



**TABLE OF CONTENTS**

A. ANSWERS TO APPELLANT’S ASSIGNMENTS OF ERROR .....1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

C. STATEMENT OF THE CASE.....2

D. ARGUMENT .....9

E. CONCLUSION .....25

## TABLE OF AUTHORITIES

### Federal Cases

Gregory v. U.S. ....	10, 11
Hernandez v. Nelson.....	11
U.S. v. Tsutagawa.....	11

### State Cases

Hardy v. Claricom.....	20
In re Estate of Kessler.....	20
Jones v. Halverson-Berg.....	20
Kay Corp. v. Anderson.....	20
Oltman v. Holland America Lines.....	20
Pierce County v. State.....	16
State v. Atchley.....	16
State v. Burri.....	9, 13
State v. Campbell.....	5
State v. Cannon.....	13
State v. Carlson.....	21, 22
State v. Chamberlin.....	20
State v. Copeland.....	9
State v. Cord.....	16
State v. Cory.....	14
State v. Dailey.....	14

State v. Garza .....	15
State v. Hofstetter.....	10
State v. Lively .....	14
State v. Long .....	13
State v. Martinez.....	14
State v. Michielli.....	9, 13
State v. Moore.....	16
State v. Sherman .....	14
State v. Stephans.....	15
State v. Sulgrove .....	9
State v. Teems.....	12
State v. Vant.....	17

**Court Rules**

Criminal Rule 4.7.....	11, 12
Criminal Rule 8.3 (b).....	9, 12, 13

## **A. ANSWERS TO APPELLANT'S ASSIGNMENTS OF ERROR**

No. 1, 2, and 8. The State's Assignments of Error 1, 2, and 8 all deal with the trial court judge's denial of the State's motion to recuse. The trial court judge ruled correctly when she denied the State's request that she recuse herself, where the State asked for recusal only after the judge ruled against the State; this was not a mandatory recusal situation and the State has pointed to no authority that requires a trial court judge to recuse herself sua sponte where one party's counsel is married to a court commissioner with no part in the case, where the relationship was known to the State for many years, and both parties' counsel had appeared before the trial judge on opposite sides many times over the course of those years, and the State chose to proceed knowing all of the relevant facts.

No. 3. The trial court did not err in making Finding of Fact No. 6 where great deference is given to the trial court's findings of fact and substantial evidence exists to support the finding.

No. 4. The trial court did not err in making Conclusion of Law No. A.3, where great deference is given to the trial court's factual findings and those findings in turn support the conclusions of law.

No. 5. The trial court did not err in making Conclusion of Law No. A.4, where great deference is given to the trial court's factual findings and those findings in turn support the conclusions of law.

No. 6. The trial court did not err in making Conclusion of Law No. B.2 where, the trial court's factual findings are entitled to great deference and those findings support the conclusions of law.

No. 7. The trial court did not err in making Conclusion of Law No. B.3 where, the trial court's findings of fact are entitled to great deference and those findings support the conclusions of law.

No. 9. The trial court did not err in denying the Appellant's motion to reconsider.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

No. 1. Can a party who knows all of the relevant facts regarding his motion for recusal of a judge before the central issue is briefed, argued, and decided, wait until after the judge has made her decision before raising the issue of whether the judge should recuse herself?

No. 2. Giving great deference to the trial judge's findings of fact, does substantial evidence support her findings of fact and do those facts in turn support the conclusions of law?

No. 3. Did the trial judge abuse her discretion when she dismissed the case for governmental mismanagement pursuant to CrR 8.3 (b)?

## **C. STATEMENT OF THE CASE**

Bobby Beasley was charged in Mason County Superior Court with burglary first degree, a class A felony. (CP 394). He had no criminal history. (CP 154; CP 393).

The trial date was set for June 26<sup>th</sup> (RP 62); (RP 158); (CP 376); (CP 387), with the final day for speedy trial purposes of July 9th. (RP 19); (RP 158); (CP 387). The defense experienced difficulty in obtaining discovery and witness interviews. After letters and phone calls to witnesses Carl Hills and Linda Herrera did not result in interviews, in court on June 18, 2007, the defense told the court that it would be requesting authorization for a deposition for one of the witnesses. The court said that the

prosecutor should have the opportunity to arrange the interview, and asked that the defense investigator contact the prosecutor to see if that could be arranged. (RP 10-11); (CP 377). Mr. Beasley's attorney asked the deputy prosecutor in court to let the trial deputy know about the request, and she put a note (sticky note) on her file to inform the trial deputy that the defense was requesting help obtaining witness interviews. (RP 16); (RP 80); (RP 131); (RP 152); (RP 159); (CP 28); (CP 32).

On June 22<sup>nd</sup>, the defense notified the court and the prosecutor that it may have to request depositions for both witnesses, as the witnesses' cooperation had not yet been obtained, and again asked the deputy prosecutor for help in obtaining the interviews. (RP 12-13); (RP 49); (RP 80); (RP 98); (CP 376). The sticky note was still on the prosecutor's file for the deputy prosecutor assigned to the case. (RP 159); (CP 32).

On June 26<sup>th</sup>, the defense sent the prosecutor a letter requesting notes of any witness interviews that the prosecutor or the police had conducted, summaries of any witness interviews that had not yet been provided, and that defense counsel be allowed to attend any witness interviews conducted by the prosecutor or the police. The prosecutor did not reply, except for a summary of interviews that was provided two days later. (RP 132); (CP 152).

On June 28<sup>th</sup>, the case came before the court to address the defense's motion for depositions. (RP 15). As defense counsel entered the courtroom, the prosecutor handed him a copy of a summary of contacts and interviews with the witnesses that were the subject of the motion for depositions, (RP 16), two other witnesses who had not been disclosed before that date, and mention of a third undisclosed witness (RP 19). Two of the witnesses were contacted by the detective in April. (RP 23); (RP 133); (RP 162); (CP

289-294). Defense counsel stated as follows: “Today as I come into court, Mr. Schuetz gave me – one, two, three, four, five, six-page follow-up report by Detective Pittman, containing follow-up interviews with both of these witnesses that we have been unable to contact at all. Why could they not call us and say look, we’re going to talk to these people, why don’t you show up and you can talk to them too? Well, I don’t know why; they didn’t do it even though – that Mr. Schuetz knew that we were trying to get interviews with these people.” (RP 16-17). The interviews themselves referred to in Det. Pittman’s summary report, were contained on a CD recording that was provided to the defense on July 20<sup>th</sup>, which was specifically requested by letter from the defense on July 3<sup>rd</sup>, due to the June 28<sup>th</sup> disclosure of new witnesses. (RP 134). The CD contained interviews recorded as far back as May 17<sup>th</sup>. (RP 162). That was not provided to the defense prior to July 20<sup>th</sup>. (RP 61-63).

Further discussed was that the trial was set for the next day, and that the prosecutor had set up interviews for the defense with the witnesses for the following Tuesday. The court ordered a deposition to occur if the scheduled interviews did not take place. (RP 21); (RP 160). The trial deputy acknowledged the note on his file, as follows: “And there’s a note on my file: Carl Hills, dash, we need to see if we can facilitate – Delta for defendant – interviews, with a R for Rebecca.” (RP 20). This note was the subject of a subpoena duces tecum for the hearing on the motion to dismiss, but the prosecutor ignored the subpoena duces tecum. (RP 131); (RP 147); (RP 152); (CP 11); (CP 26-27).

The interviews took place on July 3<sup>rd</sup>. (RP 26). Also provided that day were photographs of the door that Mr. Beasley had allegedly kicked in. (RP 63); (RP 79).

This discovery had not been provided before that date. (RP 28). When counsel for Mr. Beasley and the defense private investigator appeared for the interview of Carl Hills at the prosecutor's office, Mr. Hills was already present and appeared to be angry and hostile. (CP 11). He refused to say why he was so hostile, and was instructed by the deputy prosecutor that he did not have to answer that question and others. (CP 11-12). For the next fifteen to twenty minutes, the deputy prosecutor repeatedly interrupted the defense's questioning of Mr. Hills. The deputy prosecutor instructed Mr. Hills that he did not have to answer some of the questions if he did not want to; he instructed Mr. Hills not to answer some questions, and he told Mr. Hills that he would prefer it if Mr. Hills did not try to answer a question if he was not sure of the answer, to just say "I don't know". (CP 80-82); (CP 126-127). Due to the prosecutor's interference, the defense did not get a satisfactory interview of Mr. Hills. (CP 305); (CP 319-321). The interview of Linda Herrera was completed satisfactorily. (CP 33-35); (RP 44-45); (RP 134); (RP 148).

On July 4<sup>th</sup>, Carl Hills claimed to have seen Bobby Beasley and Rene Demmon together, in violation of a no contact order. (RP 136). This resulted in Mr. Beasley's arrest as he left the courtroom on July 12<sup>th</sup>, from the prosecutor's motion to extend the no contact order. Both the prosecutor and the police knew about this allegation before the interview of Rene Demmon at the prosecutor's office on July 9<sup>th</sup>, but they said nothing to the defense, until after Bobby was arrested on July 12<sup>th</sup>. At the July 9<sup>th</sup> interview, the police repeatedly asked Ms. Demmon whether she had contact with Mr. Beasley during the relevant times, knowing that the defense had not been told of this information. (RP 136-137); (CP 321-323).

On July 5<sup>th</sup>, Beasley filed a motion to dismiss for governmental mismanagement of the case. Also on that day, the court granted a continuance over Mr. Beasley's objection pursuant to State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984). (RP 28-31). Beasley also requested authorization to record a witness interview scheduled for the next day, due to the prosecutor's interference during the interview of Carl Hills. (RP 32). The court set the motion to dismiss on for July 12<sup>th</sup>. (RP 34).

The motion to dismiss was not heard on July 12<sup>th</sup> by request of the defendant, due to unavailability of counsel. However, the prosecutor asked that Mr. Beasley appear in court that day anyway, to address and renew a no contact order. Beasley's counsel agreed, as long as the hearing was limited to that one purpose, due to his unavailability, and he would send an associate to cover the hearing. (RP 35-38); (CP 314-316).

But, the prosecutor knew that Beasley was going to be arrested, police officers were waiting, and as Mr. Beasley left the courtroom, they arrested him on allegations that he had violated a no contact order. There was no notice to Beasley or to the court regarding the planned arrest. The officers took Mr. Beasley to the jail and booked him. He was told the bail was \$1,000, and he began making arrangements to have that posted, but was informed by jail staff that Mr. Schuetz had talked to the judge and had the bail raised to \$50,000. Upon investigation, it was learned that Mr. Schuetz had not talked to the judge, but had directed the arresting officers to raise the bail on his own authority. (RP 68-73); (CP 314-316).

The motion to dismiss came on for hearing on July 30<sup>th</sup>. The State objected to the timeliness of the filing of certain of the defense documents, but withdrew that objection when the court offered to set the matter over to give the State time to respond. (RP 41-

42). The court scheduled a hearing for the following day to deliver its ruling. However, when the parties appeared for the ruling, the State submitted new declarations and requested a re-hearing of the motion to dismiss. (RP 105); (RP 111-112). The court granted the State's request (RP 111). The defense requested the State's assistance in obtaining interviews with the witnesses who had submitted declarations on behalf of the State. The State refused. (RP 117-119, 120). The court set the re-hearing on for August 7<sup>th</sup>. (RP 119).

The matter came on for re-hearing on August 7<sup>th</sup>. The State again asked for more time. (RP 122). The court granted that request, setting it to August 14<sup>th</sup> (RP 127). The State delivered its responsive pleadings to counsel for Mr. Beasley after 5 p.m. on August 13<sup>th</sup>. (RP 150).

On August 14<sup>th</sup>, the court heard argument, and granted Mr. Beasley's motion to dismiss. (RP 157-164). The judge stated as follows:

The Court will find, based upon those findings, that there has been a failure to timely produce discovery. The purpose of the rules is to minimize surprise. The State has an ongoing obligation to provide discovery. And, that there is governmental mismanagement by the delay in providing discoverable information until after the first-set trial date and as we approach the final start date and later.

Secondly, the Court concludes that the State interfered with the interview of Mr. Hills being attempted by the defense team by interrupting on multiple occasions, and most significantly, by instructing the witness that he did not have to answer the question about why he was so hostile.

The defense in criminal cases has a broad ability to inquire into the areas of bias, prejudice and interest. And what would be a more logical question than – in those areas of bias, prejudice and interest, than to inquire of an obviously angry person why he is so angry or hostile.

If the State felt that it needed a protective order in the way in which the interview was proceeding, then that option is available. It's available to both sides under Criminal Court Rule 4.7 (h) (4). Otherwise, investigations by

opposing counsel are not to be impeded under Criminal Court Rule 4.7 (h) sub (1). The Court then has found governmental mismanagement in two ways.

The second part of the test is whether there has been prejudice to the defendant. And again I'll reiterate that prejudice must be shown affecting the defendant's right to a fair trial, which includes the defendant's right to a speedy trial and the right to be represented by counsel who has had sufficient opportunity to adequately prepare a defense.

The defendant, the Court will find, was prejudiced in that he was not able to go forward to trial when that trial date was initially set, and that he was not able at that point to go forward with counsel who was prepared. The defendant has established by a preponderance of the evidence that the interference with the defense attempts to interview a witness, as well as the very late disclosure of discoverable material, required the defense counsel to request a continuance over his client's objection so that he, defense counsel, was not proceeding to trial unprepared.

There has been prejudice to the rights of the defendant which materially affected his right to a fair trial. In the interests of justice, the defendant's motion to dismiss is granted.

The case came on for entry of findings of fact and conclusions of law on the motion to dismiss on September 5<sup>th</sup>. The State had filed a motion to reconsider and a motion to recuse the judge before the hearing. (RP 165). The court made its findings of fact and conclusions of law. (RP 182-196).

The case came on for the State's motion to recuse and motion to reconsider on September 18<sup>th</sup>. (RP 197). The court denied the motion to recuse and then heard the motion to reconsider. (RP 209). The court denied the motion to reconsider, but added the language of the 'sticky note' to its findings. (RP 165-266). The court stated as follows:

With that said, the Court is not going to make any further changes with regard to the findings of fact and conclusions of law. I will make one aside, and that is that Mr. Schuetz has a very narrow focus in reading through or listening to my decision with regard to my reasons for the decision as to the notes of Mr. Finlay. The primary question before the Court at that stage was whether or not the declarations that spelled out in no uncertain terms that there were multiple instances of interference with the defense interview were credible, or were the declarations that spelled out that there was no interference with the interview.

And the Court did find very important the fact that there were contemporaneous notes taken by one participant in that interview to indicate that yes, there were interruptions and interference going on. Whether the Court specifically found that at that question there was a note related to it is looking at the issue in too narrow a focus. The Court was looking at the fact that the declarations on behalf of the State were saying that there was no interference; the declarations on behalf of defense said that there were multiple instances of interference. And the Court found that the contemporaneous notes, in addition to the other factors which I elicited as well, were important to the Court in making that decision.

(RP 266-267).

#### **D. ARGUMENT**

A trial court has the authority to dismiss criminal charges, pursuant to CrR 8.3(b). The court's decision to dismiss a case, pursuant to CrR 8.3(b), will only be reviewed under the "manifest abuse of discretion" standard. State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976); State v. Warner, 125 Wn.2d 876, 882, 889 P.2d 479(1995).

Before a court may require dismissal of charges under this rule, two things must be shown. First, there must be arbitrary action or government misconduct. The second necessary element is a resulting prejudice to the defendant's right to a fair trial. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587, 71 A.L.R. 5th 705 (1997).

The "government misconduct" necessary to satisfy the first element need not be of a malicious, evil or dishonest nature. Simple mismanagement also falls within the standard of the rule. State v. Sulgrove, 19 Wn.App. 860, 863, 578 P.2d 74 (1978). Thus, conduct that is "sufficiently careless" provides the basis for a dismissal in the furtherance of justice when the mismanagement results in prejudice to the right of a fair trial.

It is the long settled policy in this state that the rules of criminal discovery are to be construed liberally in order to serve the purposes of criminal discovery, which are "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford

opportunity for effective cross-examination, and meet the requirements of due process....”

To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense. State v. Copeland, 89

Wn.App. 492, 497, 949 P.2d 458 (1998).

Witnesses in a criminal case do not belong to either party.

Prospective witnesses are not partisans. They should be regarded as impartial and as relating the facts as they see them. Because witnesses do not “belong” to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that the witness not submit to an interview by opposing counsel . . . In the event a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that, although there is not legal obligation to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interest of justice that the witness be available for interview by counsel. Counsel may properly request an opportunity to be present at opposing counsel’s interview of a witness, but counsel may not make his or her presence a condition of the interview.”

State v. Hofstetter, 75 Wn.App. 390, 395-96, 878 P.2d 474 (1994).

A prosecutor cannot advise a witness not to speak to the defense unless the prosecutor is present. Gregory v. United States, 369 F.2d 185 (1966). The prosecutor had stated that he had “instructed all the witnesses that they were free to speak to anyone they like. However, it was my advice that they not speak to anyone about the case unless I was present.” Gregory, at 187. The court ruled that the purpose of providing the defense with a list of the names and addresses of witnesses is . . .

to assist defense counsel in preparing the defense by interviewing the witnesses. Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. Here the defendant was denied that opportunity which, not only the statute, but elemental fairness and due process required that he have. It is true that the prosecutor stated he did not instruct the witnesses not to talk to defense counsel. He did admit that he advised the witnesses not to talk to anyone unless he, the prosecutor, were present.

Gregory, at 187-88.

“We know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence. Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to.”

Gregory, at 188.

The Gregory court went on to state that the prosecutor’s advice to witnesses stemmed from motives other than the fear of witness tampering, because the advice extended to law enforcement witnesses also. Gregory, at 188. A criminal trial is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. Gregory, at 188.

In United States v. Tsutagawa, 500 F.2d 420 (1974), the government had released witnesses to be deported, thereby depriving the defense of the ability to interview or call them, and thereby depriving the defense of a fair trial (right to due process and compulsory process). Dismissal was appropriate.

In Hernandez v. Nelson, 298 F.Supp. 682, the government had allowed an informer to disappear, thus depriving the defendant of a fair trial.

CrR 4.7 also requires that a prosecutor refrain from interfering with the defense’s investigation of the case, and further mandates that discovery is a continuing obligation, as follows:

h) Regulation of Discovery.

(1) Investigations Not to Be Impeded. Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(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.

Under CrRLJ 4.7(g) (7), the court can dismiss an action where a party has failed to comply with discovery rules. In addition, under CrRLJ 8.3(b), trial court can dismiss an action when the State's action constitutes misconduct that has prejudiced the defendant. The rule states the following:

The court, in the furtherance of justice after notice 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 rights to a fair trial. The court shall set for its reasons in the order.

CrRLJ 8.3(b).

It is not necessary for a defendant to demonstrate evil intent or actions of a dishonest nature on the part of the prosecuting authority. Simple mismanagement is sufficient to show government misconduct. Government misconduct 'need not be of an evil or dishonest nature; simple mismanagement is sufficient' to warrant dismissal. State v. Teems, 89 Wn.App. 385, 948 P.2d 1336 (1997) (State's failure to provide defendant with notice of refiling of charges after a mistrial until only twelve days prior to end of speedy trial constituted simple mismanagement; case dismissed), citing State v. Michielli,

132 Wn.2d 229, 239, 937 P.2d 587 (1997) (State's filing of additional charges five days before trial thereby forcing defendant to waive speedy trial in order to prepare defense to new charges constituted simple mismanagement; case dismissed).

A CrRLJ 8.3 government misconduct dismissal is not limited to actions by the prosecutor. Police misconduct, to include simple mismanagement, can result in an CrR 8.3 dismissal. State v. Granacki, 90 Wn.App. 598, 959 P.2d 667 (1998).

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, *supra*, at 240.

In Michielli, the court determined that the State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, constituted mismanagement and prejudice sufficient to satisfy CrR 8.3(b). Michielli, *supra*, at 243.

Discovery rules are intended to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the State. State v. Cannon, 130 Wash.2d 313, 328, 922 P.2d 1293 (1996). The following cases exemplify situations where the courts have found governmental mismanagement and resulting prejudice that justified dismissal of the charges.

In State v. Long, 32 Wn.App. 732, 649 P.2d 845 (1982), dismissal of a charge of first degree assault was upheld. The prosecutor and police had arranged to have a necessary witness hypnotized, and the hypnotism rendered the witness's memory beyond rehabilitation, although the witness believed that his memory was accurate.

In State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976); the defendant was charged with theft of hay. The prosecutor instituted a special inquiry proceeding to examine the defendant's alibi witnesses to ascertain their testimony for trial. The special inquiry proceeding was not authorized for this purpose, and it rendered the defendant's witnesses unavailable to him. Dismissal was proper.

In State v. Martinez, 121 Wn.App. 21, 86 P.3d 1210 (2004), a prosecutor had withheld exculpatory evidence. Dismissal was proper.

In State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996), the State allowed an informer to attend AA meetings, form a romantic relationship with a woman, and induce her to set up drug transactions. The State's actions were outrageous and violated the defendant's due process rights. Dismissal was proper.

In State v. Cory, 62 Wn.2d 371, 282 P.2d 1019, 5 A.L.R. 3d 1352 (1963), law enforcement installed a microphone in a jail conference room and eavesdropped on attorney/client conversations. Dismissal was proper.

In State v. Sherman, 59 Wn.App. 763, 801 P.2d 274 (1990), dismissal was proper where the State failed to produce IRS records that it had agreed to produce pursuant to a discovery order (sufficient grounds by itself for dismissal), and other grounds included State's filing of motion to reconsider discovery order after date trial was to start, State's filing of amended information after scheduled trial date start, and attempt to expand witness list on day of trial.

In State v. Dailey, 93 Wn.2d 454, 610 P.2d 357 (1980), dismissal was proper where State did not comply with a discovery order until a month later, names and addresses of State's witnesses were not disclosed until less than one court day before

trial, State was late in compliance with bill of particulars and was extremely late in dismissal of charge against codefendant.

In State v. Garza, 99 Wn.App. 291, 994 P.2d 868 (2000), a presumptive violation of the defendant's right to counsel would arise if the jail's security concerns did not justify examination of defendants' legal papers; the case was remanded for a fact-finding hearing.

Finally, in State v. Stephans, 47 Wn.App. 600, 736 P.2d 302 (1987), the State had access to the legal custodians of child witnesses, but the defense did not. The State gave the custodians advice that a court order was incorrect and that there was no authority for the court's prior order directing the witness to submit to an evaluation. The State argued that it had no better witness cooperation than did the defense because the witnesses were in Alaska. The court ruled that dismissal was proper, because it was the State that filed the charges and must prove the case, and while the State's lack of formality as to a witness list may not be enough to dismiss by itself, the State's encouragement of the children's custodians to ignore a court order for an evaluation was egregious.

Here, the State's late discovery disclosures by themselves would be sufficient to dismiss the case. But, the State also interfered with the interview of a witness by interjecting itself as the witness's legal advisor, essentially, and by giving the witness various advice that interfered with the defense's ability to conduct the interview and gain information. The State's interference was not authorized and should not have occurred. The trial was originally set for June 26<sup>th</sup>. But the State provided photographs of the allegedly damaged door on July 3<sup>rd</sup>, it provided a detective's summary of witness contacts and interviews on June 28<sup>th</sup> that included contacts and interviews going back to

April and May, and it did not provide the recording of those interviews and follow-up interviews until July 20<sup>th</sup>, well after the last day for trial.

The State has assigned error to only one of the trial court's findings of fact. Thus, the rest of the findings of fact are verities on appeal. State v. Moore, 161 Wn.2d 880, 884, 169 P.3d 469 (2007).

The State claims that the trial court erred in making finding of fact #6. A trial court's findings of fact are given great deference on appeal. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). A trial court's findings of fact are reviewed under a clearly erroneous standard, and will be reversed only if not supported by substantial evidence. Substantial evidence exists only if there is a sufficient quantity of evidence in the record to persuade a fair-minded rational person of the truth of the finding. Great deference is given to the trial court's factual findings. State v. Atchley, 142 Wn. app. 147, 154, 173 P.3d 323 (2007). Where a trial court has weighed the evidence, appellate review is limited to whether substantial evidence supports the trial court's findings, and if so, whether the findings in turn support the conclusions of law. Pierce County v. State, \_\_\_ Wn. App. \_\_\_, 185 P.3d 594, 627 (Div. II. 2008).

Finding of fact #6 reads as follows:

On July 3<sup>rd</sup>, an interview of witness Carl Hills took place in the prosecutor's office. Mr. Hills was already in the prosecutor's library/conference room when the defense team arrived. Mr. Hills appeared very hostile and angry. When asked why he was hostile, the State advised the witness that he need not answer the question, and at multiple other times during the defense interview of Mr. Hills the State interrupted the defense interview and the flow of that interview and interjected instructions or advice to the witness.

To make this credibility determination, the Court reviewed the declarations that were filed, and compared what the declarations actually said and what was left out. Second, the State's declarations were essentially carbon copies of each other; the same language was used in them, which is not generally how

people speak when giving their own information. The third consideration was the notes taken by defense counsel during the interview of Mr. Hills.

Additionally on July 3<sup>rd</sup>, the defense was provided with a compact disc containing photographs of the door that was allegedly kicked in. Although the State argued that it is the policy of its office to provide that type of discovery earlier on, apparently it wasn't done and that was not brought to their attention.

(CP 31-35, at 33, Findings of Fact and Conclusions of Law).

Credibility determinations are for the trier of fact and are not subject to review.

The appellate court defers to the trial court on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Vant, \_\_\_ Wn. App. \_\_\_, 186 P.3d 1149, 1152 (Div. II, 2008).

There is substantial evidence in the record to support this finding, and it includes but is not limited to the following documents: Declaration of Gregory Gilbertson in Response to State's Motion to Reconsider (CP 80-84); Finlay's Notes of Hills Interview (CP 126-127); Legal Authorities for Motion Under CrR 8.3(b) and Declaration (CP 222-224); Declaration of Bruce Finlay Re: Opposing Declarations of Schuetz, Borcharding, and Hills (CP 241-242); Declaration of Gregory G. Gilbertson Regarding Interview of Carl Hills, July 3, 2007 (CP 304-305); Declaration in Support of Motion to Dismiss (CP 319-325); and includes evidence of similar conduct by Mr. Schuetz in other cases: (CP 342: "During my attempt to interview Ms. Jones, Mr. Schuetz repeatedly interrupted me when he didn't like my question. . . . He interrupted me repeatedly saying, that question puts words in her mouth, you're confusing her, et cetera. I felt like he was trying to – and actually was succeeding in – blocking a good faith attempt by the defense to have access to the witness – interview the witness." Attorney Lousteau telling the court about Mr. Schuetz during a witness interview); (CP 347: Mr. Schuet[z]: "No. I'm going to direct him that he doesn't have to answer. It's an objectionable question. If you want to go

before the Court, we can argue about that.” Mr. Schuetz directing witness Trooper Pigmon not to answer a question in a deposition in *State v. Rose Muniz*).

Here, the findings of fact in turn support the conclusions of law. The trial court found that there was governmental mismanagement in two ways: by a failure to provide timely discovery, and by interference with a defense interview. The trial court found prejudice to the defendant from the effect on his right to a fair trial, which includes a speedy trial and the right to be represented by counsel who has had sufficient time to adequately prepare a defense. The defendant was unable to go forward when the case was set and within the speedy trial period due to the very late discovery and the interference in a witness interview. (CP 34-35). These conclusions are fully supported by the findings of fact, which in turn are supported by substantial evidence in the record. Indeed, the State has only challenged one of the findings of fact, and therefore accepts the rest of them as verities on appeal.

The final issue is whether the judge was required to recuse herself, under circumstances where all of the relevant facts and circumstances were known to the parties in advance of the hearing, and neither party asked her to recuse herself. The State first made the request after the judge heard the motion to dismiss. (RP 164); (CP 109-125, Motion to Reconsider, filed August 24, 2007). The State’s Motion to Reconsider, (CP 109-125), asked the court to recuse herself or reverse her decision on the grounds that substantial justice had not been done, that there was no evidence supporting certain portions of the oral decision, and that reasonable inferences from the evidence justified a contrary decision. The State’s brief argued that Beasley’s defense counsel was either not credible or had a personal agenda against the deputy prosecutor, as follows: “Defense

counsel's so-stated personal opinion was a revelation both as to his belief system and his willingness to ignore facts in championing his opinions and agenda," (CP 115); "Just as defense counsel did not let the facts get in the way of his agenda in the two bar association matters, he has not felt constrained by mere facts in his various declarations and correspondences herein. His willingness to allege matters unsupported and/or refuted by the facts bears directly on the credibility of his assertions," (CP 115); "This was such a gross exaggeration and mischaracterization of the truth that it simply cannot be overlooked," (CP 117); "Once again, defense counsel demonstrates that he will not let the facts or the truth get in the way of his agenda," (CP 117); "This statement is technically true. It is also the height of disingenuousness," (CP 117); "Again, however, it does not constrain counsel in his attempts to create a false impression," (CP 118); "This statement, like so many others, is made with no regard to the actual facts," (CP 118); "Once again, defense counsel defense counsel (sic) ignores the actual facts and misstates the record," (CP 120); "Again, however, mere facts do not constrain counsel in his attempts to create a false impression," (CP 120); "defense counsel continued trumpeting his own agenda, regardless of the facts. This determination to stick to a false scenario speaks volumes," (CP 121); "The latest factually unsupported assertions by defense counsel are offered as illustrative of his mindset towards and personal dislike of this declarant," (CP 123); "... are wholly fabricated and are plainly part of the general defense strategy in this matter of attacking the state in any manner which will disrupt the prosecution, regardless of the truthfulness of the attacks", (CP 125). Mr. Beasley submits that this kind of argument is beyond acceptable and professional conduct.

First, the State has not cited any authority for its claim that the Court must recuse itself, other than a general citation to the Code of Judicial Conduct, and general case law citations that restate the judicial canons. Those rules state a judge's ethical responsibilities in general terms. There is no rule that specifically covers the situation before this Court. There is no case law cited by the State, and a search by defense counsel found no case that supports the State's position. Likewise, a search of the Judicial Conduct decisions from 2007 back to 1982 found no case where a judge was disciplined under facts remotely similar to the current case. A court need not consider any argument that is not supported by citation to authority. Hardy v. Claircom Communications Group, Inc., 86 Wn.App. 488, 495 n.4, 937 P.2d 1128 (1997); In Re Estate of Kessler, 95 Wn.App. 358, 370 n.15, 977 P.2d 591 (1999); Oltman v. Holland America Line USA, Inc., 136 Wn. App. 110, 126, 148 P.3d 1050 (2006).

The Code of Judicial Conduct is designed to give guidance to judges. State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389, 392 (2007). In certain instances the duty to recuse is nondiscretionary because the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. These instances include where the judge has a financial interest in the outcome or where the judge has been the target of personal abuse or criticism from the party before her. But a claim of an unconstitutional risk of bias must overcome *a presumption of honesty and integrity* accruing to judges. Chamberlin, at 38 (emphasis added). The law presumes that judges perform functions regularly and properly and without bias or prejudice. Jones v. Halvorson-Berg, 69 Wn.App. 117, 127, 847 P.2d 945 (1993); Kay Corp. v. Anderson, 72 Wn.2d 879, 885, 436 P.2d 459 (1967).

In Chamberlin, the issue was whether a judge who had reviewed an application for a search warrant could also preside over a motion to suppress evidence that challenged the probable cause for the search warrant. Our Supreme Court answered affirmatively, finding no violation of the Canons for Judicial Conduct or of the associated appearance of fairness doctrine. Chamberlin, at 39-40. In that case the judge was asked to recuse himself before the hearing; not after as in the present situation. There is no authority cited by the State nor was any found by the defense that would support a motion to recuse made for the first time after an adverse decision.

The State's motion to recuse was raised for the first time after the judge had made her decision. But, one cannot wait until after an adverse decision to ask for a different judge. It was incumbent upon the State to make such a motion before the hearing; not after an adverse decision. The lack of any motion to recuse before the hearing "suggests that in fact counsel was not concerned about any such" issues. "Just as one cannot seek a new trial based on newly discovered evidence when counsel has failed to use due diligence to find such evidence, one cannot seek reargument after an adverse decision when counsel has failed to use due diligence to inform himself about any possible basis for a motion to recuse." State v. Carlson, 66 Wn.App. 909, 916, 833 P.2d 463 (1992).

The State suggests that the trial judge could not be impartial and objective because defense counsel's wife was a court commissioner, and that she was uncomfortable with having to make the decision. But, judges are required to make decisions that at least one party will not like, and all of the facts were known to the State before the motion to dismiss or even the State's motion for re-hearing of that motion

were argued. If the State felt that there was an issue, it was required to raise it before the hearing instead of waiting until after an adverse decision.

This is clearly not a case that requires recusal, and there are no authorities that even remotely suggest that recusal would be appropriate under the Court's discretion. The motion to recuse cannot be made for the first time after an adverse decision. In Carlson, the court stated as follows:

If counsel or a litigant has reason to believe that a judge of the panel should be disqualified, he must act promptly. There are important reasons to place the responsibility on counsel to request a recusal. Only counsel and the litigant are in a position to determine whether circumstances give rise to a concern on their part as to possible bias or unfairness. . . . However, when a party or counsel has a reasonable and justifiable concern that a judge will be biased or unfair he has an obligation to move as promptly as possible to request that the judge recuse herself so as to minimize any disruption or delay in the appellate process. He cannot wait until he has received an adverse ruling and then move for disqualification.

State v. Carlson, at 916-17.

In Carlson, the defendant had received an adverse ruling from a panel of the Court of Appeals, and then moved for one member of that panel to recuse herself. The defendant's argument for recusal was based on the judge's participation in a program known as "Kids Court" and by the participation of the King County Prosecuting Attorney, Norm Maleng, in the judge's re-election campaign. Kid's Court was a program designed to prepare child victims of sexual abuse for their appearances in court. It involved role playing by the judge, a prosecutor and other courtroom personnel. Although there was no discussion about the facts of any one case, the case at issue was a case involving child sexual abuse. Carlson, at 912. The court noted that no case was found where an issue of appearance of fairness had caused either reargument or a vacation of judgment to be ordered. Carlson, at 914.

The State brought its motion for the first time after an adverse decision. There is no authority cited that supports the contention that this was a mandatory recusal situation.

Finally, the State's brief contains a factual error. In its argument summary #6 on page ii of its brief to this court, the State says "where defense counsel's investigator and defense counsel subsequently conceded that the defense had "gleaned" everything they needed from Carl Hills during their interview of him on July 3, 2007." Defense counsel did not say that. The State at page 10, footnote 4 of its brief cites RP 148 for the proposition that "Defense counsel later conceded on the record that this was true." But that is not correct.

The part of the record cited by the State is the defendant's argument on the motion to dismiss, and it reads as follows, starting at RP 147, line 16:

Mr. Finlay: Then I'll have to try and make it fast. I served a subpoena duces tecum on the prosecutor's office for the sticky note that he's referring to July – June 18<sup>th</sup>, my first request for depositions - I have never been provided with any response – that was to bring it to court today and drop a copy off to my office on Friday. The prosecutor has ignored that court order.

I served a subpoena duces tecum on the sheriff's office for a copy of the videotape of Mr. Gilbertson during the internal investigation of Detective Sergeant Borcharding because of the declaration referred to by Mr. Schuetz filed by Detective Sergeant Borcharding. The sheriffs resisted complying with that subpoena duces tecum, and through the prosecutor's office, Mr. Cobb filed a motion to quash and a motion to shorten time. I spoke to Mr. Cobb, finally did get the video.

Judge, Detective Sergeant Borcharding's affidavit, as described by Mr. Schuetz, is entirely misleading and both he and Mr. Schuetz know it. I've got here the video itself and I'd ask that the Court review this thing. Detective Borcharding's affidavit – could you find that for me, Bobby? Detective Borcharding – it's right here. Detective Borcharding's affidavit states that Mr. Gilbertson specifically stated in his interview that the interview of Carl Hills ended smoothly and cordially and they, the defense, were able to glean everything they needed from the interview.

That's true, but he says nothing whatsoever about Mr. Gilbertson's repeated statements at the beginning of the videotape about Mr. Schuetz's interference with the interview of Mr. Hills. And Mr. – Chief Byrd didn't bother to inquire into that, but Mr. Gilbertson stated it over and over and over. The

interview did not go very smoothly initially, refused to answer why he consulted with counsel, refused to answer a number of questions directly. Mr. Finlay and Schuetz had a number of interactions. Mr. Gilbertson believed that Mr. Schuetz was representing Hills as legal counsel, he was adversarial and he thought it was improper.

It went – there are a couple of dozen maybe, I don't know how many references, I don't want to state an exact number because then he'll claim I'm making a false affidavit. But, Judge, this affidavit of Detective Sergeant Borcharding which was filed by Mr. Schuetz creates the impression in the Court that nothing was said in this interview regarding the interference and that is not true. I got this today, after they initially fought my subpoena duces tecum. I asked for it and Chief Byrd said I couldn't have it, it's an internal investigation.

Why is the subject of the internal investigation allowed to view the videotape of the investigator who's complaining against him? I think this internal investigation was a complete sham and they didn't want to give it to me because they knew this declaration of Detective Borcharding was not – was misleading; let's put it that way. So I've got the tape and I'd ask the Court – it's a CD – I'd ask the Court to enter it into evidence and review it.

(RP 147-149).

The portion cited for the claim that defense counsel conceded that the defense had “gleaned” everything needed from the Hills interview appears to be the middle portion, which states as follows: “Detective Borcharding’s affidavit states that Mr. Gilbertson specifically stated in his interview that the interview of Carl Hills ended smoothly and cordially and they, the defense, were able to glean everything they needed from the interview. *That’s true*, but he says nothing whatsoever about Mr. Gilbertson’s repeated statements at the beginning of the videotape about Mr. Schuetz’s interference with the interview of Mr. Hills.”

But, the words, “that’s true” refer to what Det. Borcharding’s affidavit says that Mr. Gilbertson said on the videotape. In other words, it is true that Mr. Gilbertson said that on the tape, as Det. Borcharding claims. The passage is not a concession by defense counsel. Moreover, the declaration was misleading. It was filed to create the impression that there really was no interference, and if there was any, it was very minor. But, the

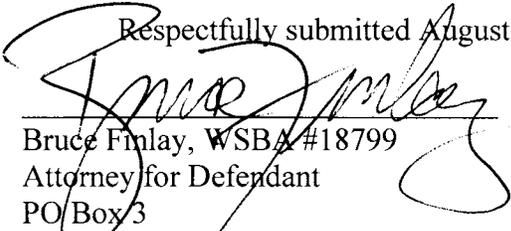
video shows Mr. Gilbertson repeatedly attempting to tell Chief Byrd about the interference, but Chief Byrd was not interested. The State has not included the video with its record on appeal.

Also, the State insists in this Court, as it did repeatedly in the trial court, that “One of the declarations filed by the defense, the Declaration of Dan Morse, confirmed the declaration of Detective Heldreth and refuted the assertions of defense counsel as to Detective Heldreth’s alleged statements to defense counsel.” State’s brief at page 10, citing (CP 57). However, this claim is wrong, and the State’s insistence on it is bizarre. CP 57 does not seem to have anything to do with the claim, but the Second Declaration of Dan Morse, CP 173-175 is right on point. In it, Mr. Morse states, “In response to the Supplemental Declaration of Harry Heldreth, my previous declaration does not contradict anything Mr. Finlay said in his declaration, and I did not intend to create any such impression. Det. Heldreth did tell us that he told the witness not to speak to us without the prosecutor. That there was also a discussion about witness’ rights does not change that fact.” (CP 173).

#### **E. CONCLUSION**

For the foregoing reasons, this Court should affirm the rulings of the trial court.

Respectfully submitted August 25, 2008.



Bruce Finlay, WSBA #18799  
Attorney for Defendant  
PO Box 3  
Shelton, WA 98584  
360-432-1778

FILED  
COURT OF APPEALS  
DIVISION II  
08 AUG 27 AM 11:12  
STATE OF WASHINGTON  
BY Pat Lewis  
DEPUTY

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	
Petitioner,	)	No.36880-3-II
	)	
vs.	)	DECLARATION OF
	)	SERVICE RE: BRIEF OF
BOBBY D. BEASLEY, JR,	)	RESPONDENT
Respondent.	)	
_____	)	

I, Pat Lewis, on August 26, 2008, delivered by hand the following documents:

Brief of Respondent  
Declaration of Service

to the Mason County Prosecutor's Office.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: August 26, 2008 at Shelton, Washington.

Pat Lewis  
Pat Lewis, legal assistant for  
Bruce Finlay