

Case No: 73106-8-1

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

FILED  
Feb 16, 2016  
Court of Appeals  
Division I  
State of Washington

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**STATE OF WASHINGTON**

Petitioner,

v.

**DARLA KIDDER**

Respondent.

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FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

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REPLY BRIEF ON APPEAL

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SKAGIT COUNTY PROSECUTING ATTORNEY  
RICHARD A. WEYRICH, PROSECUTOR

By: HALEY W. SEBENS, WSBA#43320  
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**A. RCW 10.77.086(4) PROVIDES FOR DISMISSALS WHEN AFTER ATTEMPTS AT RESTORATION, COMPETENCY IS NOT RESTORED**

The trial court order made findings of the defendant's incompetency and unrestorability and dismissed the pending cases. CP 125. The court found the defendant unlikely to be restored based on, presumably, the in-court observations of the defendant and the initial competency evaluation. CP 125. This finding was made short of restoration efforts and without expert opinion. Despite the absence of any expert opinion that the defendant was unlikely to be restored, and without permitting testimony regarding restorability, the court found that the defendant was unlikely to be restored. Respondent's entire argument relies on the erroneous argument that the ninety day restoration period included the wait-period prior to admission. The dismissal order here is an abuse of discretion for failing to follow the requirements set forth in RCW 10.77. The decision should be reversed.

Under the relevant statutory scheme, RCW 10.77 *et. seq*, the time period for restoration does not begin to run until a defendant is actually admitted to WSH and received into the physical custody of the hospital. RCW 10.77 allows for competency restoration when a defendant has been found incompetent for trial. Depending on the

nature of the charge and the stage of the restoration proceedings, the period of restoration for a felony offense ranges from 45 to 180 days. The primary argument raised by the respondent questions when the restoration period begins to run. Respondent contends that the time period begins on the date that the restoration order is entered. However, when the relevant statutes are viewed as a whole, it is apparent that the time period must begin to run when the defendant is actually admitted to WSH.

RCW 10.77.068, enacted in 2012, as part of a reform of the competency evaluation and restoration process, created performance targets for WSH admissions and evaluations. This statute creates in subsection (1)(a)(i) the following aspiration timeline:

For a state hospital to extend an offer of admission to a defendant in pretrial custody for legally authorized treatment or evaluation services related to competency, or to extend an offer of admission for legally authorized services following dismissal of charges based on incompetent to proceed or stand trial, seven days or less.

RCW 10.77.068(1)(a)(i). The statute also recognized in subsection (1)(c)(iv) that certain situations may prevent a defendant from being admitted for restoration within the seven day aspiration:

An unusual spike in the receipt of evaluation referrals or in the number of defendants requiring restoration services has occurred, causing temporary delays until the unexpected excess demand for competency services can be resolved.

RCW 10.77.068(1)(c)(iv). Thus, it is apparent from RCW 10.77.068 that the legislature recognized that competency restoration begins with the actual admission of the defendant to WSH, rather than merely the entry of the order. If the restoration period simply began when the order is entered, these timelines would be unnecessary. Furthermore, in RCW 10.77.068, the legislature has expressly recognized that a defendant will likely need to wait before actually beginning a term of competency restoration. Despite the legislature's performance target and ideal timeframes, defendants are rarely transported for criminal restoration within 7 days. Subsection (1)(c)(iv) contemplates that this delay could be longer.

Additionally, RCW 10.77.084 sets forth the process by which restoration is to occur. Notably, subsection (b) of this statute begins with:

At the end of the mental health treatment and restoration period, if any, or at any time a professional person determines competency has been, or is unlikely to be restored, the defendant shall be returned to court for a hearing.

RCW 10.77.084(b). Again, this statute indicates the legislature understood the restoration period would begin when the defendant was admitted to the hospital. Otherwise, there would be no reason for the defendant to be "returned to court" if the period could run out before the defendant was ever transferred to the hospital. This is

further clarified by the fact that the Court shall have the option of extending the order of commitment or treatment for an additional ninety days. RCW 10.77.086(3). This second restoration period allows the appropriate facility to continue to attempt restoration. It is illogical for any period of restoration to run before the defendant is undergoing restorative treatment or for the Court to consider the time period of commitment running while the defendant is awaiting transport.

As with the other statutory provisions, RCW 10.77.086(1)(a)(i) shows that the legislature understood restoration to occur in the custody of the secretary of Department of Social and Health Services (DSHS), and in an appropriate facility. The legislature would not have expected the restoration period to run while the defendant is in the county jail awaiting restoration. Indeed, such an interpretation would completely defeat the legislature's goal of providing a method to restore competency. The clear indication is that the legislature recognized that there could be delays in admitting defendants to the hospital, and that this time was not included in the restoration period.

Respondent's argument relies on the incorrect assertion that former RCW 10.77.086 calculates the transport period. Respondent states that "the 90 day period in former RCW 10.77.086 had never

been interpreted to include only the time a defendant actually spends at WSH.” Respondent’s Brief at 23, ¶ 2. However, the sentence footnotes *State v. Weiss*, where the court specified that the “Washington statute is silent on the amount of time that can elapse between entry of the order for competency restoration and the time placement actually occurs.” *Weiss v. Thompson*, 120 Wn. App. 402, 410, n.3, 85 P.3d 944 (2004). Subsequently, the Supreme Court endorsed the ruling from *Weiss* that a defendant may have to wait in jail longer than several days for evaluation and or treatment. *Born v. Thompson*, 154 Wn.2d 749, 755, 117 P.3d 1098 (2005). The *Born* court noted that “an individual charged with a misdemeanor that is a violent act may be committed for up to 29 days (evaluation and mental health treatment and restoration of competency time combined). Further, the individual may be forced to spend time in jail awaiting space at the appropriate institute.” *Id.* at 755 (citing *Weiss*, 120 Wn. App. 402). There is no authority for respondent’s proposition that the ninety day period includes time for transport.

The interpretation that transport time is not included in the ninety day competency restoration period is particularly evident with the recent amendment and clarification to the statute. *Compare* RCW 10.77.086, enacted 2015 1st sp. S c. 7, § 5 (“The ninety day

period for evaluation and treatment under subsection (1) includes only the time the defendant is actually at the facility and is in addition to reasonable time for transport to or from the facility.”). Although the former .086 did not have the clarifying language that time spent in transit did not count toward the period of restorability, the fact of the amendment proves the legislative intent, and supports that the restoration period included only the time spent at the facility. Not only does the legislature’s recent amendment support the proposition that transport time is not factored into the time for restoration, respondent cites no authority holding such a proposition.

Here, the trial court’s dismissal order did not provide any insight into the trial court’s perspective on the transport calculation issue. See CP 25. The order simply found it was unlikely that the respondent would be competent in a reasonable period of time. CP 25 at ¶ 9.

**B. RESPONDENT’S FAILURE TO DISTINGUISH BETWEEN THE STATE AS THE PROSECUTING AUTHORITY AND WESTERN STATE HOSPITAL IMPROPERLY PLACES BLAME OF DELAY AND MISCONDUCT ON THE PROSECUTOR’S OFFICE.**

Respondent’s argument interchangeably refers to both Western State Hospital and the prosecuting authority as ‘the State.’

This mischaracterization and lack of distinction between two separate entities argues a CrR 8.3 responsibility. Respondent's characterization of 'the State' not only presumes prosecutorial responsibilities for delays beyond their control, but confuses a review of what would be a CrR 8.3 dismissal for government misconduct. However, here the trial court's order dismissing the felony charges made no reference to CrR 8.3, made no findings as to misconduct on behalf of the prosecutor, or prejudice affecting the respondent. The trial court order dismissing the criminal charges is not a CrR 8.3 dismissal.

Under CrR 8.3(b), dismissal is proper only where defense has shown (1) arbitrary action or governmental misconduct, and (2) prejudice materially affecting Defendant's rights to fair trial. *State v. Moore*, 121 Wn. App. 889, 895, 91 P.3d 136 (2004) (*rev. denied*, 154 Wn. 2d 1012, 114 P.3d 657 (2005)). *See also State v. Koerber*, 85 Wn. App. 1, 5-6, 931 P.2d 904 (1996) (CrR 8.3(b) dismissals should be limited to 'truly egregious cases of mismanagement or misconduct by the prosecutor.'). The misconduct must be that of a government agent. Otherwise, "[i]t must be shown that the State in some way 'instigated, encouraged, counseled, directed, or controlled' the conduct of the private person." *State v. Mannhalt*, 33 Wn. App. 696,

702, 658 P.2d 15 (1983). Western State Hospital was not acting at the direction of the prosecuting attorney's office, and there is no arbitrary action or governmental misconduct. Though there is no case on point which indicates that an independent agency's actions should not be considered under CrR 8.3(b), the appellate Court has specifically found that the misconduct must be linked to the prosecutor's office. See *State v. Koerber*, 85 Wn. App. 1 (1996).

No case law supports a finding that another governmental agency, such as DSHS or WSH is so closely linked to the prosecutor's office that CrR 8.3(b) could apply. A more analogous situation would be to compare cases where the Court has considered private citizen's actions. In *Mannhalt*, the Court required a showing that the "State in some way 'instigated, encouraged, counseled, directed, or controlled' the conduct" of a private citizen. *State v. Mannhalt*, 33 Wash. App at 702 (1983). WSH is a State owned psychiatric hospital administered by DSHS. The County Prosecutor's Office has no influence or control over WSH's actions.

The trial courts dismissal order makes no findings as to a dismissal based on CrR 8.3(b). By interchangeably referring to both WSH and the prosecuting authority as 'State,' respondent asserts a CrR 8.3 misconduct argument. The trial court made no findings as to

misconduct, mismanagement or prosecutorial direction causing any delays attributable to the Skagit County Prosecutor's Office.

**C. RESPONDENT'S SUBSTANTIVE DUE PROCESS ARGUMENT IS NOT SUPPORTED BY THE RECORD OR THE COURT'S DISMISSAL ORDER.**

Respondent argues that the trial court dismissed the felony charges due to serious violations of the respondent's Fourteenth Amendment substantive due process rights. This argument is not supported either from the record or the court's dismissal order. Specifically, the trial court explained the reasoning behind the court order stating that "The [defendant] is incompetent to stand for trial, and it is unlikely that she will be competent within a reasonable period of time." Court's Order, at 9. The trial court made no findings as to balancing the respondent's liberty interest with incarceration, nor did the court's order include any supporting facts regarding the detention period or the respondent's stated deterioration. Without a finding of likelihood of restorability, the trial court acted outside its authority as provided in RCW 10.77 *et. seq.*, by dismissing the case.

**D. CONCLUSION**

For the above mentioned reasons, the State respectfully requests this Court reverse the order of the superior court.

DATED this 16th day of February, 2016.

Respectfully Submitted,



By: **HALEY W. SEBENS, WSBA#43320**  
Deputy Prosecutor  
Attorney for Petitioner

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DECLARATION OF DELIVERY

I, Vickie Maurer, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Nielsen Broman Koch, PLLC, Attorney at Law, 1908 E. Madison St., Seattle WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 16th day of February, 2016.



VICKIE MAURER, DECLARANT