

No. 48117-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Anthony Perez,

Respondent.

Grays Harbor County Superior Court Cause No. 15-1-00107-1

The Honorable Judge David Edwards

Respondent's Brief

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RESPONDENT'S ISSUE AND ASSIGNMENT OF ERROR
PERTAINING TO APPELLATE COSTS

The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Anthony Perez is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Anthony Perez with Rape of a Child in the Second Degree. CP 1-2. The incident was said to have occurred on March 15, 2015, and the Information was filed on March 17, 2015. CP 1. At the time Mr. Perez was charged, the state already had in its possession Mr. Perez's cell phone, the alleged victim L.L.'s cell phone, and DNA-related evidence. CP 46.

After 24 days, on April 9, 2015, the state filed a motion to add an allegation that the offense was predatory in nature, which adds a minimum term of 25 years and a maximum of life imprisonment. CP 21. The sheriff's department had not yet completed their investigation, and the prosecuting attorney was aware that several items of evidence would be forthcoming. These items included DNA results, the results of searches of the cell phones, and electronic messages allegedly between Mr. Perez and L.L. CP 47.

Trial was set for August 4, 2015. Mr. Perez made a timely discovery demand, listing these specific items. CP 47. The court entered an Omnibus Order, setting a discovery deadline of June 15, 2015. CP 47. Mr. Perez's speedy trial expired August 8, 2015. CP 50.

The state did not provide the defense with the discovery as ordered. Nor did the state request additional time, or address at all its failure. CP 47-48.

Eight days after the deadline, the investigator reviewing the cell phones completed his report. That report referenced three documents, which were contained on three separate disks of materials from the phones. The state never provided Mr. Perez's attorney with those disks. CP 48.

Ten days after the discovery deadline passed without state action, the crime lab completed their report regarding the DNA samples. CP 48.

Sixteen days after the deadline, the court was to hold a CrR 3.5 hearing. It had to be reset, as the prosecutor had not provided the defense with access to the arresting officer's body camera video. CP 48.¹ On the day the hearing was to have been held, Mr. Perez's attorney finally got the

¹ The state had provided the video the week before to Mr. Perez's prior attorney, who had not been on the case for quite some time. CP 47-48.

body camera video, which had been in possession of the state since the arrest. CP 48.

The detective who completed the analysis of the phones was named Detective Beall. He completed his report June 23, 2015, as noted above. This report wasn't provided to Mr. Perez until July 23, 2015. CP 48. Even then, the state did not provide Mr. Perez with the documents that Beall referenced and attached, nor did they provide the disks. CP 48.

The state handed over an updated DNA results report to the defense on July 27, 2015. CP 48. The next day, the prosecutor disclosed anticipated witnesses for trial. The list included 16 lay witnesses and three experts. CP 48. This was 43 days after the deadline set in the Omnibus Order, a deadline to which the state had not objected. CP 48.

Mr. Perez asked the court to dismiss the charges for mismanagement. At the time of the hearing, held July 28, 2015, the defense still had not been provided with several items of discovery. These items included the disks that formed the basis of the cell phone analysis and data recovery. The state's expert, Detective Beal, had completed his review of these materials more than a month earlier. CP 48, 50.

The trial court found that the state was aware that important information had not been provided to the defense. Judge David Edwards further found that the state did not act with reasonable diligence. CP 48.

Judge Edwards found that the prosecutor made material misrepresentations when she claimed she had not received the defense's May 15, 2015 discovery demand. CP 49. Judge Edwards found that the prosecutor failed to provide timely discovery, failed to monitor the processing of evidence, and that the specific prosecuting attorney committed unethical conduct constituting bad faith. CP 49.

The court noted that the basis for the "predatory act" enhancement was contained in the cell phone material. The DNA evidence was to be used by the state to prove that sexual contact had occurred. The court found that both of these were crucial to the state's case, and that failure to give the defense an opportunity to review and challenge this evidence unconstitutionally forced the defendant to choose between a speedy trial and an effective attorney. CP 50.

Judge Edwards dismissed the case. CP 50.

The prosecutor moved for reconsideration, and filed a flurry of new declarations. CP177 . Judge Edwards struck the declarations, and found that the state hadn't acted with diligence in securing these materials before the court's original ruling. CP 177-178. Judge Edwards noted that while the prosecutor claimed she did not have adequate time to make a full presentation at the time of the hearing, she did not request additional time

nor even note that she was not fully prepared. CP 178. Judge Edwards concluded that this too was not reasonable diligence. CP 178.

Judge Edwards denied reconsideration. CP 177-180. The state appealed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE CASE AFTER FINDING A “COMPLETE FAILURE” TO PROVIDE COURT-ORDERED DISCOVERY, A FAILURE TO ACT WITH REASONABLE DILIGENCE, UNETHICAL CONDUCT, AND PROSECUTORIAL MISCONDUCT INVOLVING BAD FAITH.

A. The trial court’s Findings of Fact are verities on appeal.

Under the Rules of Appellate Procedure, “[a] separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” RAP 10.3(g). Unchallenged findings are verities on appeal. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580 (2016).

Here, Appellant failed to include a separate assignment of error for each finding. Instead, Appellant assigned error to “[t]he trial court’s findings regarding the discovery process.” Appellant’s Opening Brief, p. 1. This general assignment of error does not comport with RAP 10.3(g).²

² In its argument section, the state specifically mentions Findings Nos. 18, 19, and 20, and the court’s conclusions of law. Appellant’s Opening Brief, p. 12.

Because Appellant failed to separately assign error to any of the court's numerous findings, they are verities on appeal. *Id.* These findings are sufficient to sustain the court's decision to dismiss the prosecution.

B. The prosecution erroneously relies on declarations that were stricken by the trial court.

In its memorandum opinion addressing the state's reconsideration motion, the trial judge struck from the record all new declarations filed in support of the motion. CP 177-178. The court noted that parties "may not present new evidence in support of a motion for reconsideration absent a showing that the evidence is newly discovered..." CP 177. The court found that the prosecuting attorney had not acted with reasonable diligence to secure these declarations prior to the hearing on the original motion to dismiss. CP 178.

The state did not appeal the court's decision striking the materials supporting the reconsideration motion.³ Despite this, the prosecutor cites these materials in its brief. *See* Appellant's Opening Brief, p. 13, 20. This is improper, given the state's failure to appeal the trial court's decision striking these materials. CP 177-178.

³ The prosecution filed its Notice of Appeal on September 1, 2015, ten days prior to the court's decision on the reconsideration motion. CP 125, 177.

C. The trial court properly found that the government mismanaged its case.

A trial court's decision dismissing a case for state mismanagement is reviewed for abuse of discretion, and will be affirmed unless the decision is manifestly unreasonable or based on untenable⁴ grounds. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). The trial judge's decision dismissing this case was not manifestly unreasonable or based on untenable grounds. The Court of Appeals should affirm the dismissal. *Id.*

Due process requires that criminal proceedings comport with prevailing notions of fundamental fairness such that the accused is given a meaningful opportunity to present a complete defense. *State v. Greiff*, 141 Wn.2d 910 at 920, 10 P. 3d 390 (2000). State mismanagement of discovery may infringe an accused's constitutional right to due process. *Greiff*, 141 Wn.2d at 920.

An appellate court is not limited to the trial court's rationale for a particular decision, but may affirm "on any ground established by the law and the record." *State v. Motter*, 139 Wn. App. 797 at 802, n. 3, 162 P.3d

⁴ The word "untenable" in this context means "indefensible." Garner, *A Dictionary of Modern Legal Usage*, Oxford Univ. Press, Inc. (1990).

1190 (2007); *see also* RAP 2.5(a). There are three separate bases for dismissal in this case.⁵

First, under CrR 8.3(b), a trial court has discretion to 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.” CrR 8.3(b); *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Misconduct and prejudice need only be shown by a preponderance of the evidence. *State v. Stein*, 140 Wn. App. 43 at 53, 165 P.3d 16 (2007). Misconduct does not require evil or dishonest action; simple mismanagement is sufficient. *Michielli*, 132 Wn.2d at 239.

Second, a court may dismiss for governmental mismanagement under CrR 4.7, which permits dismissal whenever the prosecutor fails to comply with the discovery rule or an order of the court. CrR 4.7(h)(7)(i). The purpose of the criminal discovery rules is to “provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.” *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007).

⁵ The trial judge’s written Findings of Fact, Conclusions of Law, and Order of Dismissal do not cite the authority under which the court dismissed the case. CP 46-53. Mr. Perez argued that dismissal was appropriate under CrR 4.7 and CrR 8.3. CP 34-37.

The discovery rules are “designed to enhance the search for truth.” *Id.* at 433. Courts should apply the rules to “insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.” *Id.*⁶

Third, in addition to the grounds provided by CrR 8.3(b) and CrR 4.7 (h)(7)(i), the court also has inherent authority to dismiss a case under appropriate circumstances. *See, e.g., State v. Chichester*, 141 Wn. App. 446, 457, 70 P.3d 583 (2007); *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986); *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956).

Here, the government mismanaged its case, provided late discovery, and failed to provide critical information. The court’s detailed findings and conclusions address the mismanagement, discovery delays, and nondisclosures in depth. CP 46-53, 177-180.

As noted above, the state failed to specifically assign error to any of the court’s findings, and thus the findings are verities on appeal. RAP 10.3(g); *Mueller*, 185 Wn.2d at 9. The three findings specifically

⁶In addition, “courts have long recognized that effective assistance of counsel, access to evidence, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial.” *Boyd*, 160 Wn.2d at 434 (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Strickland v. Washington*, 466 U.S. 668, 684, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

mentioned in the body of the state's argument (Nos. 18, 19, and 20) are well-supported. *See* Appellant's Opening Brief, p. 12.

Furthermore, the remaining findings adequately support the court's conclusions and its decision to dismiss the case. These unchallenged findings (which are not addressed by the state) include (1) the unexplained 3-month delay in providing the body camera video (CP 47), (2) the failure to provide three disks "which included additional electronic conversations between Mr. Perez and the alleged victim" (CP 48),⁷ (3) the failure to provide documents attached to Detective Beall's report and incorporated by reference (CP 48), (4) the "updated report" on DNA results, which was provided just a few days before trial, (5) the state's delay in disclosing "sixteen lay witnesses and three expert witnesses," which occurred "only four court days before the scheduled trial" and "43 days past the deadline set forth in the Omnibus Order" (CP 48).

The court found that the state failed to produce evidence in a timely fashion, ignored the court's omnibus order, provided no explanation for the delays, never provided Mr. Perez with certain critical

⁷ Without citation to the record, the state suggests that the "material was provided in the initial discovery." Appellant's Opening Brief, p. 13. Apparently, the state believes that Mr. Perez should have been content with photographs rather than an electronic copy of the phones' contents. In any event, the state fails to challenge Finding No. 11, in which the court found that the three disks included "additional electronic communications between Mr. Perez and the alleged victim," and were never provided to Mr. Perez. CP 48.

evidence, and waited until four days before trial (and 43 days after the deadline set by the court) to produce a witness list that included sixteen lay witnesses and three expert witnesses. CP 47-48.

This evidence amply supports the court’s additional findings—that the state “was not thorough in their review of discovery, diligent in following up with police investigators who evaluated the evidence, and timely in providing evidence to Mr. Perez.” CP 48. It also supports the court’s determination that the state “did not act with reasonable diligence to ensure that the DNA results and the computer forensic examination were provided to Mr. Perez.” CP 48. It also supports the court’s conclusion that “the State ignored this case for weeks as if it was unimportant.” CP 48.

These discovery issues were exacerbated by the prosecuting attorney’s material misrepresentations to the court. CP 49. The court concluded that the prosecutor failed to provide discovery, failed to act with reasonable diligence, engaged in unethical conduct, and committed “prosecutorial misconduct involving bad faith.” CP 49.

These findings are supported by the record and sufficient to establish mismanagement. *Michielli*, 132 Wn.2d at 239.

D. The trial court acted within its discretion in dismissing the case for mismanagement.

The state may not, by failure to provide timely discovery, force an accused person to choose between his/her rights to a speedy trial and to the effective assistance of adequately-prepared counsel. *State v. Brooks*, 149 Wn. App. 373, 387, 203 P.3d 397 (2009); *see also State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Here, the court found that the prosecutor's misconduct and mismanagement prejudiced Mr. Perez by forcing him "to choose between his right to a speedy trial and ineffective assistance of counsel." CP 50.

The prosecution's misconduct interjected new facts into the case right before trial. *Id.* These new facts included the electronic contents of the alleged victim's cell phone, which was never provided to the defense, and which the court described as "crucial evidence." CP 48, 50. The new facts also included DNA evidence purporting to establish that intercourse occurred. CP 50. The new facts also included the identity of lay witnesses and experts who would be testifying at trial. CP 48.

Defense counsel could not prepare for trial without the missing electronic copy of the cell phone's contents. Furthermore, counsel could not prepare for trial without the assistance of experts, to help analyze the cell phone data and the DNA evidence. Finally, the late disclosure of 16

lay witnesses and three expert witnesses prevented defense counsel from adequately preparing for trial. CP 48.

The trial court determined that the governmental mismanagement and late discovery prevented defense counsel from being prepared for trial. Given the volume of late discovery and its nature (including the state's late witness list and the refusal to provide phone data that would likely require expert evaluation), this decision was not manifestly unreasonable; nor was it based on untenable grounds. Accordingly, the trial court's decision should be affirmed. *Brooks*, 149 Wn. App. at 387.

II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).⁸

⁸ Division II's commissioner has indicated that Division II will follow *Sinclair*.

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Perez indigent. CP 59-61. There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

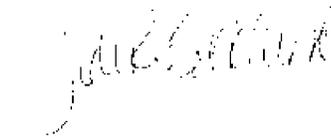
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, the Court of Appeals should affirm the trial court’s decision. In the alternative, if the state substantially prevails, the court should decline to award appellate costs.

Respectfully submitted on June 27, 2016.

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A handwritten signature in black ink, appearing to read "Manek R. Mistry". The signature is fluid and cursive, with the first name being the most prominent.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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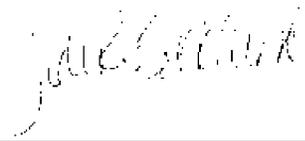
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I filed the Respondent's Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 June 27, 2016.



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