

73814-3

FILED
Dec 31, 2015
Court of Appeals
Division I
State of Washington

73814-3

NO. 73814-3-I

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

STATE OF WASHINGTON,

Appellant,

v.

STEPHEN HOPE,

Respondent,

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

The Honorable Joseph P. Wilson, Judge

BRIEF OF RESPONDENT

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A. RESPONDENT'S STATEMENT OF THE ISSUE

Following testimony from the prosecution's first witness in what was suppose to be a four-day jury trial, the matter was recessed until the following day at the State's request after the assigned prosecutor revealed two of its witnesses had failed to appear to testify as scheduled. The following morning the prosecutor informed the court it had just learned the State's key witness had been injured sometime before the week of trial and was unavailable to testify for an unknown period of time. Has the State failed to show the trial court abused its discretion in denying the State's request for a one-week recess and instead dismissing the prosecution, when the start of trial had already been postponed several times to accommodate the prosecution, a jury had been selected and sworn with the understanding the State was ready to proceed, and where there were jurors who could not remain on the jury beyond the original week set for trial?

B. STATEMENT OF THE CASE

On December 22, 2014, the appellant Snohomish County Prosecutor charged respondent Stephen Hope with possession of a stolen vehicle. CP 24-25. The prosecution alleged that on May 16, 2014, Snohomish County Sheriff's Deputy Dixon Poole saw a person later identified as Hope driving the stolen vehicle that day. CP 20-23. Hope denied the allegation, claiming he had an alibi. Id.

The trial date was continued by party agreement until June 19, 2015. CP 14-17. On May 21, 2015, the prosecution unilaterally moved to continue trial until July 24, 2015, on the basis that the currently assigned deputy prosecutor, Tammy Bayard, was to begin four to six weeks of medical leave beginning on May 11, 2015. CP 12-13. The court approved a continuance, but only until July 2, 2015, to accommodate Bayard's leave. CP 10-11.

By June 29, 2015, however, a new deputy prosecutor, Robert K. Grant, had been assigned, and on that date filed a "Motion and Affidavit for Order Continuing Trial." CP 7-9. According to the affidavit filed by Grant;

On the currently scheduled trial date of July 2, 2015, Deputy Poole will be out of the area on a pre-scheduled vacation. He will be returning from that vacation on July 16, 2015. He is unable to reschedule that vacation, as he will be spending part of it with his family spreading his father's ashes.

Absent any unforeseen circumstances, the State would be available for trial on July 24, 2015. This witness is necessary to the State's case, and his absence due to vacation is good cause to continue trial. . . .

CP 8.

Grant's request was approved on July 2, 2015. CP 5-6.

At 1:00 p.m. on July 24, 2015, another deputy prosecutor, Scott Halloran, appeared on behalf of the State in the matter for "Trial Call" and Jennifer Rancourt appeared on behalf Hope. CP 38. According to the minute entry, the court granted Rancourt's request for a material witness

warrant for Kelsie Carlson, Hope's alibi witness. Id. This warrant was quashed later that day, however, when Carlson appeared for trial. CP 37.

At 9:22 am on Monday, July 27, 2015, both parties appeared for trial and stated they were ready to proceed. RP¹ 3. When deputy prosecutor Grant moved to exclude witnesses, he explained;

The State does not have a managing witness as my two detectives aren't in the office today, they'll be here tomorrow, so I don't have a managing witness for the case. But I would be asking that the defense exclude all their witnesses.

THE COURT: Which detectives are gone?

MR. GRANT: Detective Fagan and Detective Ludwig.

THE COURT: But the others will be ready to go?

MR. GRANT: Today.

RP 4.

Following discussions regarding motions in limine, RP 4-18, the following exchange occurred:

THE COURT: Okay. So State has six witnesses. How many you got ready to go today?

MR. GRANT: Three of them are ready to go today.

THE COURT: And then three tomorrow?

MR. GRANT: Probably just two

¹ There is a single verbatim report of proceedings in this matter for the hearing dates of July 27-28, 2015, and is referenced herein as "RP."

THE COURT: And defense is ready to start your case tomorrow?

MS. RANCOURT: We are, Your Honor.

THE COURT: How long do you anticipate this case lasting?

MS. RANCOURT: Three days if they only call two witnesses tomorrow.

RP 19.

Deputy prosecutor Grant then reassured the trial court that he believed the case would be in the jury's hands by the afternoon of Wednesday, July 29, 2015. RP 20.

A jury venire was receiving preliminary instructions by 10:17 a.m., and voir dire and jury selection, which was not transcribed for appeal, was completed by 11:39 a.m. RP 22-26. In preliminary remarks to the jury, the court reiterated that the parties expected the jury to begin deliberations by Wednesday afternoon, or possibly not until Thursday morning. RP 35. Following the court's preliminary instructions, the trial recessed for lunch, reconvening at 1:29 p.m. RP 37.

When the trial reconvened, the court asked if the parties were ready to proceed. RP 39. In response, deputy prosecutor Grant stated there were two potential problems, one with a defense witness who needed the advise of counsel before testifying, and another with the prosecution's key witness,

Deputy Dixon Poole, who was scheduled to testify the first day of trial but had failed to appear. RP 39-40. Grant explained that neither he nor Poole's supervisor knew where Poole was, that he was not scheduled for work, but that he had been scheduled to testify. RP 39-40. Grant assured the court he would know Poole's whereabouts by the end of the day. RP 40.

Thereafter the trial proceeded with opening statements by counsel for both parties, and the testimony of Ron Bahr, the operations manager for Sickle Steel Cranes, the owner of the stolen vehicle allegedly possessed by Hope. RP 42-79. Following Bahr's testimony, the prosecution's next scheduled witness, "Deputy Gibson," failed to appear. RP 79. The prosecutor then explained that despite talking with Deputy Gibson during the preceding lunch hour, the deputy was under the mistaken impression he did not need to appear until the following day, but could be there in an hour if necessary. RP 80.

After learning Deputy Poole was still unaccounted for and that neither the State nor defense had any witnesses left to call that day, the court recessed the proceedings at 2:52 p.m. RP 81-83. Prior to the recess deputy prosecutor Grant assured the trial court, "I'll have all my witnesses here tomorrow that I can at whatever time Your Honor tells them to be here." RP 81.

The following morning, deputy prosecutor Grant informed the court

about what he had learned about Deputy Poole's availability to testify. RP 84-86. According to Grant, Poole "is the only officer who can in fact identify the defendant as driving the stolen vehicle." RP 84. Poole was unavailable to testify, however, because of an injury to his head² that required repair with a steel plate and "a high dosage of Percocet," presumably for the resulting pain. RP 84-85. Grant also relayed that Poole had a post-op appointment at 11:30 a.m. that day and would hopefully know more about getting off the Percocet, which makes him "fuzzy" and "sleepy" because it is a "high prescription narcotic." RP 85. Poole told Grant that he did not think he would be available to testify until the following week, August 2-8, 2015. RP 86.

Grant asked that the State be allowed to proceed with the three witnesses it did have available, and then recess the matter at lunch time until the following week in order to give Poole a chance to see when he might be available to testify at trial, noting that the State could not effectively prosecute Hope without Poole's testimony. RP 85-86.

² In an affidavit filed by deputy prosecutor Grant on August 3, 2015, Deputy Poole's injury was not to his head, but instead to his hand. CP 26-27.

The defense objected to any further delay, noting the State had already been granted a continuance of trial to accommodate Deputy Poole's schedule, that significant effort were required for the defense to ensure its three witness were available, noting two of them had to be brought to trial by the Department of Corrections at taxpayer expense. CP 28-30; RP 86-88.

Based on deputy prosecutor Grant's statement that Poole would not be available to testify until at least the following week, the court granted Hope's motion to dismiss, noting the jury had been selected based on a trial being completed by Thursday that week, and that at least one sitting juror had made it known she could not easily extend her tenure on the jury in light of work responsibilities. CP 1; RP 89-91. The court also noted Poole had known about his condition for at least a week, yet had failed to inform the prosecution about it, which he had an obligation to do. RP 90-91.

C. ARGUMENT

THE TRIAL COURT CORRECTLY DISMISSED THE CHARGE.

The trial court did not abuse its discretion in finding the prosecution's failure to bring its witnesses to trial prejudiced Hope's right to a fair trial. Therefore, this Court should affirm.

CrR 8.3(b) authorizes a trial court to dismiss any criminal prosecution in the furtherance of justice, and to ensure that an accused person is treated fairly. The rule reads, in part, as follows:

The Court, in the furtherance of justice after motion and hearing, may dismiss any criminal prosecution due to arbitrary action or government misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

Thus, a court may require dismissal under CrR 8.3 when the defendant shows: (1) governmental misconduct; and (2) prejudice affecting the defendant's rights to a fair trial. State v. Brooks, 149 Wn. App. 373, 384, 203 P.3d 397 (2009); State v. Rohrich, 149 Wn.2d 647, 654, 658, 71 P.3d 638 (2003); State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003); State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997); State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996); State v. Martinez, 121 Wn. App. 21, 86 P.3d 1210, 1214 (2004).

A trial court's decision on a motion to dismiss is reviewed for abuse of discretion. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). A court abuses its discretion only when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P. 2d 1017 (1993).

Under the first element, simple case mismanagement falls within the standard of government misconduct subject to CrR 8.3(b) dismissal. Blackwell, 120 Wn.2d at 831; State v. Sulgrove, 19 Wn. App. 860, 863, 578 P.2d 74 (1978). Moreover, Washington courts have held the misconduct

need not be intentional, evil, or dishonest; simple mismanagement is sufficient. State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990). The underlying purpose of CrR 8.3(b) is fairness to the defendant. State v Stephans, 47 Wn. App. 600, 603, 726 P.2d 302 (1987). This is the reason CrR 8.3 exists; to provide a trial court with authority to dismiss any criminal prosecution in the furtherance of justice and to ensure an accused person is treated fairly. State v. Wilke, 28 Wn. App. 590, 624 P.2d 1176 (1981).

The type of governmental misconduct addressed by CR 8.3(b) can take many forms. For example, in Sulgrove, the defendant was charged with escape and the case was called to trial one day before expiration of speedy trial. The defendant promptly moved for dismissal on grounds he was charged under the wrong statute. 19 Wn. App. at 861. The State moved to amend the charging document, which prompted the defendant to seek additional discovery on the amended charge. Id. at 862. The State then sought a recess for one-day and on the following day the State produced only inadmissible evidence and then sought an additional continuance. Id. The Sulgrove Court affirmed the trial court's dismissal of the case pursuant to CrR 8.3(b), holding the conduct of the State in failing to allege the offense properly and to marshal admissible evidence, was sufficiently careless to constitute misconduct and grounds for dismissal in the furtherance of justice. Id. at 863; see also Stephans, 47 Wn. App. at 603 (misconduct element met

where witnesses disobeyed a court order, where there was no indication that the State was ready for trial, and where no remedy would have served interests of justice short of a dismissal).

Here, similar to Sulgrove, the State mismanaged the prosecution of Hope. Specifically, the prosecution repeatedly asserted it was ready to proceed to trial when in fact it was not. The prosecution's lack of preparedness became apparent after State's first witness, Ron Bahr, concluded his testimony. It was only then that the prosecution realized it had no more evidence to present that day, which necessitated an early recess. RP 79-83. The following morning, the prosecution's ineptness became even more apparent when it revealed that unbeknownst to the prosecution until that morning, its key witness, Deputy Poole, had suffered a significant injury sometime before trial began that left him unable to testify for an unknown period of time. RP 84-86.

The State claims it had no duty to "track each witnesses' location before they testify." Brief of Appellant (BOA) at 14. The State then argues the trial court erred in chastising the prosecution for not knowing where Deputy Poole was prior to trial, claiming this wrongly places a "non-existent obligation of the State to know the location of its witnesses at all times, while ignoring the fact that such knowledge would have done nothing to alleviate Deputy Poole's medical situation or his inability to testify." BOA at 15. This

misses the point.

The trial court did not dismiss the prosecution based on the State's failure to track Poole's whereabouts at all times, or Poole's failure to notify the prosecution about his predicament. To the contrary, the court dismissed the prosecution because a trial was started with assurances from the prosecution that it was ready to proceed, when in fact it was not. The prosecution was not ready because it had failed to marshal its evidence on both the first and second days of trial when it bungled arranging for the testimony of both Deputy Gibson and Deputy Poole. Thus, as in Sulgrove, the State's failure to marshal its evidence for trial is mismanagement for purpose of CrR 8.3(b).

Under the second element, the defendant must show prejudice that affects the defendant's rights to a fair trial. State v. Baker, 78 Wn.2d 327, 332- 33 (1970); Blackwell, 120 Wn.2d at 831 (1993). Here, the prosecution's mismanagement prejudiced Hope because, as the trial court noted, jury selection was completed with the understanding that the trial would conclude the week it began. RP 89-90. It is apparent from the court's comments that it was aware of at least one juror who could not participate in Hope's trial beyond the current week, and that there could be others with the same problem, especially given that none of the potential jurors were expecting to sit on a case that lasted beyond Thursday, July 30, 2015. Id. Thus, had the

recess been granted, it would have required a new jury and starting trial all over again. Nothing in the record suggests the court's concerns were unwarranted.

When a trial ends without a verdict on a particular charge, retrial is banned under double jeopardy principles, which protect the defendant's valued right "to have his trial completed by a particular tribunal," and to prevent the State from manipulating the trial process by terminating the proceedings when it appears its case is weak or the jury is unlikely to convict. Crist v. Bretz, 437 U.S. 28, 35-36, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978) (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949)). The exception is when the defense requests a mistrial on that charge, which did not occur here. Downum v. United States, 372 U.S. 734, 735-36, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963); see RP 86 (Hope's counsel objected to any continuance or recess of trial and moved to dismiss the charge, but never moved for a mistrial).

Double jeopardy bars retrial when circumstances indicate the State's decision not to try a charge at the first trial was motivated by a concern it could not prove its case. State v. Wright, 165 Wn.2d 783, 805-06, 203 P.3d 1027, 1038 (2009). For example, in Downum, 372 U.S. at 735, the prosecutor requested a midtrial dismissal because a key state witness was unavailable. "[L]ack of preparedness by the Government to continue the trial

directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee." United States v. Jorn, 400 U.S. 470, 486, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971) (citing Downum, 372 U.S. 734). As the Court later explained, the double jeopardy clause "forbids the prosecutor to use the first proceeding as a trial run of his case." Arizona v. Washington, 434 U.S. 497, 508 n. 24, 98 S. Ct. 824, 832, 54 L. Ed. 2d 717 (1978).

Here, the trial court correctly found Hope was prejudiced by the State's mismanagement and that nothing short of dismissal was the correct remedy. The court correctly recognized that the continuance requested by the prosecution would require picking a new jury to hear the case, in violation of Hope right to be free from double jeopardy. Therefore the trial court did not error in granting the motion to dismiss under CrR 8.3 and this Court should affirm.

But even if dismissal were not warranted under CrR 8.3(b), it was under State v. Chichester, 141 Wn. App. 446, 170 P.3d 583 (2007). In Chichester, several continuances had been granted before a firm trial date in district court was established. 141 Wn. App. at 449. On the day trial was to begin, the prosecutor's office requested another continuance because the prosecutor assigned to the case had another trial, office policy precluded assigning a different prosecutor, and a continuance would not violate the speedy trial rules. Id. at 450-52. Chichester objected, noting he was missing

work to attend trial, and argued that if trial did not proceed as scheduled, the charges should be dismissed due to governmental mismanagement. Id. at 452. The trial court denied the prosecutor's request for a continuance and dismissed the charge with prejudice, finding the prosecutor's office had mismanaged its case load and that this had prejudiced Chichester "because of trial preparation, travel, and further delay." Id. at 452-53.

This Court rejected the State's appeal, holding the trial court did not abuse its discretion in denying the prosecutor's request for a continuance or in dismissing the charge. Id. at 454-59. With regard to the State's claim that Chichester was not sufficiently prejudiced by the prosecution's failures to warrant dismissal under CrRLJ 8.3(b),³ this Court held:

We think it plain from a review of the record in Chichester's case that the district court dismissed the case because the State was not ready, not on the basis that Chichester had been prejudiced by arbitrary action or governmental misconduct. . . . We do not believe CrRLJ 8.3(b) is the controlling rule where the State comes to court on the date of trial unready to proceed after being unable to show good cause for a continuance. 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.

When Chichester moved to dismiss, the State still had the opportunity to begin the trial with [another prosecutor] or

³ CrRLJ 8.3(b) contains identical language to that found in CrR 8.3(b).

to propose some other deployment of resources consistent with the trial date. Instead of objecting to a dismissal, the State declared itself unready to proceed and virtually invited the court to grant the defense motion.

Somewhat similar circumstances were presented in State v. Sulgrove, 19 Wn. App 860, 578 P.2d 74 (1978). . . . The trial court dismissed the case because of the State's lack of preparation. This court affirmed. Sulgrove, 19 Wn. App. at 863. Of significance to the present case, we noted parenthetically that "had the trial court not dismissed the prosecution under CrR 8.3(b), but simply allowed the trial to proceed and denied any request for a continuance (as would have been well within its discretion, having already granted one continuance), the State would have failed for a lack of evidence." Sulgrove, 19 Wn. App. at 863. The same is true here. The trial court was within its discretion to deny the request for a continuance. Because the State was not ready to proceed, the case would have necessarily failed for lack of evidence if the court had called it for trial. Granting the defense motion to dismiss simply recognized that reality.

Control of a trial calendar ultimately rests with the court, not the litigants. The court's decisions were reasonable. We find no abuse of discretion.

141 Wn. App. at 457-59.

Here, as in Chichester, the prosecution was not ready to proceed despite having picked a jury with the understanding it was, and it subsequently failed to establish good cause for its erroneous claim of readiness such that a continuance would be warranted. And had trial proceeded as scheduled, the prosecution would likely have failed for lack of evidence, as the prosecution conceded. RP 85. The trial court's decision to dismiss the prosecution "simply recognized this reality." 141 Wn. App. at 459. It also provided a clear and necessary signal from the court that

459. It also provided a clear and necessary signal from the court that "[c]ontrol of the trial calendar . . . rests with the [trial] court" and not the prosecutor. Id. As such, the trial court did not abuse its discretion in dismissing the charge against Hope and therefore should be affirmed.

D. CONCLUSION

For the reasons stated, this Court should affirm the trial court and dismiss the State's appeal.

DATED this 31ST day of December 2015.

Respectfully submitted,

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

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| STATE OF WASHINGTON |) | |
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| Appellant, |) | |
| |) | |
| vs. |) | COA NO. 73814-3-1 |
| |) | |
| STEPHEN HOPE, |) | |
| |) | |
| Respondent. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEPHEN HOPE
 5823 65TH DRIVE NE
 MARYSVILLE, WA 98270

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF DECEMBER 2015.

X *Patrick Mayovsky*