

No. 38888-0-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

APPELLANT,

Vs.

CANDI BANGE

RESPONDENT.

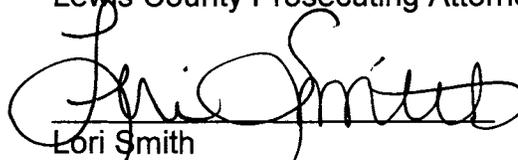
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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____

Appeal from the Superior Court of Washington for Lewis County
Honorable Judge Lawler

State's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATE'S REPLY TO DEFENDANT'S RESPONSE BRIEF.....1

**I. THE TRIAL COURT ABUSED ITS DISCRETION
WHEN IT DISMISSED THIS CASE ON THE DAY OF TRIAL
RATHER THAN IMPOSING A LESS-DRASTIC REMEDY
BECAUSE BANGE CANNOT HAS NOT SHOWN HOW
SHE WOULD BE PREJUDICED BY A SHORT RECESS
TO THE FOLLOWING DAY TO ALLOW THE STATE TO
PRODUCE ITS WITNESS.....1**

CONCLUSION.....14

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Baker, 78 Wash.2d 327, 474 P.2d 254 (1970). 10

State v. Blackwell, 120 Wn.2d 822, 845 P.2d 1017 (1993)..... 10

State v. Brooks, 149 Wn.App. 373, 203 P.3d 397(2009)..... 5

State v. Cannon, 130 Wn.2d 313, 922 P.2d 1293, *review denied*,
____ Wn.2d.____(2009) 6

State v. Chichester, 141 Wn.App. 446,170 P.3d 583(2007)
.....4,5,10,11

State v. Koerber, 85 Wn.App. 1, 931 P.2d 904(1996) 2, 6,7

State v. Laureano, 101 Wash.2d 745, 682 P.2d 889 (1984)..... 10

State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997)..... 2, 7

State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980) 8

State v. Ramos, 83 Wn.App. 622, 922 P.2d 193 (1996)..... 8, 9

State v. Rohrich, 149 Wn.2d 647, 71 P.3d 638 (2003) 2

State v. Sherman, 59 Wn.App. 763, 801 P.2d 274 (1990)..... 7,8

State v. Smith, 67 Wn.App. 847, 841 P.2d 65 (1992)..... 13

State v. Stephans, 47 Wn.App. 600, 726 P.2d 302 (1987) 3, 4

State v. Sulgrove, 19 Wn.App. 860,, 578 P.2d 74 (1978)..... 3

State v. Whitney, 96 Wash.2d 578, 637 P.2d 956 (1981)..... 10

State v. Wilson, 149 Wn.2d 1, 65 P.3d 657(2003)..... 2, 8

State v. Woods, 143 Wn.2d 561, 23 P.3d 1046(2002)(..... 6

CASES FROM OTHER JURISDICTIONS

People v. Defore, 150 N.E. 585 (N.Y.1926)(Cardozo, J) 12

State v. Musumeci, 717 A.2d 56, (R.I., 1998)..... 11,12,13

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THIS CASE ON THE DAY OF TRIAL RATHER THAN IMPOSING A LESS-DRASTIC REMEDY BECAUSE BANGE CANNOT SHOW HOW SHE WOULD BE PREJUDICED BY A SHORT RECESS TO THE FOLLOWING DAY TO ALLOW THE STATE TO PRODUCE ITS WITNESS.

In her response brief, Bange misquotes a sentence from the State's brief, and relies upon case law that is distinguishable and thus inapplicable to the circumstances presented here. This Court should reverse and remand for trial.

First, a small technical correction. On page eight of Bange's response brief, she writes that "the State concedes, both at trial and on appeal, that it mismanaged Bange's prosecution." Bange Response Brief at 8. This is not correct. Bange purports to quote from the State's opening brief when she puts quotation marks around the following sentence, citing page ten of the State's brief: "the State concedes mismanagement below . . . ". *Id.* But this is a misquote. Instead, what the State actually wrote was, "the State conceded mismanagement below . . . " State's Brief, pg. 10. Thus, when quoted correctly, this phrase indicates that the State "conceded" mismanagement only to the trial court. The State does not concede on appeal that mismanagement occurred below--as Bange's misquote incorrectly indicates.

Moving on, Bange relies on cases that describe far more egregious conduct on the part of the State than what is alleged here, and as such those cases are inapplicable. As previously set out in the opening brief, before dismissal is appropriate under CrR 8.3, a defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting the defendant's right to a fair trial." State v. Michielli, 132 Wn.2d 229, 239-240, 937 P.2d 587 (1997). The defendant must show that actual prejudice--not merely speculative prejudice--affected his right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). Moreover, the trial court must also consider the long-held rule that dismissal is an *extraordinary* remedy, available *only after* the trial court considers *intermediate and less drastic remedial steps*. State v. Koerber, 85 Wn.App. 1,4, 931 P.2d 904(1996)(trial court abused its discretion in dismissing case without considering reasonable alternatives plus no finding of prejudice); State v. Wilson, 149 Wn.2d 1, 12,65 P.3d 657(2003)(trial court should have considered less extreme alternatives before dismissing case).

In her reply brief, Bange relies on cases that are distinguishable from the circumstances presented here because the cases cited by Bange involve egregious misconduct by the State

and obvious substantial prejudice to the defendants--which is not the case here. For example, Bange cites State v. Sulgrove, 19 Wn.App. 860, 863, 578 P.2d 74 (1978). But in Sulgrove, trial was called *one day* before speedy trial expired, and the State sought a recess for one day and on the following day the State produced only *inadmissible* evidence-- and then sought an additional continuance. Id. at 862. In Sulgrove, the State had also cited the wrong statute in the charging document--and if the State was allowed to amend the charges, the defendant would have needed additional discovery. Id. In contrast, in the instant case, there were *thirteen days* remaining in speedy trial time, and the State offered to start the trial with its available witnesses on the first day of trial, and then bring its other witness in the following day, but that request was denied and the court instead dismissed this case. Additionally--unlike in Sulgrove--here there was no finding that the State sought to use "inadmissible evidence." Sulgrove simply does not apply here.

Bange also cites State v. Stephans, 47 Wn.App. 600, 726 P.2d 302 (1987). But Stephans, too, is readily distinguishable. In Stephans, the witnesses disobeyed a court order at least partly because the State "gave egregiously bad advice" to the witnesses--

conduct that looked suspiciously like the State was encouraging the victims not to follow the court's order. Id. The Stephans Court stated:

We do not say that a prosecuting attorney-or any lawyer, for that matter-is barred from discussing a court order with a potential witness. We would hope that any such discussion would be conducted on a professional basis, and that it would be well seasoned with common sense. We do say that under no circumstances may a prosecuting attorney counsel, or suggest his approval of, disobedience.

Stephans, 604,605. No such egregious behavior on the part of the State occurred in the present case. Here, the State offered to start the trial as scheduled, putting on its available witnesses, with only a brief recess until the following day, at which time it could produce the correct crime lab technician to testify. RP 8. That forensic witness would then testify to the information in the correct crime lab report (that lab report was faxed to the State the day of trial--but after the court had dismissed the case). CP 27; RP 2,8. Thus, none of the shady shenanigans that occurred in Stephans occurred here, and the reasoning of that case does not apply here.

Bange also cites State v. Chichester, 141 Wn.App. 446, 170 P.3d 583 (2007). But that case, too, is distinguishable. In Chichester there had been several previous continuances granted, and on the day of trial the prosecutor requested yet another

continuance for the dubious reason that the assigned prosecutor had another trial and office policy precluded having a different prosecutor handle the case. Thus, in Chichester, the State was not ready to put on its case *at all* because there was no prosecutor available to present the case. Id. That is far more egregious than what transpired in Bange's case, because the State here was able to proceed on the day of trial with the witnesses it did have, needing only a short recess until the next day so the State could bring in the crime lab technician. RP 8. These facts are not comparable to Chichester or the other cases relied upon by Bange in her response.

For other examples of other comparatively-worse alleged egregious conduct by the State where dismissals were affirmed, see State v. Dailey, 93 Wn.2d 454, 455-56, 610 P.2d 357(1980)(State repeatedly ignored orders to supply bill of particulars, refused to disclose identities of eleven witnesses and allowed evidence to be destroyed); State v. Brooks, 149 Wn.App. 373, 388, 203 P.3d 397(2009)(after a previous continuance, the trial court noted on the part of the State a "total failure to provide discovery in a timely fashion," which included the report of the lead detective, a 60-page victim's statement and disclosure of two new

witnesses, all of which had been available for weeks). But the State's conduct in the present case is nowhere near that alleged in the just-cited cases, nor is it comparable to the conduct described in the cases relied upon by Bange.

Instead, this case is more similar to cases discussing belated scientific testing--which was anticipated from the beginning of the case--and the results of which were not a surprise. See e.g., State v. Cannon, 130 Wn.2d 313, 328-29, 922 P.2d 1293, *review denied*, ___ Wn.2d.__(2009)(defendant on notice from the start of case that the State would rely on forensic evidence from blood samples and paint chips); State v. Woods, 143 Wn.2d 561, 584, 23 P.3d 1046(2002)(defendant could not show prejudice requiring dismissal from late DNA test results when no "new facts" were interjected into the proceedings as a result of the delays).

Furthermore, it is worth pointing out that our Courts *have* reversed a trial court's dismissal order even where the State's "misconduct" was arguably more egregious than the State's conduct here. See, e.g., State v. Koerber, supra, where the trial court summarily dismissed the case without considering other remedies because the State's material witness was not available on the first day of trial, and the State could not tell the court when that

witness would be available. Koerber at 2. Despite this conduct by the State in Koerber--conduct more egregious than in the present case--the Koerber Court reversed the trial court's dismissal of the case. In contrast, in the instant case the State offered to get its witness to court the *next day*--with *thirteen* days of speedy trial remaining. RP 8. Under the reasoning of Koerber, the dismissal in this case should surely be reversed given the less serious circumstances presented here.

Bange also quotes a passage from Chichester where this Court expressed its concern that if it ruled that the trial court should not have dismissed the case but instead should have granted another continuance, that "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." Chichester at 457,458. First of all, whether there is speedy trial time remaining is always a relevant consideration in deciding the propriety of a trial court's dismissal of a case for alleged misconduct by the State. State v. Sherman, 59 Wn.App. 763, 769, 801 P.2d 274 (1990)(time for trial period expired on day of motion to dismiss); Michielli, 132 Wn.2d at

444-45(new charges added only three days before trial which would require continuance beyond expiration of speedy trial and which were based on facts long known to the State); State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003)(defendant was not in custody and speedy trial expiration was about a month, so the trial court should not have resorted to the extraordinary remedy of dismissal "*until speedy trial expiration became an issue*")(emphasis added).

Consideration of remaining speedy trial time is relevant to the dismissal analysis because many CrR 8.3 dismissals have been granted (or affirmed) because the State's misconduct presented the defendant with the "Hobson's Choice" of either sacrificing her right to be represented by counsel who had sufficient opportunity to prepare her defense, or sacrificing her right to a speedy trial by being forced to request a continuance. State v. Ramos, 83 Wn.App. 622, 637, 922 P.2d 193 (1996), citing State v. Sherman, *supra*, and State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

And, while unexcused conduct by the State cannot force a defendant to choose between such rights, it is also true that "*[t]he defendant . . . must prove by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing*

either of these rights." Ramos, 83 Wn.App. at 637, *quoting State v. Price, supra* (emphasis supplied by the Ramos court). Bange has not, and cannot, make such a showing here.

Bange was not presented with a "Hobson's Choice", nor has Bange shown by a preponderance that interjection of new facts into the case forced her to choose between speedy trial or prepared counsel. Ramos, supra. Here, *thirteen days* remained in the speedy trial period. The State requested that it be allowed to start the trial with available witnesses and then recess briefly until the following day so that the State could procure the correct forensic scientist to testify. RP 8. After all, Bange knew from day one which controlled substance formed the basis for the charge, and she had been timely provided with the State's witness list showing that a forensic scientist would be testifying at trial. Thus, Bange's claim that her counsel could not have been prepared for trial within the thirteen days of remaining speedy trial time is disingenuous at best. See, Ramos, supra ("even if substitution of counsel had been appropriate, there is no showing. . . that substitute counsel could not have become prepared for trial during the twelve days remaining before the speedy trial expiration date).

But perhaps the larger issue here, at least from the State's perspective, is whether the supposedly long-entrenched rule that "dismissal-is-an-extraordinary-remedy-of-last-resort" really still exists at all. If it does, then surely this case is one to which that tenant should apply. In dismissing this case, the trial court totally ignored that oft-quoted rule by applying such an extraordinary remedy without considering whether less-drastic remedies were available, given that no new facts had been interjected and that Bange could not show prejudice. In this way, the trial court ruled as if dismissal were the only remedy. In so doing, the trial court abused its discretion. Dismissal is the appropriate remedy only when there has been such prejudice to the defendant's right to a fair trial that the matter could not otherwise be remedied. State v. Laureano, 101 Wash.2d 745, 762-63, 682 P.2d 889 (1984); State v. Whitney, 96 Wash.2d 578, 580, 637 P.2d 956 (1981); State v. Baker, 78 Wash.2d 327, 474 P.2d 254 (1970). That is not the case here, and the trial court's dismissal should be reversed. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Finally, Bange further cites Chichester's policy concerns that if it held that the trial court should have allowed a continuance, doing so would allow the State to file "last-minute motions to

continue [and] would routinely serve to dislodge a confirmed trial date" and therefore--according to Bange-- Chichester thus provided a "clear and necessary signal from the court that 'control of the trial calendar . . . rests with the [trial] court' and not the prosecutor." Response Brief at 14; citing Chichester, supra. In other words, when considering the remedy in these matters, it can also be appropriate for the trial court to choose a remedy that will perhaps teach the State a lesson. Maybe so - - in the *right case*. Or, as one Court reasoned when discussing such a motive:

Although punishment and deterrence are valid and important considerations in selecting a sanction . . . , the trial justice should choose a sanction sufficiently potent to achieve such goals when the circumstances call for such a result, [but] even weightier policy considerations favor resolution of criminal charges on their merits. See, e.g., *United States v. Blue*, 384 U.S. 251, 255, 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510, 515 (1966) (reversing the dismissal of an indictment for the government's violation of the defendant's . . . rights because barring the prosecution would "increase to an intolerable degree interference with the public interest in having the guilty brought to book"). Thus dismissals of all pending criminal charges for the state's commission of discovery violations are to be disfavored save in the most extreme circumstances. See *DiPrete*, 710 A.2d at 1274. Indeed, we conclude that dismissal is an appropriate sanction only as a last resort and only when less drastic sanctions would be unlikely or ill suited to achieve compliance, to deter future violations of this kind, and to remedy any material prejudice to defendant.

State v. Musumeci, 717 A.2d 56, 63 -64 (R.I., 1998)(emphasis

added). Although above- quoted passage is from a case from

another jurisdiction, the legal principles discussed therein are the same employed by Washington Courts when considering the propriety of a dismissal for an alleged discovery violation. Indeed, although the State supposes it could be said in the instant case that the trial court was perhaps "understandably angered by the state's inexcusable lack of preparation," it should also be remembered that "the burden of any dismissal sanction ultimately falls squarely on the people of this state and not solely upon" the prosecutor's office. Id. It is also important to consider that while we can likely all agree that a "defendant is entitled to a 'trial by jury, not trial by ambush,'" we would likewise do well to consider the words of a brilliant, legendary jurist who recognized "that as a general rule, and subject to constitutional safeguards, a criminal defendant should not 'go free because the constable [or the prosecution] has blundered.'" Musumeci, supra(emphasis added), *quoting People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 587 (1926) (Cardozo, J.)(last emphasis added to highlight quote by Cardozo). Considering that the State's alleged "blunder" here was a comparatively minor one that occurred with thirteen days of speedy trial remaining, and which did not prejudice Bange, the trial court should have instead employed the less-drastic remedy of a brief trial recess to the following day to

allow the State to bring in its forensic witness. That is to say, *if* there is anything left of the maxim that dismissal is an extraordinary remedy--then it most certainly should apply under the circumstances presented here. After all, dismissal is not required "in every instance where untimely discovery by the State affects the defendant's ability to prepare the the defense within the speedy trial period." State v. Smith, 67 Wn.App. 847, 853, 841 P.2d 65 (1992). Put differently, when selecting a remedy in these cases, we should be careful that we are not "throwing out an indictment with the bathwater dirtied by the prosecution's discovery violation." Musumeci, supra. Yet the trial court here did just that--and unjustifiably so. This was an abuse of its discretion, and this court should reverse.

CONCLUSION

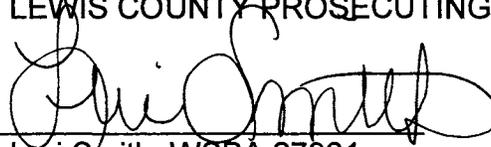
Under the circumstances presented here, the trial court abused its discretion when it dismissed this case rather than applying a less-drastic remedy. Thirteen days remained in speedy trial, the State's conduct did not interject new material facts into the case, and Bange would not be prejudiced by a brief trial recess to the following day. If dismissal truly remains an "extraordinary remedy," it was surely wrongly applied here. Accordingly, this

Court should reverse the trial court's order and remand this case for trial.

RESPECTFULLY SUBMITTED this 22nd day of September, 2009.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:

A handwritten signature in black ink, appearing to read "Lori Smith", written over a horizontal line.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

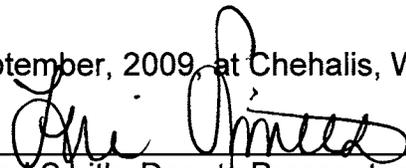
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vs.)
CANDI BANGE,) DECLARATION OF
Respondent.) MAILING

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DIVISION II

LORI SMITH, Deputy Prosecutor for Lewis County, Washington,
declares under penalty of perjury of the laws of the State of Washington that
on **September 22, 2009**, I served Respondent Candi Bange with a copy of the
State's Reply Brief by depositing same in the United States Mail, postage
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DATED this 22nd day of September, 2009, at Chehalis, Washington.


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