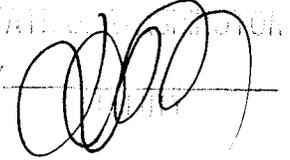


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COURT OF APPEALS

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STATE OF WASHINGTON

BY



No. 40279-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Joshua Wilson,

Respondent.

Clallam County Superior Court Cause No. 09-1-00490-0

The Honorable Judge George Wood

Brief of Respondent

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Joshua Wilson was charged with Assault in the Second Degree and Felony Harassment. The Information was filed on November 10, 2009, and Mr. Wilson first appeared in court on that same day. CP 7-8, RP (11/10/09). The prosecution alleged that Mr. Wilson had strangled Catherine Hall. CP 7-8. Mr. Wilson planned to present a consent defense, arguing that the touching was part of a consensual sex act. CP 17.

Mr. Wilson was held in custody pending resolution of his case. RP (11/10/09) 5. He also had charges pending under a different cause number (09-1-00135-8). RP (12/18/09) 2. At a status hearing for both cases, his attorney noted that the parties had reached a plea agreement in the other case: Mr. Wilson would plead guilty to Bail Jumping, additional charges would be dismissed, and sentencing would be postponed until after the Assault and Harassment charges had been resolved. RP (12/18/09) 2-4.

At the status hearing, Mr. Wilson asked the state to help set up an interview with Ms. Hall, who had been difficult to locate. RP (12/18/09) 4. Defense counsel noted that additional work might be needed to prepare for trial on January 11, 2010, but that Mr. Wilson did not wish to waive his right to a speedy trial. RP (12/18/09) 4-5. The prosecutor represented that she would arrange the interview. RP (12/18/09) 5.

Mr. Wilson pled guilty to Bail Jumping in his other case on December 29, 2009. RP (12/29/09) 2-7. At that time, defense counsel told the court that Mr. Wilson had directed him—against his advice—to proceed to trial on January 11 (on the Assault and Harassment charges), even if counsel were not completely prepared. RP (12/29/09) 7. Counsel also told the court that he had yet to receive photographs of Ms. Hall’s injuries and medical records relating to her, and that the prosecutor had yet to arrange an interview with her. RP (12/29/09) 8.

The prosecutor acknowledged that she’d had no contact with Ms. Hall, and related that her office had had telephone contact with Ms. Hall’s family. RP (12/29/09) 9. She indicated that the police were providing a CD with the photographs, but that she needed Ms. Hall’s consent to get the medical records. RP (12/29/09) 8, 13. The judge noted that the trial date was less than two weeks away and warned the prosecutor: “[w]hat I don’t want to do is to have this come down to the last second where either we’re going to get a material witness warrant or the victim is unavailable...” RP (12/29/09) 9. Another status hearing was set. RP (12/29/09) 10.

At that third status hearing (held January 5, 2010), Mr. Wilson moved to dismiss because the prosecution had still not arranged an interview with Ms. Hall. RP (1/5/10) 5. The prosecutor revealed that she

was still unable to reach Ms. Hall, that Ms. Hall had likely left the county, and that a friend or family member had refused to provide her telephone number. RP (1/5/10) 5-6. The prosecutor then asked for a material witness warrant so law enforcement could “start shaking the trees” to find Ms. Hall. RP (1/5/10) 6. In addition, the prosecutor moved to dismiss the charge without prejudice. RP (1/6/10). Mr. Wilson argued that the dismissal should be with prejudice. RP (1/5/10) 6. Defense counsel noted that Mr. Wilson was expecting a 12+ month DOC sentence on his other case. RP (1/5/10) 6. He argued that Mr. Wilson would be prejudiced in preparing a defense from prison, and that the parties had agreed to delay sentencing on the Bail Jumping charge until resolution of the Assault and Harassment charges. RP (1/5/10) 6-7.

The court dismissed the charges with prejudice. The judge noted that the state would not be ready to go to trial as scheduled, and found that Ms. Hall had deliberately made herself unavailable. RP (1/5/10) 7-8. The court entered an Order that indicated: “Upon the defendant’s motion, the state being unprepared for trial, it is here by ordered that this matter is dismissed with prejudice. State is unable to locate complaining witness after good faith effort to do so.” CP 5.

The prosecution appealed the court’s order. CP 4.

ARGUMENT

I. THE TRIAL JUDGE REASONABLY EXERCISED HIS DISCRETION BY DISMISSING THE CASE WITH PREJUDICE.

A. Standard of Review

A dismissal under CrR 8.3(b) is reviewed for an abuse of discretion. *State v. Brooks*, 149 Wn.App. 373, 384, 203 P.3d 397 (2009). The trial court's decision must be upheld unless it was manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.* A trial court's decision may be affirmed on grounds not presented to the trial court "if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a); *see e.g., Newman v. Veterinary Bd. of Governors*, ___ Wn.App. ___, ___, 231 P.3d 840, 845-846 (2010).

B. A dismissal for mismanagement may be proper even when the government acts in good faith.

CrR 8.3(b) allows a trial court to dismiss any prosecution in the furtherance of justice "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." CrR 8.3(b). Dismissal may be premised upon simple mismanagement; the governmental misconduct "need not be of an evil or dishonest nature." *Brooks*, at 384.

Accordingly, a finding of “good faith” does not excuse the government’s mismanagement of a prosecution. *Id.*

An accused person is prejudiced when the mismanagement negatively impacts “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 [the] defense.’” *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Here, the trial judge reasonably exercised his discretion in dismissing the prosecution. Government mismanagement prejudiced Mr. Wilson’s right to a speedy trial and his right to the effective assistance of counsel. *Michielli, supra.*

C. The government mismanaged its case by failing to diligently seek contact with the complaining witness.

The prosecutor mismanaged the case by failing to use diligence in her efforts to locate the complaining witness. First, Mr. Wilson, who remained in custody, had a strong interest in his right to a speedy trial, refused to enter a waiver, and twice emphasized that he was interested in

trial commencing on January 11.¹ RP (11/10/09) 5; RP (12/18/09) 4-5; RP (12/29/09) 7; RP (1/5/10) 4.

Second, the prosecutor knew that defense counsel required assistance arranging an interview with the complaining witness. RP (12/18/09) 4-5; RP (12/29/09) 8-10; CP 18.

Third, more than a month and a half after Mr. Wilson's first appearance, the state acknowledged that it had been unable to contact the complaining witness. RP (12/29/09) 8.

Fourth, by the end of December, the state's effort to contact the complaining witness consisted of only a few telephone calls. RP (12/29/09) 5.

Fifth, on December 29th, the court noted that the trial date was less than two weeks away and warned the prosecutor: "[w]hat I don't want to do is to have this come down to the last second where either we're going to get a material witness warrant or the victim is unavailable..." RP (12/29/09) 9.

Sixth, even by January 5, the prosecutor had only "left messages with various family members," and acknowledged that she had not yet

¹ In addition, sentencing in a companion case was, by virtue of a plea agreement, tied to the resolution of this prosecution. RP (12/18/09) 2-4; RP (1/5/10) 4-7.

asked “law enforcement to start shaking the trees” to locate the alleged victim. RP (1/5/10) 5-6.

Under these circumstances, the prosecutor should have done more, earlier in the proceedings, to locate the complaining witness. The government could have deployed police investigators to locate her, or pressed family members to provide additional information. The prosecutor could have sought Mr. Wilson’s release from custody, and asked for a material witness warrant earlier in the proceedings.

The prosecutor’s lack of effort distinguishes Mr. Wilson’s case from the lead case—also named *State v. Wilson*—cited in Appellant’s Opening Brief. See Appellant’s Opening Brief, pp. 8-16, citing *State v. Wilson*, 149 Wn.2d 1, 65 P.3d 657 (2003). In *Wilson*, the Supreme Court addressed two different cases presenting similar issues. In the first case, the prosecutor had actually scheduled victim interviews, but the victim’s mother had refused to allow the interview. Even before the issue reached a hearing, the prosecutor sent a detective to go and speak with the family. *Id.*, at 4-5. Following a hearing, the trial judge gave the prosecutor only two business days to set up *and complete* the interview. The prosecutor did manage to set up an interview within the timeframe, but defense counsel refused to either travel to the victim’s home or to conduct the interview by telephone. *Id.*, at 5-6. The prosecutor sought a material

witness warrant, asked that the defendant be released from custody (to extend the speedy trial expiration date), and explained that the youthful victim had previously refused to be interviewed because he'd been under the mistaken impression that the defendant personally would be present during the interview. *Id.*, at 5. Under these circumstances, the Supreme Court found that the prosecutor had acted diligently and had taken reasonable steps to arrange the interview. *Id.*, at 10-11.

The second case addressed in *Wilson* involved a witness who was a busy college student. *Id.*, at 6-7. The defense investigator waited several months before following up on a message from the witness, and then another month before asking the prosecutor for help. *Id.*, at 7. The prosecutor left a series of messages for the witness, and then directed a detective to make contact with him (while the prosecutor was on vacation). *Id.* The witness then called and left messages for the prosecutor and the defense investigator. Progress was interrupted by the Nisqually earthquake, which closed down the courthouse. *Id.* The witness called both the prosecutor and the defense investigator again a few days after the earthquake. *Id.* The following day, the defense moved to dismiss, and the court granted the motion despite the absence of any prejudice, and even though the witness was available that afternoon for an

interview. *Id.* The Supreme Court found, once again, that the prosecutor had acted reasonably and diligently. *Id.*, at 11-12.

The prosecutor in this case had numerous options she could have pursued to enable Mr. Wilson's attorney to meet with Ms. Hall. Furthermore, given the fact that she had had no contact with Ms. Hall, she should have been alerted to the fact that strenuous efforts were necessary. If such efforts had failed, the prosecutor could have requested a material witness warrant sooner in the proceedings, and asked that Mr. Wilson be released (to extend the speedy trial deadline). In the absence of such steps, the trial judge did not abuse his discretion by implicitly finding that the government mismanaged its case. *Michielli, supra.*

D. The government mismanaged its case by failing to timely provide discovery, including photographs and medical records.

The prosecutor also mismanaged the case by failing to provide discovery in a timely fashion. Although the trial judge did not reference this failure, it provides an additional basis for affirming the dismissal with prejudice under RAP 2.5(a). *See Newman, supra.*

The police photographed the complaining witness's injuries; however, the prosecutor had not obtained those photographs as of December 29. RP (12/29/09) 8. Nor had the prosecutor obtained medical records pertaining to the complaining witness's injuries. RP (12/29/09) 8.

Presumably, the state planned to introduce the photographs (and information in the medical reports) to establish that Mr. Wilson assaulted another by strangulation.

Although these materials were not in the prosecutor's possession, she was required, under the court's Order Setting Case Schedule, to provide them (or at least allow defense counsel to inspect and copy them) no later than the "Compliance Date," which was December 4, 2009. Order Setting Case Schedule, Supp. CP. The fact that she had not is sufficient to support a dismissal under CrR 8.3. *See State v. Sherman*, 59 Wn.App. 763, 768-769, 801 P.2d 274 (1990) (dismissal affirmed based on prosecutor's failure to timely produce IRS records available to its chief witness).

E. Mr. Wilson was prejudiced by the government's mismanagement of its case.

Constitutionally adequate assistance requires, at a minimum, that defense counsel "conduct a reasonable investigation." *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Without doing so, counsel cannot make informed decisions about how best to represent the client. *Brett*, at 873. The degree and extent of investigation required will vary depending upon the issues and facts presented by each case. *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). Defense counsel must, "at the very

least... reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.” *Id.*, at 111-112.

Under the American Bar Association standards (quoted with approval in *A.N.J.*, at 111), “Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case...” ABA, *Standards for Criminal Justice, Prosecution Function and Defense Function*, 4-41(a) (3rd Edition, 1993). Furthermore, “depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant.” *A.N.J.*, at 112; *accord Dando v. Yukins*, 461 F.3d 791, 799 (6th Cir. 2006).

Mr. Wilson was charged with assaulting Ms. Hall by strangulation. CP 7. His defense—as outlined in the compliance memorandum and later alluded to by defense counsel—was that the strangulation was consensual, and occurred during a sexual encounter. CP 17; RP (12/29/09) 10-13. Under these facts, review of any photographs and medical records was essential.

Furthermore, defense counsel was unable to even begin evaluating the case without interviewing the complaining witness. Finally, the trial judge dismissed the prosecution just one week before trial was scheduled to begin. Order Setting Case Schedule, Supp. CP. In such a short time, defense counsel could not be expected to (1) carefully evaluate the photographs, medical records, and proposed testimony of Ms. Hall, (2) adequately investigate a response to that evidence (i.e. by consulting with experts), (3) prepare a defense for trial.

Accordingly, governmental misconduct prejudiced Mr. Wilson and materially affected his right to a fair trial. The prosecutor's slow pace in addressing the problem—although conducted in good faith—constituted mismanagement, and put Mr. Wilson in the untenable position of choosing between his right to a speedy trial and his right to an attorney who had had an opportunity to adequately prepare for trial. *Michielli, supra*. The trial court's order of dismissal was a reasonable exercise of discretion, and should be affirmed.

II. IF THE TRIAL COURT'S ORDER IS INSUFFICIENTLY DETAILED TO SUPPORT THE DISMISSAL, THE CASE SHOULD BE REMANDED FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

CrR 8.3(b) does not require findings of fact and conclusions of law; instead the court need only enter a written decision explaining its reasons for dismissal. CrR 8.3(b). Despite this, the Appellant contends

the dismissal was an abuse of discretion because “the judge did not find any prejudice” and “failed to consider intermediate remedial steps.” Appellant’s Opening Brief, pp. 11, 15. Appellant also fixates on the court’s finding of “good faith” (and the judge’s comments that the witness’s absence was not the fault of the prosecutor). Appellant’s Opening Brief, p. 11.

The record establishes that the trial judge considered these factors and at least implicitly found in Mr. Wilson’s favor. RP (1/5/10) 4-8. Accordingly, the dismissal should be affirmed as a reasonable exercise of discretion. CrR 8.3(b); *Michielli, supra*. If the trial court’s oral ruling and written order are insufficient, the case should be remanded for entry of findings of fact and conclusions of law. Although not required by the rule, such findings and conclusions could help clarify the factors considered and the findings implicitly made by the trial judge.

CONCLUSION

For the foregoing reasons, the trial court’s order dismissing the case with prejudice must be affirmed. In the alternative, the case should be remanded to the trial judge for entry of findings of fact and conclusions of law.

Respectfully submitted on July 15, 2010.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON
BY  COUNTY

I certify that I mailed a copy of the Brief of Respondent to:

Joshua Wilson, DOC #876733
Larch Corrections Center
15314 NE Dole Valley Rd.
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and to:

Clallam County Prosecuting Atty
223 E 4th St, Ste 11
Port Angeles, WA 98362

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 15, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 15, 2010.



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