

No. 39069-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTINE D. KRENİK,

Appellant.

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STATE OF WASHINGTON
BY [Signature]
COURT OF APPEALS
DIVISION II

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

The Honorable Carol Murphy, Judge
Cause No. 08-1-879-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether CrR 4.7 discovery rules were violated when the state failed to notify the defense prior to trial of the possible existence of federal law enforcement surveillance of the defendant's property, but where the State was not in possession of the fruits of any federal surveillance and did not know if any existed.

1.a. Whether there was a violation of CrR 4.7 where the state was not in possession of a piece of evidence and did not know if it existed.

1.b. If this court finds that a discovery rule was violated, whether the violation would have violated Krenik's right to a fair trial, given that there has been no showing that the "evidence" was material.

1.c. Whether the trial court's denial of a mistrial was an abuse of the court's discretion, or dismissal is an appropriate remedy.

2. Whether the failure to notify the defense prior to trial of the possible existence of federal law enforcement surveillance constituted misconduct which justifies dismissal under CrR 8.3(b) and whether the trial court abused its discretion in not dismissing the case pursuant to CrR 8.3(b).

B. STATEMENT OF THE CASE

Christine Krenik was charged with one count of unlawful delivery of a controlled substance-methamphetamine, within 1000 feet of a school bus route stop, one count of unlawful manufacture of a controlled substance-marijuana, within 1000 feet of a school bus route stop, and one count of unlawful delivery of a controlled substance-methamphetamine. [CP 7]. Krenik was tried and convicted on all charges. [RP 432-33].

Law enforcement began investigating Krenik after receiving information from an informant. [RP 30]. Detective Russell, a deputy assigned to Thurston County Narcotics Task Force, testified that Mary Yost contacted him and informed him that she had a charge in Mason county. [RP 30]. Russell met with Yost and the Mason County prosecutor and facilitated an agreement in which Yost would work for the task force as an informant. [RP 31]. Yost provided Russell with the names of individuals from whom she believed she could buy controlled substances, including Krenik. [RP 33]. Law enforcement arranged for Yost to purchase a quarter ounce of methamphetamines from Krenik; this purchase occurred on February 19, 2008. [RP 35]. Yost was able to purchase methamphetamine from Krenik and she turned it over to law enforcement. [RP 57]. A second purchase was arranged on March 5th, 2008. [RP 104]. Again, Yost was able to purchase methamphetamine from Krenik. [RP 115]. Ray Spragg of Thurston County Animal Services testified that while he was dispatched to Krenik's property regarding an animal control issue [RP 297], he observed marijuana plants in a fenced patio area. [RP 298]. During the trial, the deputy prosecutor questioned Russell about the

surveillance of Krenik's property. [RP 47]. The questioning went as follows:

Q. Was it difficult to set up actual surveillance in this location?

A. Actually, yes, it was.

Q. Sometimes do you have officers that are equipped with cameras to record the events?

A. Yes.

Q. Was that possible in this situation?

A. Yes, it was.

The prosecutor then asked for a sidebar. [RP 48]. After the sidebar, the state's direct examination of Russell continued.

At the next break, the court placed the sidebar discussion on the record. [RP 67]. The prosecutor explained that the purpose of the sidebar was to alert the court and counsel that when he asked Russell whether "that was possible in this situation," the prosecutor was asking whether it was possible for the task force to record events with cameras. [RP 68]. The prosecutor believed that Russell, in answering "yes, it was," was referring to DEA surveillance equipment instead of task force equipment. [RP 68]. The prosecutor stated, "I think Detective Russell confused what I was asking him and referred to the DEA's—I don't want to call it a camera. I'm not sure what it was, actually. But it was my understanding something that gives them the opportunity to watch

something live.” The prosecutor then stated that he did not intend to ask any questions about DEA surveillance because he did not know anything about the equipment or whether it was used. [RP 70].

Defense counsel then stated that there was “a 4.7 issue” [RP 70] because the prosecutor failed to disclose the DEA videotape. The prosecutor responded,

Your Honor, I know of no videotape. What I’ve said to the Court several times is that it was my understanding, in speaking with the detective today, that the DEA was doing their own investigation, independent of what Thurston County was doing, and they had a camera in a hidden location. I don’t know what it did. I don’t have any discovery on it myself; otherwise, I would have turned it over.

[RP 72]. Defense counsel then conducted a *voir dire* of Russell. Russell testified that he did not know the exact date on which he told the prosecutor about the DEA equipment but that it was “[p]robably within the past week, two weeks. It was just recently.”

[RP 74]. Russell also testified that he did not view any images associated with the DEA equipment. [RP 74].

Defense counsel’s *voir dire* continued:

Q. Okay. Did you make a recordation in your police report that there was any imaging device installed by the DEA?

A. Not by the DEA, no, just that—I don’t know how I worded it. I think it was this one, that there’s an electronic—I’ll have to refer to this...

Q. Yes.

A. I was trying to find where I put it in here.

[Prosecutor suggested a page number in the police report]

A. Yes, this was through electronic surveillance equipment.

Q. Okay. Did you indicate to the previous prosecutor that there was some imaging equipment?

A. I don't recall. I'm not even sure which prosecutor that would have been.

Q. Okay. This is the first prosecutor you met with on that case?

A. Yes.

When asked by the prosecutor on *voir dire* whether he even secured items into evidence regarding any electronic surveillance equipment, Russell stated, "No, I did not." [RP 77].

Defense counsel then argued that the prosecutor should have disclosed the information regarding the DEA equipment earlier, and that this was a discovery violation. [RP 76-77]. The prosecutor then argued that there was no discovery issue because the state had nothing in its possession that it had not turned over to the defense. [RP. 77-78]. Defense counsel then moved for a mistrial. [RP 79]. It was denied by the court. [RP 79].

C. ARGUMENT

1. CrR 4.7 discovery rules were not violated, nor were Krenik's constitutional rights, when the State failed to notify the defense prior to trial of the possible existence of federal law enforcement surveillance of the defendant's property, but where the State was not in possession of the fruits of any federal surveillance and did not know if any existed.

There are three issues to be resolved to settle the discovery violation inquiry. The first issue is whether there was a violation of CrR 4.7 discovery rules. The second issue is whether, if there was a violation, the defendant's constitutional right to a fair trial was denied. Finally, the last issue is whether the trial court's denial of mistrial was an abuse of discretion.

1a. There was no violation of CrR 4.7 where the State was not in possession of a piece of evidence and did not know if it existed.

CrR 4.7 requires the State to disclose various categories of evidence to the defendant. The rule states that the "prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). In this case, the prosecutor confirmed his awareness of the DEA's investigation and the presence of some surveillance equipment. [RP 72]. However, the prosecutor stated that he was not in possession of any evidence that might have been produced by

DEA surveillance and did not know if any such evidence existed. [RP 72]. This statement was supported by the testimony of Russell, who confirmed during *voir dire* examination that he never collected any such evidence. [RP 76]. The discovery rules of CrR 4.7 are not violated where the state has no evidence and does not know if it exists.

Nevertheless, Krenik claims that the prosecutor violated discovery rules by not disclosing his knowledge of the federal surveillance of Krenik's property. [RP 78] According to defense counsel, "Your Honor, just to clarify for record purposes, I recognize they don't have the tangible item. It's the knowledge. It's the knowledge within the prosecutor's possession concerning image-recording device [sic]. It's the knowledge." Krenik apparently believes that the prosecutor has duty to disclose absolutely every possible piece of knowledge he has about the case. This belief is not supported by case law. "While prosecutors may not suppress material evidence, neither are they under a duty to disclose of their own initiative all they know of the case and their witnesses." State v. Ervin, 22 Wn. App. 898, 904; 594 P.2d 934 (1979). Contrary to Krenik's multiple assertions that the prosecutor hid evidence from

the defense, the prosecutor did not suppress any evidence and did not violate any rules of discovery.

1b. If this court finds that a discovery rule was violated, the violation would not have violated Krenik's right to a fair trial because there has been no showing that the "evidence" was material.

The State did not violate discovery rules in this case. However, if this court were to find that a discovery rule was violated, there would be no reversible error because Krenik was not denied the right to a fair trial. A prosecutor's failure to disclose information does not violate a defendant's right to a fair trial unless the information was material. State v. Heath, 35 Wn. App. 269, 272; 666 P.2d 922 (1983); State v. Mak, 105 Wn.2d 692, 704; 718 P.2 407 (1986) (overruled on other grounds). "Evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" State v. Thomas, 150 Wn.2d 821, 850; 83 P.3d 970 (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375 (1985)). "The mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial...does not establish 'materiality' in the constitutional sense." Mak, 105 Wn.2d at 704-05.

In this case, there has been no showing that the state withheld material evidence. In fact, Krenik's brief fails to discuss the rule requiring that undisclosed evidence be material. Instead, she asserts in conclusory fashion that "the failure to provide timely discovery of material evidence establishes clear discovery violations and corresponding governmental misconduct, and that such misconduct severely prejudiced [Krenik's] right to be adequately prepared for trial or to gather potential evidence on her behalf." Brief of Appellant, 10. This statement does nothing to show that had Krenik been aware of the DEA surveillance, the outcome of the trial would have been different. Even Krenik characterizes the evidence at issue was "potential evidence."

It is unclear from Krenik's brief whether she is assuming that the undisclosed information regarding DEA surveillance is material or whether she believes that her right to a fair trial was denied because of the *potential* that the knowledge could lead to material evidence. However, the mere *possibility* that the knowledge of DEA surveillance could have led to evidence favorable to Krenik is insufficient to establish materiality. No one knows whether the DEA surveillance produced any evidence favorable to Krenik. But it is known that the State's case against Krenik was very strong. There

was testimony from both Detective Russell and Mary Yost, the informant, detailing the controlled buys of methamphetamine. [RP 35, generally]. There were body wire tapes, from the wire worn by Yost during the buys, played for the jury. [RP 45-46; 86, 100, 136, 152]. There were also positive tests conducted on the controlled substances purchased from Krenik [RP 146, 149]. It is unlikely that anything on a videotape, if there is a videotape, would have negated the state's evidence. It is even possible that the video, if it exists, would corroborate the state's case. Since we can only guess as to whom the evidence may favor, it is not material evidence justifying a dismissal or any other remedy.

1c. The trial court's denial of a mistrial was not an abuse of the court's discretion, and dismissal is not an appropriate remedy.

In light of the facts in this case, neither a mistrial nor a dismissal were proper remedies. CrR 4.7(h)(7)(i) provides for the following sanctions:

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

The trial court properly denied a mistrial in this case. The grant or denial of a mistrial is reviewed by the courts for abuse of discretion,

and abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. State v. Greiff, 141 Wn.2d 910, 921; 10 P.3d 390 (2000). “The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial.” Mak, 105 Wn.2d 692, 701.

Krenik does not specifically assign error to the trial court’s denial of a mistrial,¹ but does make a conclusory statement that “[p]roviding notice of potential evidence during the direct examination of a witness is clearly prejudicial to a fair trial, o [sic] to

¹ Krenik twice mentions that the trial court did not provide reasons for its ruling. Brief of Appellant, 8 & 10. This is a mischaracterization of the record. After *voir dire* examination of Russell, the court asked defense counsel if he had a motion. [RP 76]. Defense counsel said yes, and began to argue that there was a discovery issue. [RP 76-77]. After the prosecutor made his argument, the court provided a reason for denying a remedy.

And if I understand correctly the testimony, the detective, the prosecutor is not in possession of anything that they could turn over to the defense. And so I don't think that there is a remedy here. If there is something beyond that, I would invite you to file a written motion, but I don't think that the prosecutor or this detective can turn over anything that they don't have. And it appears from the testimony that this detective never reviewed any such material, either. So that was my understanding of the testimony.

[RP 78]. After that, defense counsel clarified that the remedy he was seeking was a mistrial, and the court denied that motion having already provided a rationale for why no remedy was warranted. [RP 79].

allow defense counsel to appropriately investigate the issues that may be raised by this additional evidence.” Brief of Appellant, 12. Krenik cites no authority in support of her argument that she was prejudiced by discovering during trial that neither the prosecutor nor the police were in possession of any DEA surveillance evidence or knew if any existed. Nor does she cite authority to support an argument that the denial of a mistrial was an abuse of discretion. A reasonable person could agree with the trial court that Krenik was not so prejudiced that a new trial was required where Krenik learned during trial that the prosecutor had no DEA surveillance evidence and no such evidence was used against Krenik in trial. Therefore, the trial court’s denial of a mistrial was not an abuse of discretion.

Dismissal of the case is not an appropriate remedy even if this court were to find that the state violated discovery rules. Dismissal of a case for discovery abuse is an extraordinary remedy that is generally available only when the defendant has been prejudiced by the prosecution’s actions. State v. Cannon, 130 Wn.2d 313, 328; 922 P.2d 1293 (1996).

Courts have favored continuances or recesses as the remedies for discovery violations. State v. Brush, 32 Wn. App 445,

456; 648 P.2d 897 (1982) (holding that “[b]ecause the available remedy was the granting of a continuance and since defense counsel did not move for such a continuance, the prosecutor’s noncompliance with the discovery rule was not prejudicial error”); State v. Laureano, 101 Wn.2d 745, 762-63; 682 P.2d 889 (1984) (overruled on other grounds) (holding that in a case of a discovery violation, dismissal was “especially inappropriate since defendant steadfastly refused to allow his counsel to request a continuance to further prepare the case”).

Krenik complains that she did not have sufficient time to prepare for her defense because there was information disclosed during the state’s case in chief. However, defense counsel never requested a continuance or recess so it could further investigate and prepare. Krenik should not be granted an extraordinary remedy where she did not request, for strategic reasons or otherwise, a less drastic remedy. See State v. Cohen, 19 Wn. App. 600, 605-06; 576 P.2d 933 (1978) (holding that “[d]efendant was unable, through no fault of his own, to prepare his defense as thoroughly as he desired to within the time available. But his own refusal to seek a continuance, when it was necessary to prepare his own case, should require neither suppression of the evidence nor dismissal of

the charge”). Krenik should have requested a recess at trial if she needed more time. A simple phone call to the DEA may have revealed if there was evidence produced by surveillance.

2. The failure to notify the defense prior to trial of the possible existence of federal law enforcement surveillance did not constitute misconduct which justifies dismissal under CrR 8.3(b) and the trial court did not abuse its discretion in refusing to dismiss the case pursuant to CrR 8.3(b).

A trial court has authority to dismiss a prosecution in the interests of justice. CrR 8.3(b) states,

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

In order for a court to dismiss pursuant to CrR 8.3(b), there must be a showing of arbitrary action or governmental misconduct. State v. Blackwell, 120 Wn.2d 822, 831; 845 P.2d 1017 (1993). The governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. Id. (citing State v. Dailey, 93 Wn.2d 454 at 457, 610 P.2d 357 (1980)). The defendant must also show that the misconduct or arbitrary action prejudiced his right to a fair trial. State v. Michielli, 132 Wn.2d 229, 240; 937 P.2d 587 (1997). However, “dismissal of the charges is an extraordinary remedy available only when there has been prejudice

to the rights of the accused which materially affected his or her rights to a fair trial.” Id. at 830 (quoting Seattle v. Orwick, 113 Wn.2d 823, 830; 784 P.2d 161 (1989)). Dismissal under 8.3(b) is a remedy that the trial court should use only as a last resort. State v. Brooks, 149 Wn. App. 373, 402; 203 P.3d 397 (2009). “A trial court’s decision on a motion to dismiss under the rule is reviewed for manifest abuse of discretion.” State v. Michielli, 132 Wn.2d 229, 240; 937 P.2d 587 (1997).

In the present case, Krenik did not move at trial for dismissal pursuant to CrR 8.3(b). Consequently, there was neither notice nor a hearing as required by the rule. Indeed, Krenik does not specifically assign error to the lack of a dismissal pursuant to CrR 8.3. She does, however, argue at length that the government did commit misconduct in this case. *See generally*, Brief of Appellant. Although never explicitly requested by Krenik, she seems to be asking this court to conduct an analysis of the government’s actions in this case, find that there was misconduct or arbitrary action, find prejudice to the Krenik’s rights such that her right to a fair trial was materially affected, and find that the trial court abused its discretion because it did not dismiss the case pursuant to CrR 8.3(b) (even though there was no motion before the court to do so).

This court should not make any of these findings. First, the government's conduct does not rise to the level of misconduct or arbitrary action. Krenik cites the following as "proof" of misconduct:

[T]he failure to disclosure [sic] the discovery at issue, the reasons for the non-disclosure advanced by the Deputy Prosecutor, the patently false representations that the Deputy Prosecutor gives for his actions, and the conflicting statements of the Deputy Prosecutor in representing to the Court and Defense Counsel the posture of the case and the issues at bar.

Brief of Appellant, 10. The only item of "proof" listed above that merits discussion is the State's failure to notify the defense prior to trial of the federal surveillance. The other items of "proof" offered by Krenik constitute personal attacks on the prosecutor which are unsupported by the record. For the reasons stated above, the State's actions did not violate any discovery rules. Since the State's actions, as held by the trial court, did not violate discovery rules, they cannot constitute misconduct worthy of dismissal under CrR 8.3(b).

Even if this court were to find misconduct by the State, Krenik was not prejudiced by the State's actions. Krenik complains that she was prejudiced because the State's actions did not "allow defense counsel to appropriately investigate the issues that may be raised by this additional evidence." Brief of Appellant, 12. She

claims that she did not have adequate time to prepare after the State's disclosure. Brief of Appellant, 14. However, at no time during trial did Krenik request a continuance or recess for time to investigate. In her brief, Krenik states,

So, even had the defense simply been in the position to have continued the matter here because of the disclosure during trial, which of course is not a practical remedy, decisional law has established that merely impacting the right to speedy trial is sufficient to justify a dismissal.

Brief of Appellant, 14. This quote from appellant's brief touches on two issues relevant to the question of whether Krenik was prejudiced: appropriateness of a recess and speedy trial rights. As state above, continuances or recesses are favored remedies. However, Krenik cites no authority and makes no argument for why a recess would not have been a practical, appropriate remedy.

Rather, Krenik cites a line of cases which discuss situations where a defendant is forced by the state's misconduct to choose between his right to a speedy trial and his right to adequate counsel. Brief of Appellant, 15 (citing State v. Teems, 89 Wn. App. 385, 388-89; 948 P.2d 1336 (1997); State v. Michielli, 132 Wn.2d 229, 244; 937 P.2d 587 (1997)). Krenik appears to be implying that a continuance or recess in this case would have impacted her speedy trial rights. His argument overlooks the fact that the speedy

trial rule, CrR 3.3, determines the date that the trial begins. A continuance or recess in a trial that has already begun does not impact speedy trial rights. Further, Krenik's claim that "merely impacting the right to a speedy trial is sufficient to justify a dismissal" is at best a mischaracterization of the law and at worst a blatantly false statement of law. Krenik appears to be relying on language from State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980), as support for this statement, but the Court of Appeals, interpreting Price, came to the following conclusion:

We do not read State v. Price, *supra*, as altering the rule that the trial court's decision regarding the remedy for violation of discovery is discretionary. State v. Bradfield, *supra*. The language in Price, relied upon by Smith, is permissive and conditional. The court there recognized that as a result of late discovery one of the defendant's rights "*may be impermissibly prejudiced.*" (Italics ours.) Price, at 814. We do not interpret this language to require dismissal in every instance where untimely discovery by the State affects the defendant's ability to prepare the defense within the speedy trial period. Accordingly, we also reject the apparent premise of the dissenting opinion that Price established a per se rule of dismissal in such cases.

State v. Smith, 67 Wn. App. 847, 852-53; 841 P.2d 65 (1992).

Therefore, even if Krenik's speedy trial rights were impacted, this court is not required to dismiss this case.

Incidentally, although Krenik does not mention it in her brief, there was one month left in speedy trial time when her trial started.

CP _____. Krenik was not in the position where she had to choose between her right to a speedy trial and to adequately prepared counsel. There is no prejudice to Krenik.

Finally, in order for this court to find that Krenik's case should have been dismissed pursuant to CrR 8.3(b), it would have to find that the trial court abused its discretion. Abuse of discretion only exists if no reasonable person would take the view adopted by the trial court. Greiff, 141 Wn.2d at 921. In State v. Stewart, Jr., the defendant argued that the trial court abused its discretion by declining to dismiss the case pursuant to CrR 8.3(b). 141 Wn. App 791, 796-97; 174 P.2d 111 (2007). The court disagreed, holding that "[w]hile the prosecutor or the court may decline to prosecute under certain circumstances, neither is required to do so." Id. at 797. In this case, the trial court did not dismiss pursuant CrR 8.3(b), nor was it required to do so. A reasonable person could have declined to dismiss this case, especially because defense counsel did move for dismissal at trial. Therefore, Krenik's case should not be dismissed under CrR 8.3(b).

D. CONCLUSION.

The state did not violate discovery rules in this case, nor did the state commit misconduct that would have justified a dismissal under CrR 8.3(b). Therefore, the state respectfully requests that Krenik's convictions be affirmed.

Respectfully submitted this 23rd of November, 2009.



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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent to all parties or their counsel of record on the date below as follows:

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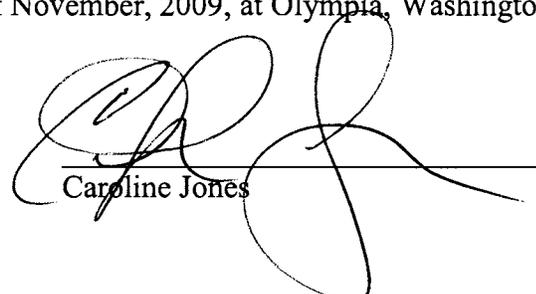
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 23 day of November, 2009, at Olympia, Washington.



Caroline Jones