

NO. 84573-5

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DAVID A. OPPELT, Jr.,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. ISSUES**

The following issues are raised in the Petition for Review and the Answer to Petition for Review:<sup>1</sup>

(1) Did the defendant establish actual prejudice from the delay in filing charges? (Answer to Petition for Review, issue no. 1)

(2) If so, is the State's negligence sufficient to establish a Due Process violation? (Answer to Petition for review, issue no. 2)

(3) If so, is the trial court entitled to balance the degree of negligence against the degree of prejudice? (Petition for Review, issue no. 1)

(4) Did the trial court abuse its discretion in refusing to dismiss the case under CrR 8.3(b)? (Petition for Review, issue no. 2)

## **II. STATEMENT OF THE CASE**

The facts are set out in the Brief of Respondent at 1-6.

## **III. ARGUMENT**

### **A. THE DEFENDANT HAS FAILED TO ESTABLISH THAT ACTUAL PREJUDICE RESULTED FROM PRE-TRIAL DELAY.**

The essential basis for all of the petitioner's arguments is a showing of actual prejudice. Absent prejudice, there can be no due

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<sup>1</sup> Under RAP 13.7(b), the issues raised in the petition and the answer are all before the court for decision.

process violation. State v. Salavea, 151 Wn.2d 133, 139, 86 P.3d 125 (2004). Dismissal under CrR 8.3(b) can likewise not be justified absent a showing of prejudice. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The standards governing a finding of prejudice are set out in the Brief of Respondent at 11-17. Applying those standards, the defendant has failed to show prejudice.

**1. The Determination Of Prejudice Should Be Made On The Basis Of The Best Evidence Available, Which Is The Record At Trial.**

In resolving the question of prejudice, there is a preliminary issue: should the determination be made from the pre-trial record or the record at trial? The Court of Appeals “decline[d] to adopt a fixed rule, but look[ed] first to the motion record.” Slip op. at 8. The court cited conflicting cases. Id. n. 16. On the one hand, courts have reviewed suppression rulings on the basis of the evidence at the suppression hearing. State v. Jessup, 31 Wn. App. 304, 317, 641 P.2d 1185 (1982); State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). On the other hand, courts have reviewed pre-trial determinations of the sufficiency of the evidence on the basis of the evidence introduced at trial. State v. Jackson, 82 Wn. App. 594, 609, 918 P.2d 945 (1996).

There is a clear distinction between these two situations. Suppression rulings involve issues independent of those raised at trial. Such rulings can also be based on facts that are inadmissible at trial. United States v. Raddatz, 447 U.S. 667, 679, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980). Consequently, the rulings are reviewed based on the pre-trial record. In contrast, pre-trial rulings on sufficiency of the evidence are essentially predictions of the evidence that will be admitted at trial. On appeal, the court considers the actual events, not the predictions.

In the present case, the essential question is whether the delay caused substantial prejudice to the defendant's right to a fair trial. See State v. Chavez, 111 Wn.2d 548, 558, 761 P.2d 607 (1998). When this issue is raised pre-trial, the court is asked to predict the events of trial. When the ruling is reviewed, the appellate court should consider the actual events, not the predictions.

Courts have applied this analysis in comparable situations. For example, a ruling on severance of defendants depends on a prediction of prejudice: severance is required if a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577

(1991). Although a defendant must normally move for severance pre-trial, the motion must be renewed at trial. CrR 4.4(a). Even though the trial court makes its pre-trial determination on the basis of “potential for prejudice,” the appellate court reviews the decision on the basis of “actual prejudice.” State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017 (1999). In performing this review, the appellate court looks at the events of trial, not the pre-trial predictions. See, e.g., State v. Johnson, 147 Wn. App. 276, 284-87, 194 P.3d 1009 (2008), review denied, 165 Wn.2d 1050 (2009); State v. Asaeli, 150 Wn. App. 543, 584-85, 208 P.3d 1136, review denied, 167 Wn.2d 1001 (2009).

Another example relates to motions for change of venue. Such a motion should be granted if the defendant shows a probability of prejudice from pre-trial publicity. Hoffman, 116 Wn.2d at 71. A motion for change of venue may be made prior to jury selection. Even so, the trial court’s ruling is reviewed on the basis of the actual experience of jury selection, not the prior predictions. “[T]he best test of whether an impartial jury could be impaneled is to attempt to impanel one.” State v. Jackson, 150 Wn.2d 251, 271, 76 P.3d 217 (2003).

The same analysis should apply to prejudice resulting from pre-trial delay. A pre-trial showing of prejudice will almost always be “to some significant extent speculative and potential rather than actual and substantial.” United States v. Crouch, 84 F.3d 1497, 1516 (5<sup>th</sup> Cir. 1996) (en banc), cert. denied, 519 U.S. 1076 (1997). The best test of whether a defendant can receive a fair trial is to attempt to give him one. It does not violate “fundamental conceptions of justice” for a defendant to receive a fair trial – notwithstanding a judge’s pre-trial concern that this might not occur.<sup>2</sup> Consequently, the assessment of prejudice should be based on the events of trial.

In the present case, however, this issue ultimately does not matter. Whether the pre-trial record or the trial record is considered, the outcome should be the same: the defendant failed to establish prejudice.

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<sup>2</sup> This concern did not exist in the present case. Notwithstanding the finding of “prejudice,” the pre-trial judge concluded that the defendant had *not* met his burden of proving that he could not receive a fair trial. 1 CP 95, conclusion no. 7.

## **2. Whether The Court Considers The Pre-Trial Record Or The Trial Record, The Defendant Failed To Establish Prejudice.**

### **a. Pre-trial record**

The Court of Appeals concluded that prejudice was established by the defendant's "inability to argue at trial that the specific lotion used could cause the kind of redness [the victim] displayed when examined in the emergency room." Slip op. at 9. The pre-trial declarations contained conflicting information on this point. The defense declaration said that Ms. Olson "doesn't remember anything about the lotion." 1 CP 140. The State's declaration said that Ms. Olson "believed the lotion ... was Vagisil." 1 CP 149. There is no indication that Vagisil would have caused any irritation.

The Court of Appeals decided that there was a showing of actual prejudice because Ms. Olson's 2001 statement did not refer to Vagisil. Slip op. at 9. At the pre-trial hearing, only minimal information was submitted about this statement. In an apparent reference to the statement, defense counsel said that "[i]t is unclear what type of lotion was used." 1 CP 137. There is no indication that Ms. Olson was even asked what the lotion was: she simply failed to volunteer information about a seemingly-insignificant

detail. This does not provide any basis for concluding that her information would have been exculpatory.

The possibility that a witness might have provided exculpatory testimony is not sufficient to establish prejudice. United States v. Ross, 123 F.3d 1181, 1185 (9th Cir. 1997), cert. denied, 522 U.S. 1066 (1998); see State v. Wittenbarger, 124 Wn.2d 467, 477-81, 880 P.2d 517 (1994) (possibility that destroyed evidence might have been exculpatory does not establish due process violation). Even when material witnesses suffer serious memory lapses, the defense must show how the witnesses would have testified if their memories had not dimmed. Prejudice cannot be established by speculation that the testimony might have been exculpatory. United States v. Sherlock, 962 F.2d 1349, 1354 (9<sup>th</sup> Cir. 1989), cert. denied, 506 U.S. 958 (1992). The pre-trial record in the present case provides no basis for concluding that Ms. Olson would have provided any exculpatory testimony on the identity of the lotion.

Even if the court speculates about what she might have said, the defense completely failed to show that the identity of the lotion was a material fact. With regard to the irritation, the defense declaration said:

[A.R.] was examined by Dara Moore on May 17, 2001. The report indicates that the assault took place sometime in the afternoon of Tuesday, May 8, 2001. Nine days after the alleged assault and less than 24 hours after an unknown lotion was applied to A.R.'s genitals, Ms. Moore observed redness and swelling in the labia majora, but no signs of trauma.

1 CP 137. Neither this nor any other portion of the declaration shows how this "redness and swelling" had any connection to the issues at trial.

A connection could have been established in several different ways. For example, the defense could have submitted a medical opinion on the significance of genital irritation in proving sexual abuse. Or they could have shown that the State intended to offer such an opinion. See CrR 4.7(a)(1)(iv) (State must disclose "any reports or statements of experts"). They did none of this. So far as the pre-trial record shows, the genital irritation was entirely irrelevant. Any explanation of that irritation was thus equally irrelevant.

Although the defense failed to show what caused the irritation, their evidence excluded one potential cause: **the lotion.**

According to the declaration:

When she arrived at Floyd and Bertha's home, A.R. told Bertha that her "pee pee" hurt. Lotion was applied to A.R.'s genitals.

1 CP 137. Since the irritation existed *before* the lotion was applied, it was not *caused* by the lotion. On the pre-trial record, the defendant did not carry his burden of proving actual prejudice.

**b. Trial Record**

The evidence at trial did nothing to correct the deficiencies of the pre-trial record. Rather, it enhanced them. At trial, Ms. Olson remembered most of the facts surrounding the victim's disclosure to her. 6/11 RP 46-66, 76-103. With regard to the identity of the lotion, she testified that she would not use a perfumed lotion or a body lotion on a child's genitalia. She said that the lotion she used was Vagisil. 6/10 RP 51, 54-55. There was no evidence that it was anything else. Medical evidence indicated that Vagisil would not cause genital irritation. 6/10 RP 63. The victim provided some corroboration concerning the identity of the lotion: she testified that it was "like vitamin, vitamin something." 6/10 RP 105.

By the time of trial, Ms. Olson's statement to police had been introduced (at the child hearsay hearing). The statement said that "we went to the bedroom and put lotion on her privates." Child hearsay ex. 3. Nothing in the statement suggests that anyone asked Ms. Olson what the lotion was. Again, her failure to

volunteer information about a seemingly-insignificant detail provides no evidence of what she would have said if asked.

The evidence at trial also failed to show that the genital irritation was a material fact. An expert testified that the cause of such irritation “could be anything.” 6/11 RP 167. This condition “comes up quite a bit” in children of that age. 6/11 RP 179. The defense was thus successful in refuting any inculpatory inferences that might have arisen from the existence of the irritation.

Like the pre-trial evidence, the evidence at trial did establish one thing that did *not* cause the irritation: **the lotion**. Ms. Olson testified that before she applied the lotion, A.R. “told me that her pee-pee was sore.” 6/11 RP 51. Since irritation existed before the lotion was applied, it was not caused by the lotion.

The trial record, like the pre-trial record, fails to show that the defendant suffered any actual prejudice. Rather, the record fulfilled the pre-trial judge’s prediction: “The prejudice shown is just as likely to make it more difficult for the State to prove its case.” 1 CP 95, conclusion no. 7. The fading of memories weakens the State’s case, and the State has the burden of proof. Barker v. Wingo, 407 U.S. 514, 521, 92 S.Ct. 2182, 33 L Ed. 2d 101 (1972).

Ms. Olson was never a defense witness. As the first person to whom the victim disclosed the abuse, she was an important State's witness. The delay gave the defense a basis for challenging her credibility by questioning the accuracy of her memory. The delay did not diminish the defendant's ability to challenge the State's case – it enhanced that ability.

In short, whether the court looks at the trial record or the pre-trial record, the result is the same. The identity of the lotion is a red herring. There was no showing that Ms. Olson would have ever testified that the lotion was something that would cause irritation. Her statement and testimony to the contrary are unrefuted. The evidence clearly showed that the lotion *did not* cause the irritation, since the irritation existed before the lotion was applied. The only reason Ms. Olson put the lotion on was because A.R. said that her pee-pee hurt. And the irritation was immaterial anyway – the State completely failed to establish any link between genital irritation and sexual abuse. The defense evidence fell far short of establishing actual prejudice. This being so, there was no due process violation, regardless of any other factors.

**B. NEGLIGENT DELAY IS INSUFFICIENTLY EGREGIOUS TO ESTABLISH A DUE PROCESS VIOLATION.**

**1. Contrary To What The Court Of Appeals Believed, This Court Has Never Decided Whether Negligence Can Establish A Due Process Violation.**

If this court decides whether prejudice has been shown, the next issue is whether negligent pre-trial delay is sufficiently egregious to violate due process. The Court of Appeals did not engage in any independent analysis on this issue. Rather, the court purported to follow precedent from this court. Slip op. at 7, 9. This court has, however, never decided the issue. The Court of Appeals' analysis is reminiscent of the "telephone game," in which participants successively listen to a message and then repeat it to the next person. By the time the message reaches the end of the chain, it usually has drastically changed. That is exactly what happened here.

The chain started with State v. Calderon, 102 Wn.2d 348, 352-53, 684 P.2d 1293 (1984). There, this court said: "It has been suggested that negligently failing to bring charges promptly may also establish a constitutional violation." Id. at 353. The court then went on to hold that there had been no negligence. Id. at 354. As a result, there was no need to decide what the outcome would have

been if negligence had been found. The court left that question open. A suggestion is not a holding.

The next step in the chain was State v. Alvin, 109 Wn.2d 602, 604, 746 P.2d 807 (1987). Citing Calderon, the court said that “a negligent delay may also [violate due process].” Later cases repeated this language. State v. Lidge, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989) (citing Alvin); State v. Dixon, 114 Wn.2d 857, 865, 792 P.2d 137 (1990) (citing Lidge); Salavea, 151 Wn.2d at 139 (“due process may or may not be violated” by negligent delay, citing Dixon and Calderon).

The problem is that the word “may” is ambiguous. It can refer to a statement whose truth has not yet been determined: “I may pass the bar exam if I study hard.” Or it can refer to a statement that is sometimes true and sometimes false: “A candidate who passes the bar exam may be admitted to practice law.” (The candidate will usually be admitted, but not if this court determines that he or she lacks good moral character. APR 5(c).)

In the cases following Calderon, this court clearly meant “may” in the former sense. Calderon did not decide whether negligence is *ever* sufficient to establish a due process violation. None of the ensuing cases analyzed that issue, so it remained

undecided. When this court said that negligence “may” violate due process, it meant that the truth of that proposition was undetermined.

The Court of Appeals, however, interpreted the word “may” in the opposite sense. The court held that negligence *will* violate due process, if other preconditions are satisfied. In support of this proposition, the court cited the cases that followed Calderon. State v. Frazier, 82 Wn. App. 576, 591, 818 P.2d 964 (1996); Oppelt, slip op at 9 n. 21.

The “telephone game” has thus brought about a striking result. This court’s statement in Calderon has, through a series of paraphrases, been transformed into its opposite. This court refused to decide whether negligence can violate due process – and that refusal has been changed into a decision that negligence *does* violate due process under appropriate circumstances.

It is time for this court to re-state the original message. If the court does not need to decide the issue (because the defendant has failed to prove prejudice) it should make it clear that the question remains open. If the court does decide the issue, it should hold that negligence is insufficient.

## **2. The U.S. Supreme Court Has Held That Negligence Is Categorically Beneath The Threshold Of Constitutional Due Process.**

The substantive issue whether negligence is sufficient to establish a due process violation is discussed in the respondent's brief at pages 18-21. As pointed out there, a large majority of courts have held that negligence is insufficient. In cases involving substantive due process, the U.S. Supreme Court has said that negligence is "categorically beneath the threshold of constitutional due process." County of Sacramento v. Lewis, 523 U.S. 833, 849-50, 118 S. Ct. 1708, 140 L. Ed.2d 1043 (1998). Imposing a negligence standard could also have harmful effect on defendants. If the courts are prepared to second-guess prosecutors' decision to delay filing charges, prosecutors will be pressured into "resolving doubtful cases in favor of early—and possibly unwarranted – prosecution." United States v. Lindstrom, 698 F.2d 1154 (11<sup>th</sup> Cir. 1983). In accordance with the view of most courts, this court should hold that negligence is insufficient to establish a due process violation.

**C. EVEN IN THE FEW JURISDICTIONS THAT ALLOW A DUE PROCESS VIOLATION TO BE BASED ON NEGLIGENCE, THE REASONS FOR THE DELAY MUST BE BALANCED AGAINST THE DEGREE OF PREJUDICE SUFFERED BY THE DEFENDANT.**

The final step in the analysis is to balance the prejudice to the defendant against the State's reason for the delay. As the defendant points out, Division Two of the Court of Appeals has interpreted this court's decisions as not permitting balancing when the delay was negligent. Frazier, 82 Wn. App. at 592. No other reported decision has reached such a conclusion. Division One disagreed with this analysis in State v. Schifferl, 51 Wn. App. 268, 753 P.2d 549 (1988).

In the few other jurisdictions that hold negligence sufficient to violate due process, that negligence must be balanced against the resulting prejudice. For example, the Ninth Circuit Court of Appeals has applied the following test:

Whether due process has been violated is decided under a balancing test, and if mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater. The defendant must show actual prejudice from the delay, and the court must balance the length of the delay with the reasons for the delay.

Ross, 123 F.3d at 1185 (citations omitted).

The Montana Supreme Court has applied a similar test:

First, the defendant has the burden to show that he has suffered actual and substantial prejudice from the delay. Then, if he has shown sufficient prejudice, we must weigh the reasons for the delay offered by the State, as well as the length of the delay, to determine whether the defendant's rights have been violated.

State v. Taylor, 289 Mont. 63, 69, 960 P.2d 773, 776 (Mont. 1998).

The application of the balancing test is discussed in the Brief of Respondent at 22-23. As shown there, both the trial court and the Court of Appeals properly determined that the weak prejudice to the defense did not outweigh the State's interest in prosecuting the case.

**D. ADOPTING THE DEFENDANT'S ARGUMENTS WOULD MAKE IT EASIER TO OBTAIN DISMISSAL FOR PRE-CHARGING DELAY THAN FOR POST-CHARGING DELAY.**

In analyzing the individual issues in this case, the court should not lose sight of the big picture. The defendant is seeking three distinct modifications of the test applicable to pre-trial delay.

First, he claims that prejudice can be established by the possibility that a witness might have provided exculpatory evidence. This test could be satisfied in most cases where there have been lengthy delays, and in many where there have been shorter delays. One could always postulate some exculpatory fact to which a witness *might* have testified. In the past, showings of prejudice have been rare. United States v. Lovasco, 431 U.S. 783, 796-97,

97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). Neither this court nor the Court of Appeals has ever found prejudice, except when the delay resulted in loss of juvenile jurisdiction. If the defendant's argument is accepted, showings of prejudice will become common.

Second, the defendant claims that a due process violation can be established by negligence. Negligence is far more common than intentional or reckless misconduct. Like other public agencies, prosecutors and police departments are struggling to provide increased services with decreased resources. Many cases will not be handled as rapidly as they were in the past. There will likely be many cases whose handling can, in hindsight be labeled "negligent."

Third, the defendant claims that once prejudice and negligence are shown, dismissal is automatic. Dismissal will thus result from even short delays that are not explained, if some possibly-exculpatory testimony might have been lost as a result.

The net effect of these changes would be to make dismissals for *pre*-charging delay easier to obtain than dismissals for *post*-charging delay. In determining whether a defendant's right to a speedy trial was violated, the court balances four factors: the length of the delay, the reason for the delay, the defendant's

assertion of his right, and the prejudice suffered by the defendant. State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (1972); Barker, 407 U.S. at 529. The court does not merely consider whether delay was justified or unjustified – it considers what the reason was. Delay resulting from negligence is given less weight than delay resulting from more culpable reasons. Barker, 407 U.S. at 531. Similarly, the court does not merely consider whether prejudice resulted – it considers the degree of prejudice. Id. at 534. Thus, the mere existence of some unjustified delay that results in some prejudice does *not* automatically establish a speedy trial violation. Yet, according to the defendant here, those factors *do* automatically establish a due process violation.

This result is wrong. It cannot be easier to obtain dismissal for pre-charging delay (when no specific constitutional right is implicated) than for post-charging delay (which implicates the specific right to a speedy trial). In the past, dismissals for pre-charging delay have been exceedingly rare. The defendant's analysis would make them commonplace. Established law should not be modified in the ways that he urges.

**E. THE APPLICATION OF CrR 8.3(b) IS ADEQUATELY DISCUSSED IN THE BRIEF OF RESPONDENT.**

The defendant also contends that dismissal was required under CrR 8.3(b). This issue is discussed in the Brief of Respondent at 23-24. As shown there, the trial court's refusal to dismiss was not an abuse of discretion.

**IV. CONCLUSION**

The conviction should be affirmed. Per the unchallenged portion of the Court of Appeals decision, the case should be remanded for vacation of invalid sentencing conditions.

Respectfully submitted on October 21, 2010.

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