

FILED

DEC 16 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 29754-3-III

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

THE STATE OF WASHINGTON

Respondent

v.

JEFFREY SCOTT NORMAN

Appellant

BRIEF OF RESPONDENT

Tim Rasmussen
Stevens County Prosecutor

Shadan Kapri
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

Stevens County Prosecutor's Office
215 S. Oak Street
Colville, WA
(509) 684-7500

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I.

ASSIGNMENT OF ERROR

1. The Superior Court erred in denying Mr. Norman's Motion for Dismissal based upon governmental misconduct.

II.

ISSUES PRESENTED

1. Whether the trial court abused its discretion in denying Mr. Norman's Motion to Dismiss the jury convictions for first-degree child rape, two counts of second-degree child rape, first-degree child molestation, and second-degree child molestation.

III.

STATEMENT OF THE CASE

On September 26, 2005, Mr. Norman was convicted by a jury trial of the crimes child molestation in the first-degree, child molestation in the second-degree, rape of a child in the first-degree, and two counts of rape of a child in the second-degree. Clerk's Paper's (CP) 7. Mr. Norman appealed the conviction and in an unpublished opinion by the Court of Appeals, Division III, filed on June 5, 2007, the Court found no reversible error and affirmed the multiple convictions. *See State v.*

Norman, 139 Wash.App. 1003, 2007 WL 1601514, Wash.App. Div. 3, 2007; CP 42). The Washington Supreme Court denied review of the case on April 1, 2008. See *State v. Norman*, 163 Wash.2d 1015, 180 P.3d 1291 (2008).

On January 21, 2011, Mr. Norman filed a motion to dismiss the charges based upon governmental misconduct. CP 48. The trial court judge, after reviewing the record and briefing by both parties, concluded that there was no material evidence of governmental misconduct, thereby denying the Appellant's motion to dismiss the jury convictions of the child sex crimes. CP 298.

IV.

ARGUMENT

A. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT JUDGE TO DENY THE DISMISSAL OF THE CHILD SEX CONVICTIONS AGAINST THE APPELLANT.

Under Washington case precedent, to support CrR 8.3(b) dismissal, a defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting [his or her] right to a fair trial." *State v. Michielli*, 132 Wash.2d 229, 239-40, 937 P.2d 587 (1997) (citing *State v. Blackwell*, 120 Wash.2d 822, 831, 845 P.2d 1017 (1993)). A trial court's decision regarding dismissal under CrR 8.3(b) can be reversed only when a trial court has abused its discretion by making a decision that is manifestly unreasonable or based on untenable grounds. *Michielli*, 132 Wash.2d at 240, 937 P.2d 587 (citing *Blackwell*, 120 Wash.2d at 830, 845 P.2d 1017).

Appellant's attorney now argues that the motion was a CrR 7.8(b)(3). (Appellant's Brief, p. 7-12). Mr. Norman clearly argues throughout his original motion that "a dismissal of his conviction is, in fact, warranted under 8.3(b)." (CP 48 – 95; *See* CP 95) Appellant's attorney erroneously argues for a vacation of judgment under CrR 7.8 (b)(3) *when that was not the underlying argument or motion that led to this appeal.* (CP 48-95; Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss Due to Government Misconduct filed on January 21, 2011 in Stevens County Superior Court).

In a CrR 8.3(b) dismissal (as argued originally on the trial court level), an Appellant must show both "arbitrary action or governmental misconduct" and "prejudice affecting [his or her] right to a fair trial." *State v. Michielli*, 132 Wash.2d 229, 239-40, 937 P.2d 587 (1997). Division III has already decided in the unpublished opinion filed on June 5, 2007, that Mr. Norman received a fair trial. *See Additional Pro-Se Arguments, State v. Norman*, 139 Wash.App. 1003, 2007 WL 1601514, Wash.App. Div. 3, 2007; CP 42). Division III also did not accept Mr. Norman's argument of prosecutorial misconduct in the same unpublished opinion. *See Additional Pro-Se Arguments, State v. Norman*, 139 Wash.App. 1003, 2007 WL 1601514, Wash.App. Div. 3, 2007; CP 42)

Based upon the court record, it is clear that Mr. Norman has not shown prosecutorial misconduct or that he was denied a fair trial. It was not an abuse of discretion for the trial court judge to deny the dismissal based upon the

reasonable decision that there was “no material evidence of governmental misconduct.” CP 298; Order Denying Motion to Dismiss filed on March 1, 2011). Mr. Norman provides nothing to this court other than *speculation, conjecture, or inadmissible hearsay* to support his argument for prosecutorial misconduct. Prosecutorial misconduct places the burden on the defendant to show (1) the prosecutor engaged in misconduct, and (2) the misconduct prejudiced the jury. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

In addition, Mr. Norman makes no showing how the alleged misconduct impacted the outcome of the trial. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Finally, dismissal under CrR 8.3 is an extraordinary remedy, one to which a trial court should turn only as a last resort.

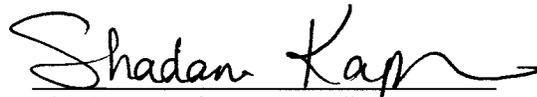
Based upon the record, the court’s ruling, and the unpublished opinion filed by Division III, it is clear that the trial court judge did not abuse his discretion by denying the dismissal of the jury convictions for child molestation in the first-degree, child molestation in the second-degree, rape of a child in the first-degree, and two counts of rape of a child in the second-degree. *State v. Michielli*, 132 Wash.2d 229, 239-40, 937 P.2d 587 (1997) (citing *State v. Blackwell*, 120 Wash.2d 822, 831, 845 P.2d 1017 (1993)); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Furthermore, Mr. Norman provides no material evidence of how such alleged misconduct warrants dismissal of a jury verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

V.

CONCLUSION

Based upon the legal arguments and case precedent above, the State requests that the Court of Appeals affirm the denial of the dismissal of the convictions against Mr. Norman.

Dated this 14th day of December, 2011.



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Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and to Ms. Andrea Burkhardt, Burkhardt & Burkhardt, PLLC, P.O. Box 946, Walla Walla, WA 99362 and to Jeffrey Norman, Airway Heights Correction Center, DOC # 887166, P.O. Box 2049, Airway Heights, WA 99001 on December 14, 2011.


Shadan Kapri,
Senior Deputy Prosecuting Attorney