissal under CrR 8.3. Dailey, supra. The order excluding the evidence as a lesser penalty was equally justified.

4. THE STATE'S BELATED CHANGE OF STRATEGY AND FAILURE TO COMPLY WITH DISCOVERY RESULTED IN PREJUDICE TO THE DEFENSE.

Prejudice occurs where the defendant is left to choose between his right to a speedy trial and his right to prepared counsel.

Such prejudice includes the right to a speedy trial and the "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense."

State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

Introducing expert testimony on retrograde extrapolation greatly expanded the complexity of this case. It presented more legal issues to litigate before the case could proceed to trial.

Neither this record nor the scientific literature supports the state's argument that the evidence it offered is "routine," "a simple linear equation," "generic toxicological testimony," or "commonplace." App. Br. at 3, 5, 19, 20 & 21.

a. Reliability of Scientific Evidence

Retrograde extrapolation is not a scientific theory that automatically satisfies the requirements of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), or Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).¹³

In Mata v. State, 46 S.W.3d 902 (Tex. Cr. App. 2001), the court reviewed expert testimony explaining the theory of retrograde extrapolation for a blood alcohol test administered more than two hours after the defendant was driving. Accord: Bagheri v. State, 119 S.W.3d 755 (Tex. Cr. App.

¹³ Washington courts apply the Frye standard for scientific evidence. State v. Gregory, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006). Appellant raised the issue of whether retrograde extrapolation evidence satisfied Frye in State v. Wilbur-Bobb, 134 Wn. App. 627, 141 P.3d 665 (2006), but the Court of Appeals concluded the issue had not been adequately preserved for appeal. It declined to address it. No other Washington court has addressed the issue.

2003). Unlike here, in both those cases the courts had before them the complete testimony of the state's expert.

In both those cases, the court concluded the state's expert relied too heavily on assumptions with too little knowledge of the personal characteristics of the defendant to be reliable.

Retrograde extrapolation is the computation back in time of the blood-alcohol level--that is, the **estimation** of the level at the time of driving based on a test result from some later time.

Mata at 908-09.¹⁴ The court found "the scientific community is divided" on whether extrapolation evidence is "reliable." Id. at 910. Some authorities

believe that extrapolation to a range of BACs can be accomplished reliably, as long as "justifiable assumptions are made that are based on sound principles of pharmacology, toxicology, and physiology." ... In each hypothetical case [given as reliable examples], the known factors include the subject's weight, the length of time in which drinking occurred, and the time at which the drinking stopped.

¹⁴ Citing Lawrence Taylor, DRUNK DRIVING DEFENSE § 5.2 (5th ed.) (2000).

Id.¹⁵ Other scientists were "more cautious" about reliability. Whether the drinking occurred on an empty or full stomach made a difference.

However useful such estimates may be in [DWI] cases, it should be remembered that the process of alcohol absorption is highly variable. The limitations and pitfalls associated with retrograde extrapolation are often not appreciated by laymen and the courts.

Id. at 910-11.¹⁶

The court noted still other scientists consider retrograde extrapolation a "dubious practice."

The absorption profile of ethanol differs widely among individuals, and the peak [BAC] and the time of its occurrence depend on numerous factors. Among other factors, the drinking pattern, the type of beverage consumed, the fed or fasted state, the nature and composition of foodstuff in the stomach, the anatomy of the gastrointestinal canal, and the mental state of the subject are considered to play a role.

¹⁵ Citing Mark Montgomery & Mark Reasor, *Retrograde Extrapolation of Blood Alcohol Data: An Applied Approach*, 36 J. OF TOXICOLOGY AND ENVTL. HEALTH 281-92 (1992).

¹⁶ Citing Richard Watkins & Eugene Adler, *The Effect of Food on Alcohol Absorption and Elimination Patterns*, 38 J. OF FORENSIC SCIENCE 285-91 (1993).

Id. at 911.¹⁷

Another source of error "arises from the unique status of the observed subject" because there is "generally no information as to his or her position in the population distribution of the parameters describing ethanol elimination."

Id. at 912.¹⁸

b. The Offer of Proof is Nothing "Simple" or "Generic."

The detailed analysis of this evidence in Mata and Baqheri belies the state's argument here that it was proposing "routine," "simple," "generic," or "commonplace" extrapolation testimony. See Appellant's Brief at 3, 5, 19, 20, 21.

As in Mata and Baqheri, here the state's offer of proof revealed several specific facts the state's expert did not know: (1) the time of the last drink; (2) whether the subject was "post-absorptive" or not; (3) the subject's genetic composition and (4) experience with alcohol to

¹⁷ Citing Alan Jones et al., *Peak Blood Ethanol Concentration and the Time of Its Occurrence After Rapid Drinking on an Empty Stomach*, 36 J. OF FORENSIC SCIENCE 376, 381 (1991).

¹⁸ Citing P.R. Jackson et al., *Back-tracking Booze with Bayes--the Retrospective Interpretation of Blood Alcohol Data*, 31 BRITISH J. OF CLINICAL PHARMACOLOGY 55-63 (1991).

determine rate of "burn off." Ms. Noble stated it was necessary for her to "assume" the subject was in a post-absorptive state. CP 53.

There was no mention of other factors discussed in the literature: (1) the subject's weight; (2) empty or full stomach; (3) rate of consumption; (4) timespan of consumption; (5) type of beverage consumed; (6) type of food in stomach; (7) anatomy of gastrointestinal canal; (8) the subject's mental state. Mata, at 910-12.

c. Admissibility of "Estimate" Instead of "Analysis"

Ms. Noble stated she could provide "an estimate of the BAC an hour before the blood draw." She mentioned relying on "averages," despite variances depending on a person's "genetic composition and experience with alcohol."

The statute requires an "analysis," not an estimate.

The statute at issue defines the crime charged as:

46.61.522. Vehicular assault -- Penalty

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

...

(b) While under the influence of intoxicating liquor or any drug, **as**

defined by RCW 46.61.502, and causes substantial bodily harm to another;

(Emphasis added.) RCW 46.61.502 provides in turn:

46.61.502. Driving under the influence

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

(a) **And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506;**

(Emphases added.) RCW 46.61.506 then provides in relevant part:

**46.61.506. Persons under influence of intoxicating liquor or drug -- Evidence -
- Tests -- Information concerning tests
...**

(3) Analysis of a person's blood ... to be considered valid under the provisions of ... RCW 46.61.502 ... shall have been performed according to methods approved by the state toxicologist

The toxicologist's approved methods for analyzing a person's blood are found in WAC 448-14. See Appendix.

Nothing in these statutes or regulations suggests that the theory of retrograde extrapolation is an "analysis of the person's breath or blood made under RCW 46.61.506," as required by RCW 46.61.502(a) and 46.61.522(b) (by incorporation).

Thus an issue exists, requiring additional research and litigation, of whether the "estimate" based on a complicated and controversial mathematical theory and assumptions of certain generalities, would even be admissible to prove the crime as defined in the statute. There was no time for the defense to investigate, retain an expert, research and present these issues after the state decided to present this evidence.

d. The Prejudice is Particularly Great When the Belatedly Disclosed Evidence is from an Expert.

The state also argues the trial court had no "reasonable distinction" between excluding the extrapolation evidence estimating the specific blood alcohol content of this defendant, and permitting evidence of the effect of alcohol on a generic human being. App. Br. at 21. But the complex and controversial extrapolation evidence required the defense to retain, consult, and probably call an expert witness to testify at trial. The evidence of the effects of alcohol on human beings in general did not.

None of the authorities the state cites involved late discovery of expert evidence.

5. THE TRIAL COURT'S SANCTION FOR VIOLATING A COURT ORDER AND DISCOVERY RULES WILL NOT BE DISTURBED ABSENT AN ABUSE OF DISCRETION. THIS COURT CAN AFFIRM ON ANY REASON WITHIN THE RECORD.

Respondent agrees with the state that the proper standard of review is an abuse of discretion. App. Br. at 17.

[A] trial judge has wide latitude when imposing sanctions for discovery violations and ruling on motions for a new trial. Absent a showing of abuse of discretion, we will not disturb the ruling on appeal.

State v. Dunivin, 65 Wn. App. 728, 731, 829 P.2d 799, review denied, 120 Wn.2d 1016 (1992). An appellate court

will not disturb the trial court's decision unless there is a clear showing it is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."

State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Furthermore, this Court should affirm the trial court's decision on any basis in this record, even a different theory than stated below.

It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although

different from that indicated in the decision of the trial judge.

State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998); Sprague v. Sumitomo Forestry Co., 104 Wn.2d 751, 758, 709 P.2d 1200 (1985); Cheney v. City of Mountlake Terrace, 87 Wn.2d 338, 552 P.2d 184 (1976).

These legal principles are key to understanding the appellate decisions on discovery issues. The vast majority of cases have affirmed the trial court, either on the same basis or a different one on the record.

a. The Trial Court Acted Within Its Discretion.

The state does not cite, and respondent could not find, a case in which the appellate court reversed as an abuse of discretion a trial court's order excluding the state's evidence where the state violated the court rules, the court's orders, and its own representations in open court.

In two cases, the Supreme Court reversed the trial court for excluding defense evidence. State v. Thacker, 94 Wn.2d 276, 616 P.2d 655 (1980); State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991). These holdings are consistent with the

constitutional rights to due process, compulsory process, and to present a defense. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.¹⁹

And, as discussed above, in one case the court **affirmed** the trial court's ruling **excluding defense evidence** under CrR 4.7, despite the constitutional protections for the defense. State v. Hutchinson, supra.

Nonetheless, as in Chichester,

The State has cited no authority mandating that a court must grant a continuance in these circumstances.

Chichester, 141 Wn. App. at 455.

The State cannot by its own unexcused conduct force a defendant to choose between his speedy trial rights and his right to effective counsel who has had the opportunity to adequately prepare a material part of his defense.

State v. Brooks, 149 Wn. App. at 387.

In Brooks, the Court suggested "it would have been better if the trial court had explored alternative intermediate remedies on the record," but noted the state failed to suggest any other alternatives. Here also, the state declined to

¹⁹ See, e.g., Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

request a continuance, and suggested no other alternative but to proceed without the defense having the opportunity to obtain an expert to refute this new expert testimony. The court observed that the defense reasonably needed an expert witness to respond.

The court carefully constructed a remedy to meet the precise problem the state created. The law permitted the court to dismiss the charge. CrR 4.7(h)(7)(i). But the court chose a less severe sanction, one it believed commensurate with the state's violation of the rule: "The Court tailored its remedy here to fit the transgression." CP 6. The state then asked to dismiss the charge.

[A] defendant is denied his right to counsel ... if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case.

State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976).

In State v. Chichester, supra, as here the prosecutor announced the state was ready for trial at readiness. After the court scheduled its cases relying on these representations, the prosecutor

said their office wouldn't have a prosecutor available after all. The morning of trial the state again appeared and said it didn't have a prosecutor available to try the case.

The Court of Appeals affirmed the trial court's dismissal the morning of trial, although the time for trial had not expired. The Court noted "the necessity for orderly procedure in the setting of trials," the right to rely on the state's representation at readiness that it was ready, and the state's failure to offer an alternative remedy. Id. at 454.

To hold that the court in such a situation cannot dismiss the case, but must instead grant another continuance, would mean that control of the court's criminal trial settings would be transferred to the State. The mere filing by the State of a last-minute motion to continue would routinely serve to dislodge a confirmed trial date, so long as there was time left in the speedy trial period. Surely this was not intended by the drafters of the rule.

Chichester, 141 Wn. App. at 458.

The state here had said it was ready. The court had brought a judge from a visiting county who had cleared his calendar for the week. A jury venire was ready. The state did not request a continuance. The court provided a remedy less

severe than dismissal. The state then requested dismissal.

The court's ruling excluding evidence was not an abuse of discretion.

b. This Court Can Affirm the Dismissal Under CrR 4.7.

The defense also moved below for dismissal under CrR 4.7(a)(7)(i). RP(8/4) 13-14. The trial court did not reach the issue because it imposed the lesser sanction of excluding the evidence. The state then moved to dismiss, which the court granted.

However, as Dailey, Sherman, and Brooks demonstrate, dismissal is appropriate under these facts for violating CrR 4.7. Since dismissal is a remedy expressly provided in the rule, this Court should affirm the trial court on that basis. Norlin, supra.

c. This Court Can Affirm the Dismissal Under CrR 8.3(b).

Dailey, Sherman and Brooks demonstrate the facts of this case justify dismissal under CrR 8.3. Although Judge Meyer expressly declined to base his decision on this rule, it also appears from his comments he erroneously believed CrR 8.3(b)

required intentional mismanagement, which he concluded had not occurred. RP(8/4) 19.

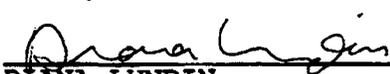
The law is clear, however, that negligent mismanagement is sufficient to warrant dismissal for governmental misconduct. State v. Sherman, supra. In State v. Sulgrove, 19 Wn. App. 860, 578 P.2d 74 (1978), for example, the Court of Appeals affirmed the trial court's dismissal, holding the state's failure to allege the offense properly and to timely marshal admissible evidence was "sufficiently careless" to be misconduct and warrant dismissal.

This record is more than adequate to show the state's mismanagement of this case. As the Supreme Court did in Dailey and the Court of Appeals did in Sherman and Brooks, this Court should affirm the dismissal of the case under CrR 8.3(b).

D. CONCLUSION

For the reasons stated above, this Court should affirm the trial court's decision.

DATED this 19th day of January, 2010.


DIANA LUNDIN
WSBA No. 26394


LENELL NUSSBAUM
WSBA No. 11140

Attorneys for Respondent

APPENDIX

WAC 448-14-010. Criteria for approved methods of quantitative analysis of blood samples for alcohol.

Any quantitative blood alcohol analysis method which meets the following criteria is approved by the state toxicologist and may be used in the state of Washington. **Analysis of urine for estimation of blood alcohol concentrations is not approved** by the state toxicologist in the state of Washington.

The blood analysis procedure should have the following capabilities:

(1) Precision and accuracy.

(a) The method shall be capable of replicate analyses by an analyst under identical test conditions so that consecutive test results on the same date agree with a difference which is not more than 3% of the mean value of the tests. This criterion is to be applied to blood alcohol levels of 0.08% and higher.

(b) **Except for gas chromatography, the method should be calibrated with water solutions of ethyl alcohol**, the strength of which should be determined by an oxidimetric method which employs a primary standard, such as United States National Bureau of Standards potassium dichromate.

(c) The method shall give a test result which is always less than 0.005% when alcohol-free living subjects are tested.

(2) Specificity.

(a) On living subjects, the method should be free from interferences native to the sample, such as therapeutics and preservatives; or the oxidizable material which is being measured by the reaction should be identified by qualitative test.

(b) Blood alcohol results on post-mortem samples should not be reported unless the oxidizable substance is identified as ethanol by qualitative test.

WAC 448-14-020. Operational discipline of blood samples for alcohol.

(1) Analytical procedure.

(a) The analytical procedure should include:

(i) A control test

(ii) A blank test

- (iii) Duplicate analyses that should agree to within 0.01% blood alcohol deviation from the mean.
 - (b) All sample remaining after analysis should be retained for at least three months under suitable storage conditions for further analysis if required.
 - (c) Each analyst shall engage in a program in which some blood samples containing alcohol are exchanged with other laboratories and tested on a blind basis so that precision and accuracy can be evaluated no less than one time per year.
- (2) Reporting procedure.
 - (a) The results should be expressed as grams of alcohol per 100 ml of whole blood sample.
 - (b) The analysis results should be reported to two significant figures, using the mathematical rule of rounding.
 - (c) Blood alcohol results on living subjects 0.0009% or lower shall be reported as negative. Blood alcohol results on post-mortem samples of 0.019% or less shall be reported as negative. (See WAC 448-14-010(2)(b))
- (3) Sample container and preservative
 - (a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper shall be used.
 - (b) Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

WAC 448-14-030. Qualifications for a blood alcohol analyst.

- (1) Minimum qualifications for the issuance by the state toxicologist of a blood alcohol analyst permit shall include college level training in fundamental analytical chemistry with a minimum of five quarter hours of

quantitative chemistry laboratory or equivalent, with a passing grade.

(2) The state toxicologist shall issue a blood alcohol analyst permit to each person he finds to be properly qualified, and he shall hold written, oral or practical examinations to aid him in judging qualifications of applicants. Such permits shall bear the signature or facsimile signature of the state toxicologist and be dated.

(3) The blood alcohol analyst permits are subject to cancellation by the state toxicologist if the permittee refuses or fails to obtain satisfactory results on samples periodically distributed to the permittees by the state toxicologist.

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

STATE OF WASHINGTON,)	
)	
Appellant,)	NO. 64073-9-I
)	
vs.)	DECLARATION OF SERVICE
)	
LEROY OLSEN,)	
)	
Respondent.)	
_____)		

I declare that on this date I served the Brief of Respondent and the Supplemental Designation of Clerk's Papers on the following parties by depositing it into the U.S. Mail, postage prepaid, addressed as follows:

Mr. Richard Johnson, Clerk
Court of Appeals, Division One
One Union Square
600 University Street
Seattle, WA 98101

Mr. Gregory M. Banks
Island County Prosecuting Attorney
101 N.E. Sixth Street
P.O. Box 5000
Coupeville, WA 98239

Ms. Diana Lundin
Fox Bowman Duarte
1621 114th Ave. S.E., Suite 210
Bellevue, WA 98004

Mr. Leroy Olsen
P.O. Box 698
Freeland, WA 98249

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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

January 19, 2010, Seattle, WA
Date and Place

Heather Muwero
HEATHER MUWERO