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No. 62074-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID A. OPPELT, JR.,

Appellant.

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

The Honorable Ellen J. Fair
The Honorable Bruce I. Weiss

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE UNJUSTIFIED, PREJUDICIAL PRE-ACCUSATORIAL DELAY OF SIX YEARS AND ELEVEN MONTHS BETWEEN THE OFFENSE AND THE AMENDED INFORMATION REQUIRED VACATION OF MR. OPPELT'S CONVICTION.

Following the decisions of *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), the Washington Supreme Court established a three-step test for determining whether pre-accusatorial delay violated a defendant's due process rights: "(1) [t]he defendant must show he was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused." *State v. Alvin,* 109 Wn.2d 602, 604, 746 P.2d 807 (1987). The three steps are considered sequentially and the third step is not reached if either the defendant cannot demonstrate prejudice or the State cannot justify the delay. *State v. Warner*, 125 Wn.2d 876, 883, 889 P.2d 479 (1995); *State v. Frazier*, 82 Wn. App. 576, 592, 918 P.2d 964 (1996).

Here, the trial court found Mr. Oppelt was actually prejudiced by the delay and the delay was caused by the State's unexplained negligence when the case "slipped through the cracks." 6/5/08 RP 34-36; CP 53-55. In fact, at the motion hearing, the State conceded the delay was unjustified: "And obviously, we don't have a reason." 6/5/08 RP 4, 26. This concession was reiterated on appeal: "The pre-trial judge found that the delay was negligent. 1 CP 93, finding no. 18. The State does not challenge this finding." Br. of Resp. at 18.[1] Therefore, Mr. Oppelt carried his burden of proving actual prejudice but the State did not carry its burden of justifying the delay. The trial court accordingly erred in reaching the third step and balancing the interests of the parties.

a. Prejudice. The State argues the court's conclusion of actual prejudice was negated by the court's conclusion that Mr. Oppelt could receive a fair trial. Br. of Resp. at 12. As stated above, however, the court erred in reaching the third step.

The State argues the issue of prejudice is the same as the issue of a fair trial. Br. of Resp. at 12. This argument is flawed. If

[1]Implicit in this concession is the State's acknowledgement that the negligence was due to the mismanagement by the prosecutor's office, rather than by the sheriff's department.

the State's position were correct, there would be no need for the three-step test; the first step would be dispositive.

In the present case, Mr. Oppelt affirmatively established Bertha Olson had a medical condition that affected her memory and that her memory of the incident was impaired. CP 93-94 (Findings of Fact 18, 19, 20, 21, 22, 23); 6/5/08 RP 7-9; 6/11/08 RP 61-64, 80, 101-02. The State does not assign error to the court's finding of actual memory loss and, therefore, it is a verity on appeal. *See State v. Unga*, 165 Wn.2d 95, 103, 196 P.3d 645 (2008) (unchallenged finding are verities on appeal). By contrast, in *State v. Bernson*, the defendant was charged with murder two years and ten months after the victim's body was discovered, during which time the police conducted an on-going investigation. 40 Wn. App. 729, 734-35, 700 P.2d 758 (1985). The defendant alleged the delay was prejudicial because, *inter alia*, the passage of time caused memories to fade thereby precluding an alibi defense. *Id.* at 734. Division Three of this Court disagreed, and stated, "The *possibility* that memories will fade is not in itself sufficient to demonstrate prejudice." *Id.* at 736 (emphasis added). *Accord State v. Ansell*, 36 Wn. App. 492, 499, 675 P.2d 614 (1984) ("The *possibility* that memories will dim is not in itself enough to

demonstrate Ansell could not receive a fair trial." (Emphasis added)). Here, however, given that Ms. Olson suffered actual memory loss and there was no on-going investigation during the delay, the State's reliance on *Bernson* and *Ansell* is inapt.

The State contends the ruling regarding prejudice is not entitled to deference because the ruling followed a pre-trial hearing, rather than the trial itself. Br. of Resp. at 12-13. These hearings and ruling are made pre-trial routinely. *See, e.g.*, *State v. Salavea*, 151 Wn.2d 133, 137, 86 P.3d 125 (2004); *State v. Norby*, 122 Wn.2d 258, 261, 858 P.2d 210 (1993); *State v. Dixon*, 114 Wn.2d 857, 859-60, 792 P.2d 137 (1990).

As a corollary of the above contention, and without citation to authority, the State urges this court to review the entire trial record for prejudice, not just the record before the motion judge. Br. of Resp. at 14-16. This is inappropriate. *De novo* review of a pre-trial ruling is limited to whether the findings of fact support the conclusions of law made by that court. "Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether a trial court's findings are supported by substantial evidence, and if so, whether those findings support the conclusion of law. We leave credibility and conflicting testimony

resolution to the fact finder." *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). *See also Sheppard v. Rhay*, 73 Wn.2d 734, 440 P.2d 422 (1968) ("[W]henever a transfer from juvenile control is faulty, proper relief can usually be afforded by a de novo hearing as to the propriety of the challenged transfer, and we directed that the de novo hearing should be an inquiry into 'whether the facts before the juvenile "session" of the superior court in the first instance warranted and justified the transfer for criminal prosecution.' *In re Dinnenburg v. Maxwell*, 70 Wash.Dec.2d 325, 332, 422 P.2d 783, 789 (1967).").

In *United States v. Sherlock*, 962 F.2d 1349, 1354-55 (9th Cir. 1989), the defendant alleged he was prejudiced by a 36-month charging delay, during which time the police conducted an on-going investigation. The Ninth Circuit wrote, "Here, the record does not indicate how [the witnesses] would have testified had their memories not dimmed. It does not show that the loss of their memories had meaningfully impaired defendants' abilities to defend themselves." *Id.* at 1354. Thus, contrary to the State's contention that *Sherlock* created a mandatory evidentiary requirement of proof of how the witness would have testified, the Court was simply referring to the record before it and was not creating a mandatory

evidentiary rule. *See* Br. of Resp. at 14. It may be noted, as a practical matter, the State's contention would create an insurmountable hurdle insofar as it would be virtually impossible for any party to prove what a witness might have remembered had a case proceeded to trial at an unspecified earlier date.

b. Negligence. The State asserts governmental negligence can never violate due process, regardless of the prejudicial impact to a defendant. Br. of Resp. at 21. To support this exculpatory assertion, the State relies on *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), in which a 16-year old passenger on a motorcycle was killed by a pursuing police car following a high-speed chase. 523 U.S. at 836-37. The passenger's parents brought a civil action against the county, the county sheriff's department, and the individual officer, pursuant to 42 U.S.C. § 1983. *Id.* at 837. The United States Supreme Court granted certiorari "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839. Accordingly, *Lewis* did not address, much less "resolve" the issue of whether actual prejudice, coupled with unjustified governmental pre-accusatorial delay, can

violate a criminal defendant's constitutional right to due process. The State's assertion to the contrary is mistaken.

The above assertion is also contrary to case law from the United States Supreme Court, the Washington Supreme Court, and this Court. *See, e.g., Lovasco*, 431 U.S. at 795 n.17 ("'A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.'"); *Salavea*, 151 Wn.2d at 139 ("[I]f the delay only is negligent, due process may or may not be violated."); *Warner*, 125 Wn.2d at 890 ("This court has recognized only two circumstances where delay can justify vacating a conviction: (1) an intentional delay by the State to circumvent the juvenile justice system will violate due process, and (2) a negligent delay *may* violate due process."); *Alvin*, 109 Wn.2d at 604 ("A deliberate delay to circumvent the juvenile justice system violates due process; a negligent delay may also."); *State v. Calderon*, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984) ("It has been suggested that negligently failing to bring charges promptly may also establish a constitutional violation."); *State v. Gidley*, 79 Wn. App. 205, 209, 901 P.2d 361

(1995) ("It has been suggested that failing to bring charges promptly may also establish a constitutional violation."); *State v. Schifferl*, 51 Wn. App. 268, 271, 753 P.2d 549 (1988) ("While negligently failing to bring charges may establish a constitutional violation, no case in Washington has addressed the circumstances in which negligence will constitute such a violation." (citations omitted)).

The State misstates Division Two's analysis in *Frazier*, *supra*, as "acknowledg[ing] the weight of authority" holds that only intentional delay violates due process. Br. of Resp. at 20. This is incorrect. Division Two actually found, "None of the cases cited by the States involved an unexplained delay causing the loss of juvenile jurisdiction, which is presumed prejudicial in Washington." 82 Wn. App. at 590 n.14.

The State also misstates Division Two's ruling in *In re Taylor*, 132 Wn. App. 827, 834, 134 P.3d 254 (2006), as holding "due process was not violated by delay in initiation of sexually violent predator proceedings." Br. of Resp. at 19. This too is incorrect. In *Taylor*, there was no "delay" in initiation of the commitment proceedings. Rather, commitment proceedings were initiated as provided by statute and the issue on appeal concerned

whether the statutory procedures violated due process. Therefore, *Taylor* is not pertinent to the issue at hand.

c. Balancing. The State contends unjustified delay is subject to balancing but a justified delay is not. Br. of Resp. at 23. This is completely backwards. "The third step, balancing the State's interest against the prejudice to the accused, is undertaken only when a justification is presented." *Frazier*, 82 Wn. App. at 592. "If the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused." *Calderon*, 102 Wn.2d at 353. *Accord Norby*, 122 Wn.2d at 214; *Dixon*, 114 Wn.2d at 860; *State v. Lidge*, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989); *Alvin*, 109 Wn.2d at 604; *McConville*, 122 Wn. App. at 645-46, 94 P.3d 410 (2004).

Frazier, supra, was correctly decided. In *Frazier*, the defendant was charged as an adult with residential burglary 17 months after he confessed, during which time he turned 18 years old. 82 Wn. App. at 579. Division Two of this Court affirmed the dismissal of the prosecution based on the actual prejudice due to loss of juvenile jurisdiction and the State's failure to provide a credible explanation for the delay. *Id.* at 587-89. The Court stated, "The trial court correctly determined that Frazier was prejudiced,

that the State provided no reason for the delay, and that this negligent delay was unjustified; therefore, it did not need to reach the third step and balance the interests of the State and Frazier." *Id.* at 592.

Assuming, *arguendo*, the court properly reached the third step, the prejudice to Mr. Oppelt outweighs any interest the State may have in prosecuting a stale claim. "The State has no interest in processing the accused in an unjustifiably negligent manner." *Frazier*, 82 Wn. App. at 592. In the absence of an on-going investigation, the 78-month delay between disclosure and charging the first information in the present case was significantly longer than delays considered in other cases. *See, e.g., Norby*, 122 Wn.2d at 260-61 (consolidated cases of 6 – 33 month delays between offenses and charging due to lack of prosecuting attorneys); *Dixon*, 114 Wn.2d at 859 (18-month delay between offense and charging to accommodate sequential prosecution of co-defendant); *State v. Potter*, 68 Wn. App. 134, 135-38, 842 P.2d 481 (1992) (1-month delay between confession and charging for death that occurred twelve and one-half years previously and was ruled accidental); *Ansell*, 36 Wn. App. at 494-95 (12-months delay between accusation and charging); *State v. Haga*, 13 Wn. App.

630, 631,536 P.2d 648 (1975) (61-month delay between offense and charging due to differing opinions in the prosecutor's office regarding the sufficiency of evidence to proceed).

d. Vacation of conviction. The paramount consideration is whether the pre-accusatorial delay "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Lovasco*, 431 U.S. at 790 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 70 L.Ed.791 (1935)). The extremely long, unjustified, prejudicial delay in the present case offends those concepts. Mr. Oppelt's conviction must be vacated.

2. THE PRE-ACCUSATORIAL DELAY OF SIX YEARS AND ELEVEN MONTHS REQUIRED DISMISSAL PURSUANT TO CrR 8.3(b).

The trial court twice abused its discretion in denying Mr. Oppelt's motion to dismiss pursuant to CrR 8.3(b), which authorizes dismissal of a criminal prosecution where the defendant shows by a preponderance of evidence arbitrary action or governmental misconduct and prejudice affecting the defendant's right to a fair trial. CrR 8.3(b); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *State v. Mitchelli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1993). First, governmental misconduct may be "simple

prosecutorial mismanagement." *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). In light of the State's concession of mismanagement and the court's finding of actual prejudice, the court's failure to dismiss was untenable. Second, CrR 8.3(b) refers only to prejudice to a defendant. Therefore, the court's consideration of prejudice to the State was the incorrect legal standard and, as such, was a further abuse of discretion.

Mr. Oppelt's conviction must be vacated.

3. THE COURT HAD NO AUTHORITY TO IMPOSE DRUG-RELATED AND PORNOGRAPHY-RELATED CONDITIONS OF COMMUNITY CUSTODY.

a. Condition 7: Do not possess or access pornographic material, as directed by the supervising Community Corrections Officer. The State concedes this community custody condition is unconstitutional. Br. of Resp. at 26. This concession is well-taken. The Washington Supreme Court has ruled this condition is unconstitutionally vague because the condition implicates the First Amendment, the term "pornography" is not defined, and the community corrections officer has complete discretion to determine what material falls within the condition. *See State v. Bahl*, 164 Wn.2d 739, 752-58, 193 P.3d 678 (2008).

Nonetheless, the State contends Mr. Oppelt waived his right to appeal this issue when defense counsel failed to object at sentencing and stated she did not object to conditions prohibiting illegal drug activity. Br. of Resp. at 25-26. This is incorrect. The pornography-related condition was not addressed at sentencing and "vagueness challenges may be raised for the first time on appeal." *Bahl*, 164 Wn.2d at 745. Therefore, this issue is properly before this Court.

b. Condition 14: Do not associate with known users or sellers of illegal drugs; Condition 15: Do not possession drug paraphernalia; Condition 16: Stay out of drug areas, as defined in writing by the supervising Community Corrections Officer. The State further concedes the drug-related conditions were not crime-related. Br. of Resp. at 26. This concession is also well-taken. The facts upon which the court could rely did not establish a link between drugs and the offense and the trial court did not determine that illegal drugs were related to the offense.

Again, however, the State contends Mr. Oppelt waived his right to object when defense counsel stated, "As far as the other drug related conditions, those are all things that are illegal anyway." Br. of Resp. at 25 (quoting transcript of sentencing hearing, 7/16

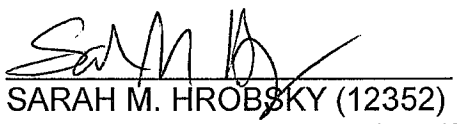
RP 29). This, too, is incorrect. First, a court has sentencing authority only as provided by the Legislature. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). And the Legislature has limited sentencing courts to only those facts that are admitted by a plea agreement or admitted, acknowledged, or proven at sentencing. Former RCW 9.94A.370(2) (current RCW 9.94A.530(2)). Second, defense counsel demurred only to those drug-related conditions that are "illegal." Here, none of the contested conditions are otherwise illegal activities. Therefore, this issue is also properly before this Court.

B. CONCLUSION

The prejudicial and unjustified pre-accusatorial delay violated Mr. Oppelt's right to due process and materially affected his right to a fair trial. The court acted without authority in imposing conditions of community custody that were either unconstitutionally vague or not justified by the facts upon which the court could rely. For the foregoing reasons and the reasons set forth in the Brief of Appellant, Mr. Oppelt respectfully requests this Court vacate his conviction or, alternatively, remand to strike the unconstitutional and unauthorized community custody conditions.

DATED this 22nd day of September 2009.

Respectfully submitted,



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

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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