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No. 93812-1

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 74300-7-1)

CITY OF KIRKLAND,

Respondent,

v.

HOPE STEVENS,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT HOPE STEVENS

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I. INTRODUCTION AND FACTUAL BACKGROUND

On June 23, 2014, prosecutors for the City of Kirkland charged Hope Stevens with assaulting her half-sister Teresa Obert and her 17-year-old nephew C.O. From the outset, Stevens notified the prosecutors and the trial judge of her strong desire for a speedy trial. She also explained that C.O., who was 6'9" and 280 pounds, had attacked her with a broomstick handle during the incident, and that she did not assault anyone.

Stevens' efforts to prepare for trial were thwarted at every turn. Initially, the City's key witnesses, Obert and C.O., refused to be interviewed by defense counsel. When these witnesses finally appeared for court-ordered depositions, they refused to answer critical questions regarding the incident and C.O.'s mental health conditions. The trial judge ordered both witnesses to appear at the courthouse to answer these questions before trial, but they refused. Then, after the trial judge ordered these witnesses to appear once again, the prosecutors claimed that they had both "left the State" in an effort to evade the judge's orders. Moreover, and contemporaneous with all of these problems, the prosecutors engaged in a series of discovery violations – culminating with the 11th-hour disclosure of four new trial witnesses (each of whom refused to be interviewed).

Relying upon both CrRLJ 8.3(b) and CrRLJ 4.7(g)(7), Stevens filed a Motion to Dismiss or For Alternative Relief. During a series of hearings,

the trial judge deferred any ruling to ensure that the City had an ample opportunity to rectify the situation before trial. Yet, after exhausting all other options and hearing no other suggestions from the prosecutors, the judge concluded that dismissal was the only appropriate remedy.

The City appealed the dismissal to the King County Superior Court pursuant to the Rules of Appeal of Decisions of Courts of Limited Jurisdiction (“RALJ”). In reversing the dismissal, the RALJ judge repeatedly complained that there had been no written findings. *See* RP IV, 7-8. Then, when discussing the merits, the RALJ judge emphasized that there was no finding that prosecutors had engaged in “gross mismanagement” of the case. *See* RP IV, 5-6, 12.¹ The RALJ judge also seemed to conclude that the willful misconduct of the City’s key witnesses was immaterial and would not support dismissal under CrRLJ 4.7(g)(7)(ii). *See* RP IV, 8-10. Thus, without further explanation, the judge signed an Order which stated: “Court finds there was an abuse of discretion.” Order.²

On February 8, 2018, this Court accepted discretionary review of the RALJ court’s decision. This supplemental memorandum is filed pursuant to RAP 13.7(d). As explained further below, the trial judge’s

¹ Yet the RALJ judge acknowledged that the trial judge could have stricken the City’s witnesses – or at least some of the witnesses – because they refused to be interviewed prior to trial. *See* RP IV, 12-13.

² In issuing this Order, the RALJ judge ignored its duty to state the reasons for its decision in writing, thereby violating RALJ 9.1(g).

decision should be affirmed as there was no legal basis for the RALJ judge to find that the trial judge had abused his discretion when he entered an order of dismissal under CrRLJ 8.3(b) and CrRLJ 4.7(g)(7)(ii).

II. ISSUES PRESENTED

1. Whether the trial judge was within his discretion under CrRLJ 8.3(b) to dismiss the charges when the un rebutted evidence showed that the prosecution had disclosed four unique and important witnesses on the eve of trial, and thereby forced the defendant to choose between her right to receive discovery in time to adequately prepare for trial and her right to a speedy trial?
2. Whether the trial judge was within his discretion under CrRLJ 4.7(g)(7)(ii) to dismiss this case after finding that the City's key witnesses had willfully violated the judge's orders for discovery and thereby prejudiced the defendant's right to a fair trial, and where the prosecutors had suggested no alternative remedy and it was undisputed that suppression of these witness's testimony would be tantamount to a dismissal?

III. DISCUSSION

A. Courts of Limited Jurisdiction

The Criminal Rules for Courts of Limited Jurisdiction ("CrRLJs") were adopted in 1987. The drafters of these rules, a task force that was created by the WSBA, determined that that the Superior Court Criminal Rules could not be imported wholesale into the system for courts of limited jurisdiction, in large part because "these courts have a tremendous volume of cases which preclude some of the more individualized procedures in

superior courts.” Tegland, 4B Rules Prac., CrRLJ 1.1, at 484 (7th Ed. 2008). These rules are intended to achieve “simplicity in procedure, fairness in administration, effective justice, and to eliminate unjustified expense and delay.” CrRLJ 1.2.

Court rules are interpreted using basic principles of statutory construction. *See, e.g., Jafar v. Webb*, 177 Wn.2d 520, 527 (2013). “If the rule’s meaning is plain on its face, [the court] must give effect to that meaning as an expression of the drafter’s intent.” *Id.* at 526. “Every provision must be viewed in relation to the other provisions and harmonized if at all possible.” *Omega Nat’l Co. v. Marquardt*, 115 Wn.2d 416, 425 (1990). A court rule “must be construed so that no word, clause or sentences is superfluous, void or insignificant.” *State v. Thomas*, 121 Wn.2d 504, 512 (1993) (citation omitted).

B. The Criminal Discovery Rules are Intended to Ensure a Fair Trial to the Accused.

The Sixth Amendment guarantees every criminal defendant the right to effective assistance of counsel. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 684–86 (1984). “To discharge this duty, trial counsel must investigate the case, and investigation includes witness interviews.” *State v. Jones*, 183 Wn.2d 327, 339 (2015). *Accord State v. Burri*, 87 Wn.2d 175, 181 (1976).

The policy underlying the rights to criminal discovery is the same as that which supports the right to civil discovery. This Court has explained:

[W]e . . . observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations for statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a 2-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.

State v. Pawlyk, 115 Wn.2d 457, 471 (1990) (quoting *State v. Boehme*, 71 Wn.2d 621, 632-33 (1967), *cert. denied*, 390 U.S. 1013 (1968)). Likewise, the criminal discovery rules are intended to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government and its agents. See, e.g., *State v. Cannon*, 130 Wn.2d 313, 328 (1996).

For this reason, trial courts are granted broad discretion to determine the scope of discoverable information and the appropriate sanctions for a violation of the discovery rules. See, e.g., *State v. Dunivin*, 65 Wn.App. 728, 731 (1992). Accord *State of Washington Physicians Ins. v. Fisons*, 122 Wn.2d 299, 339 (1993) (the rules are “designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to ‘reduce the reluctance of courts to impose sanctions’”).

Thus, the trial court must weigh many factors in determining an appropriate sanction. It is proper to leave these

determinations to the trial court. Indeed, fashioning a sanction is within the sound discretion of the trial court because it has “tasted the flavor” of the litigation and is in the best position to make this kind of determination.

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 509 (1997) (quoting *Watson v. Maier*, 64 Wn.App. 889, 896 (1992)).

Thus, absent a manifest abuse of discretion, a reviewing court should not disturb the trial court’s ruling on appeal. *See, e.g., State v. Salgado-Mendoza*, 189 Wn.2d 420, 428 (2017) (“If a party fails to comply with the rules of discovery, trial courts have broad authority to compel disclosure, impose sanctions, or both.”). *See also State v. Woods*, 143 Wn.2d 561, 582 (2001); *State v. Hutchinson*, 135 Wn.2d 863, 882-83 (1998); *City of Kent v. Sandhu*, 159 Wn.App. 836 (2011).

C. **The Trial Judge Did Not Abuse His Discretion When Applying the Remedial Provision Set Forth in CrRLJ 8.3(b).**

CrRLJ 8.3(b), which is identical to the correlative Superior Court Rule (CrR 8.3(b)), provides as follows:

The court, in the furtherance of justice after notice and hearing, may 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. The court shall set forth its reasons in a written order.

Id.

“Fairness to the defendant underlies the purpose of CrR 8.3(b).” *State v. Koerber*, 85 Wn.App. 1, 5 (1996). *Accord State v. Boldt*, 40 Wn.App. 798, 801 (1985). For a court to dismiss charges under this rule, two things must be shown. First, there must be arbitrary action or misconduct by the government. Governmental misconduct, however, need not be of an evil or dishonest nature, simple mismanagement is enough. *See, e.g., State v. Michielli*, 132 Wn.2d 229, 243 (1997). Violations of the discovery rules can support a finding of governmental misconduct. *See, e.g., State v. Brooks*, 149 Wn.App. 373, 375–76 (2009). Second, there must be prejudice to the defendant’s right to a fair trial. *See, e.g., Michielli*, 132 Wn.2d at 239-40 (dismissal upheld where the state filed additional charges three days before trial, forcing the defendant to choose between waiving right to speedy trial or going to trial with unprepared counsel).

Stevens has previously submitted a comprehensive discussion of this Court’s recent decision in *State v. Salgado-Mendoza*, 189 Wn.2d 420 (2017). *See* Appellant’s Supplemental Brief in light of this Court’s Decision in *State of Washington v. Ascension Salgado-Mendoza*, Case No. 93293-0. She will not repeat that discussion here. Suffice it to say, this Court should reaffirm *Salgado-Mendoza*’s directive that trial courts have wide latitude in the application of CrRLJ 8.3(b).

On December 30, 2014 – more than six months after the charges were filed and approximately two weeks before the trial readiness hearing – the prosecution identified four new witnesses for trial. The newly-disclosed witnesses included two medical witnesses and two lay witnesses who were alleged to be present at the Obert home around the time of the incident. The prosecution provided no additional discovery and only cursory information relating to these new witnesses. The prosecution never provided any of the requisite information relating to the two expert witnesses. *See* CrRLJ 4.7(a)(1)(a) and (vii). Moreover, the prosecution provided no statement or summary of the anticipated testimony of the two lay witnesses. *See* CrRLJ 4.7(a)(1)(ii). All four of the witnesses refused to be interviewed and, due to the 11th-hour disclosure, the defense had insufficient time to arrange for depositions pursuant to CrRLJ 4.6.

Here, even more clearly than the delayed disclosure of the testifying toxicologist in *Salgado-Mendoza*, there can be no question but that the last-minute disclosure constituted a violation of CrRLJ 8.3(b). It is important to emphasize that the prosecutors have never offered any reason, except for a lack of diligence, to explain these last-minute disclosures.

The City has recently argued that this case is unlike *Salgado-Mendoza*, for two reasons. *See* City's Answer to Appellant's Supplemental Brief in light of this Court's Decision in *State of Washington v. Ascension*

Salgado-Mendoza, Case No. 93293-0 at 13-15 (“City’s Answer”) at 14-15. First, the City claims that these witnesses were not disclosed too late in the process. Second, the City contends that the witnesses were not critical to the prosecution of the case. These arguments are unavailing.

As to the City’s first argument, the record is clear that the defense first learned that the City was adding four new trial witnesses on December 30, 2014 – and only after the parties appeared for the initial hearing on Stevens’ Motion to Dismiss or for Alternative Relief. *See* Defendant’s Renewed Motion to Dismiss (12/31/15) at 3. For this reason, the defense filed a renewed motion on December 31, 2014.

In Courts of Limited Jurisdiction, the prosecution is required to disclose all witness information within 21 days of arraignment unless the court orders otherwise. *See* CrRLJ 4.7(a)(2). Based upon the standard rules of practice in the Kirkland Municipal Court, each side must identify and list all trial witnesses in a Pretrial Order. Such an order was initially entered on August 11, 2014 and subsequently modified on November 14, 2014. *See Appendix A*. These orders specifically provide: “**All witnesses must be identified in this Order.**” *Id.* The prosecution has never explained why the four witnesses were not listed in the Pretrial Order of November 11, 2014 (which was entered more than 4 ½ months after charges were filed).

Nevertheless, the City would now hope to claim that this belated disclosure was not too late, as it was made “twenty-two days prior to the Readiness hearing.” *See* City’s Answer at 14. This is simply untrue. As the trial judge emphasized, the disclosure was made only two weeks before the readiness hearing. *See* RP III, 12.³ The judge highlighted the lateness of these disclosures, and the importance of the upcoming readiness hearing, during the hearing on January 6, 2015. *See* RP II, 25.

More to the point, the City made these disclosures at a time and in a manner that the defense was afforded no opportunity to prepare for each witness’ testimony at trial. Before entering the order of dismissal, the trial judge emphasized that all four of the late-disclosed witnesses had flatly refused to be interviewed by defense counsel prior to trial. *See* RP III, 12-14. The City has never challenged any of these findings.

Second, the City would also seem to argue that these four new witnesses were insignificant as they were only offered “for the purpose of clarifying the facts” at trial. *See* City’s Answer at 15. This is pure sophistry.

Two of the new witnesses were medical experts and, apparently, they were expected to testify regarding the nature and mechanism of certain

³ The readiness hearing was initially scheduled for January 14, 2015. *See App. A*. However, after a series of hearings regarding the ongoing discovery violations, the readiness hearing was ultimately held on January 13, 2015 and the trial judge quite correctly explained that the new witnesses were first disclosed “less than two weeks before trial readiness.” RP III, 12.

(undisclosed) injuries that were suffered by the complaining witnesses. Medical corroboration – or the lack of such corroboration – is often critical in a case of this sort. *See, e.g., State v. West*, 139 Wn.2d 37, 46-47 (1999); *State v. Mondragon*, --- Wn.App. ---, 2018 WL 827166 (Feb. 12, 2018) (medical evidence established nexus between assault and injury).

The City now argues that the medical witnesses were not designated as experts (*see* City’s Answer at 15), but such a “designation” is irrelevant. In Washington, a licensed medical doctor is qualified to present expert testimony regarding any sort of medical question. *See, e.g., White v. Kent Med. Ctr. Inc.*, 61 Wn.App. 163, 173 (1991) (so long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, she will be considered qualified to express an opinion on any sort of medical question). *See generally* Tegland, 5B Wash. Prac. Evidence § 702.9 at 52 (6th Ed. 2016).

The two lay witnesses were alleged to have been present at the Obert home either before or during the alleged incident. Yet the City has argued, without explanation, that these were “not eyewitnesses” to the alleged assault. *See* City’s Answer at 15. The City has never provided details regarding the anticipated testimony of the lay witnesses and the defense was never afforded an opportunity to interview them, so it is unclear what they would have said at trial. However, each person was a unique fact witness

– and they certainly would not present the type of “similar substantive testimony” at issue in *Salgado-Mendoza*. See 189 Wn.2d at 437-38 (contrasting toxicologist with a “key witness presenting unique testimony”).

In Washington, every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that each accused person receives a fair trial. See *State v. Coles*, 28 Wn.App. 563, 573 (1981). Here, the prosecutors identified four unique fact witnesses at a time and in a manner that forced Stevens to make the “Hobson’s choice” that was identified by this Court in *Michielli*.

D. The Trial Judge Did Not Abuse His Discretion When Applying the Remedial Provisions Set Forth in CrRLJ 4.7(g)(7).

1. Legal Background

In Courts of Limited Jurisdiction, the remedies for certain discovery violations are set forth in CrRLJ 4.7(g)(7). This rule provides:

(7) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(ii) The court may at any time dismiss the action if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the

result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure.

(iii) A lawyer's willful violation of an applicable discovery rule or an order issued pursuant thereto may subject the lawyer to appropriate sanctions by the court.

Id.

CrRLJ 4.7(g)(7) is clear on their face and the three provisions should be read together to create a unified scheme of sanctions for different types of discovery violations. Sub-section (i) covers instances where a party fails to comply with a discovery rule or order. Sub-section (ii) covers instances where there has been a willful discovery violation – without reference to the bad actor – that causes prejudice to the defendant. Sub-section (iii) covers instances where a lawyer engages in a willful discovery violation.

The defense recognizes that CrRLJ 4.7(g)(7) is different, and somewhat broader, than its cognate in the Superior Court rules (CrR 4.7(h)(7)). This makes good sense in light of the need for local courts to manage their dockets and to insure the orderly and expeditious disposition of cases. *See, e.g.,* CrRLJ 1.2.

The decision in *Sandhu* is instructive. There, a municipal court judge dismissed a criminal action because the City's prosecutor had failed to produce a material witness on the morning of trial. *See* 159 Wn.App. at 837-39. The prosecutor asked the trial court to delay that ruling, but the

judge emphasized that he had many other cases that were ready for trial. *See id.* Division One affirmed the dismissal and concluded that the judge did not abuse its discretion – particularly so since the subpoenaed witness had a history of disregarding her obligations to appear in court. *See id.* at 840. Moreover, the court emphasized that dismissal was the proper remedy where proving the case through other witnesses was not an option. *See id.*

2. Dismissal is Authorized Where the Prosecution Violates the Discovery Rules.

Washington’s criminal discovery rules require prosecutors to disclose certain information and evidence to the defendant, including the names and addresses of the witnesses and reports or statements of experts made in connection with the case. *See generally* CrRLJ 4.7. The purpose of these rules is “to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government.” *Cannon*, 130 Wn.2d at 328. The discovery rules also ensure that both sides are afforded due process during the course of the proceedings. For example, CrRLJ 4.6(a) allows the trial court to order a deposition when a witness refuses to cooperate with either party during the discovery process. *See id.*

Under CrRLJ 4.7(g)(7)(i), the Court is permitted to impose an appropriate sanction – or to enter “any other order as it deems just” – where the prosecution fails to comply with the discovery rules. However, before

entering an order of dismissal due as a result of such discovery violations, the trial judge would need to consider the body of caselaw that has developed regarding CrRLJ 8.3(b). This Court endorsed such an approach in *Salgado-Mendoza*. See 189 Wn.2d at 428-29 (discussing CrRLJ 4.7).

3. CrRLJ 4.7(g)(7)(ii) is not Limited to Discovery Abuses by a Party; Dismissal is Authorized where a Non-Party's Willful Violation of the Discovery Rules Prejudices the Defendant.

CrRLJ 4.7(g)(7)(ii) is clear and unambiguous. By its plain terms, a court of limited jurisdiction may dismiss an action in any case where there is a willful violation of the discovery rules which causes prejudice to the defendant. Sub-section (ii) of the rule is permissive, and the Court is certainly not required to dismiss for every such violation of the rule. But the sub-section goes beyond CrRLJ 4.7(g)(7)(i) and CrRLJ 8.3(b) – which relate to instances of prosecutorial mismanagement – and it contemplates an unusual situation, as in this case, where the government's key witnesses have willfully refused to comply with the trial court's discovery orders and caused prejudice to the rights of the defendant.

Unlike sub-section (i), sub-section (ii) does not use the term “party” or any analogous term within the body of the rule. Under the doctrine of *in pari materia*, this Court must harmonize these rules and adopt an interpretation that gives full force and effect to each and every aspect of the

rules. *See, e.g., Bainbridge Island v. City of Puyallup*, 172 Wn.2d 398, 423 (2011). The only reasonable conclusion is that sub-section (i) is limited to actions of a party, while sub-section (ii) has no comparable limitation.

During RALJ proceedings, the City sought to engraft a requirement that sub-section (ii) applies only to violations by the prosecuting authorities. Such a reading of the rule is misguided for several reasons.

First, “[i]t is well settled that courts will neither read into a statute matters which are not there nor modify a statute by construction.” *King County v. Seattle*, 70 Wn.2d 988, 991 (1967). *Accord Kilian v. Atkinson*, 147 Wn.2d 16, 21 (2002). Nor may the Court read into a rule those things which it conceives may have been left out unintentionally. *See, e.g., Rhoad v. McLean Trucking*, 102 Wn.2d 422, 486 (1984); *State v. Enloe* 47 Wn.App. 165, 170 (1987).⁴

Second, at the least, the City’s reading of the rule would render sub-section (ii) superfluous. Under CrRLJ 8.3(b), a trial court is authorized to dismiss any case in which the prosecution has engaged in mismanagement of the case and such mismanagement would include the violation of

⁴ Moreover, under the doctrine of *expressio unius alterius est*, where a provision specifically designates the things or classes of things upon which it operates, an inference arises in law that the drafters intended all omissions. *See, e.g., Wash. Natural Gas Co. v. Publ. Util. Dist. No. 1*, 77 Wn.2d 94, 98 (1969). Here, it is reasonable to conclude that the drafters intended to exclude the term “party” when they drafted CrRLJ 4.7(g)(7)(ii).

discovery rules. *See, e.g., Salgado-Mendoza*, 189 Wn.2d at 431 (concluding that prosecution violated CrRLJ 8.3(b) by its late disclosure of toxicologist). CrRLJ 4.7(g)(7)(ii) would make no sense at all, and be wholly redundant, if it interpreted to authorize dismissal based only upon discovery violations of the prosecution.

Perhaps more significantly, the City’s reading of the rule cannot be squared with this Court’s prior case authorities. CrRLJ 4.7(g)(7)(ii) applies only in an extreme case – such as this one – where the trial court makes a finding of “willful” misconduct or “gross negligence” during the discovery process. This is substantially more than is required for the court to find a violation of CrRLJ 8.3(b). Rather, as this Court has recently reiterated: “[A defendant] can prove misconduct because a discovery violation need not be willful — simple mismanagement will suffice.” *Salgado-Mendoza*, 189 Wn.2d at 428. Were this Court to accept the City’s construction of the rule, sub-section (ii) would be wholly inconsistent with CrRLJ 8.3(b). Thereafter, in every future case involving government mismanagement within a court of limited jurisdiction, the prosecution could point to sub-section (ii) and argue that dismissal is unwarranted absent a finding of “willful” misconduct or “gross negligence.”

Finally, even if we assume that sub-section (ii) is somehow ambiguous, the Court should apply the rule of lenity. *See, e.g., State v.*

Hamilton, 121 Wn.App. 633, 639 (2004) (noting that court must adopt a construction most favorable to the accused).

4. The Trial Judge Did not Abuse His Discretion in Dismissing this Proceeding.

Here, in the weeks before trial, the trial judge was faced with an astonishing array of discovery violations. The trial judge specifically (and quite correctly) concluded that the City's key witnesses had intentionally refused to appear for court-ordered depositions. As the trial judge noted: "The pattern of the City's witnesses' failure to cooperate with defense counsel [was] well documented." RP II, 10. The City has never challenged these findings and they are amply supported by the record.

There can be no serious claim that the trial judge acted precipitously when issuing his final ruling, since he afforded the City and these witnesses numerous opportunities to comply with the discovery orders. After the witnesses willfully refused to appear for their second deposition on January 2, 2015, the judge gave the City one additional chance. Then, the prosecutors assured the judge that these witnesses would be available for depositions on an agreed date (January 8, 2015). Yet, once again, these witnesses thumbed their nose at the trial judge and disregarded his order on discovery.

For this reason alone, the trial court was authorized to dismiss this case under sub-section (ii). Throughout the proceedings, the City never suggested any alternative remedy to the court – short of dismissal – for this situation. In fact, it was well understood by the trial judge and the parties, that suppression of these two witnesses’ testimony would be tantamount to a dismissal of the action. As the trial judge explained: “Both parties have argued and I believe testified or written in their briefs that the police have acknowledged there are no other witnesses to this case.” RP II, 26.

Although the prosecutors suggested no alternative remedies, it is clear that the trial judge considered all available options. The City never requested a material witness warrant pursuant to CrRLJ 4.10. Nevertheless, on January 6, 2015, the Court advised the parties: “The court is certainly not going to send officers out to arrest witnesses.” RP II, 26. Instead, faced with no other alternatives, the trial judge decided that dismissal was the only fair and appropriate remedy.

But the court’s decision cannot be evaluated in a vacuum. The trial judge also found that the City’s prosecutors had mismanaged their discovery obligations in this case. The prosecutors could offer no explanation or justification for their actions, and their dilatory conduct created a situation in which the defense was deprived of any reasonable opportunity to prepare for their testimony at trial.

The City would like to contend that the trial court abused his discretion by failing to consider a less-drastic alternative remedy. Yet, the City fails to articulate what that alternative remedy might have entailed. In considering this argument, it is important to note that the City did not suggest any alternative remedy when arguing these matters in the trial court. In fact, the judge did consider lesser sanctions when he imposed remedial sanctions during the hearings of December 30, 2014 and January 6, 2015. During the final hearing, on January 13, 2015, the judge was left with no reasonable alternatives short of dismissal.⁵

IV. CONCLUSION

For all of these reasons, and in the interests of justice, this Court should affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 9th day of March, 2018

/s/ Todd Maybrow

Todd Maybrow, WSBA # 18557

James E. Lobsenz, WSBA # 8787

⁵ There is some question whether the procedural rules allow for exclusion of testimony as a remedy. Neither CrRLJ 4.7(g)(7)(i) nor CrRLJ 4.7(g)(7)(ii) mentions such a sanction. While this Court might conclude that such a remedy could be available under the catch-all provision in CrRLJ 4.7(g)(7)(i), it need not reach that issue in this appeal for such a ruling would have necessarily resulted in dismissal of this prosecution. Moreover, that option appeared to be futile under these circumstances as the prosecutors advised the judge that the two witnesses had left the State of Washington sometime after the hearing on January 6, 2015.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Allen, Hansen, Maybrown & Offenbecher, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Email (through the Court website) to the following:

Attorneys for Respondent

Melissa J. Osman
MOBERLY & ROBERTS, PLLC
12040 98th Ave NE Ste 101
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Co-counsel for Petitioner Stevens:

James Lobsenz
CARNEY BADLEY SPELLMAN
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Todd@ahmlawyers.com

DATED this 9th day of March, 2018.


Sarah Conger, Legal Assistant

APPENDIX A

Kirkland Municipal Court
King County, State of Washington

PRE-TRIAL ORDER

Defendant Stevens, Hugo A. Case No. 38384

It is hereby ordered that:

I. SETTING

The matter will be set for: Bench Trial Jury Trial. Speedy trial date: 5/2/2015

II. DISCOVERY

Discovery has been completed; OR
 Discovery is incomplete and is hereby ordered to be completed as follows:
Provided by: _____ within _____ days
Provided by: _____ within _____ days

III. MOTIONS

Pre-trial motions have been waived or are presented below:

A. CUSTODIAL STATEMENTS

- No custodial statements by defendant will be offered in the City's case in chief, or in rebuttal; OR
- The statements referred to in the City's discovery will be offered and:
 - May be admitted into evidence without hearing by stipulation of the parties: OR
 - Admissibility of these statements is not stipulated, and a CrRLJ 3.5 hearing is requested.

B. OTHER MOTIONS _____

IV. WITNESSES All witnesses must be identified in this Order. (The Court will not subpoena witnesses)

Witnesses on behalf of the City (with address & phone - unless confidential):
Sal Edgemen off Voss off Pierce, Sal Porter off Vales MOTION TRIAL
off Carlson off Deer off Garrison off Olmsted Teresa Obert MOTION TRIAL
Witnesses on behalf of the Defendant (with address & phone - unless confidential):
potential medical witnesses, Dr. Stanley Henry MOTION TRIAL

V. BRIEFING SCHEDULE

Moving party's brief due two (2) weeks prior to hearing. Responding party's brief due one (1) week prior to hearing.
Rebuttal brief due two (2) court days prior to hearing. No brief to be required from: Plaintiff Defendant.

VI. OTHER ORDERS _____

VII. COURT DATE

MOTION HEARING is set for Jan 6, 2015, at 1:00 P.M.
 BENCH TRIAL DATE READINESS is set for Jan. 14 2015, at 8:30 A.M.

ALL PARTIES AND ATTORNEYS ARE TO BE PRESENT FOR THE READINESS CALENDAR AND ASSIGNMENT OF A SPECIFIC DATE FOR TRIAL THE FOLLOWING WEEK.

All previously ordered conditions of release shall remain in effect. Non-Pattern Jury Instructions to be filed by Readiness.

VIII. SPEEDY TRIAL WAIVER

I give up my right to a trial within 60/90 days. My new commencement date is 1/4/2014
My new expiration date is 2/2/2015

Order dated this 4 day of April, 2014.
The undersigned parties have agreed that the correct expiration date for purpose of CrRLJ 3.3 is accurately set forth above.
The Court-ordered pre-trial conference on the above matter having been held.

Judge/Judge Pro-Tem _____

Defendant _____

Prosecutor _____

Address _____

Defense Attorney _____

City _____

State _____

Zip _____

Phone _____

DEFENDANT

Kirkland Municipal Court
King County, State of Washington

PRE-TRIAL ORDER

Defendant Stevens, Hope A. Case No. 38384
it is hereby ordered that:

I. SETTING

The matter will be set for: Bench Trial Jury Trial. Speedy trial date: _____

II. DISCOVER

Discovery has been completed; OR
 Discovery is incomplete and is hereby ordered to be completed as follows:
Follow up from SCOPE Provided by: _____ within _____ days
Defence Provided by: _____ within 30 days
of trial

III. MOTIONS

Pre-trial motions have been waived or are presented below:

A. CUSTODIAL STATEMENTS

- No custodial statements by defendant will be offered in the City's case in chief, or in rebuttal; OR
- The statements referred to in the City's discovery will be offered and:
 - May be admitted into evidence without hearing by stipulation of the parties: OR
 - Admissibility of these statements is not stipulated, and a CrRLJ 3.5 hearing is requested.

B. OTHER MOTIONS Motion to exclude evidence, including all hearing
Motion to dismiss

IV WITNESSES All witnesses must be identified in this Order. (The Court will not subpoena witnesses)

Witnesses on behalf of the City (with address & phone - unless confidential):
Sgt. Coqueron off Voss off Pierce Sgt. Porter off Madros off Russell MOTION TRIAL
Off Carlson off Quimet off Dear off Garrison Teresa Oberl MOTION TRIAL
Witnesses on behalf of the Defendant (with address & phone - unless confidential):
witnesses identified above MOTION TRIAL

V. BRIEFING SCHEDULE

Moving party's brief due two (2) weeks prior to hearing. Responding party's brief due one (1) week prior to hearing.
Rebuttal brief due two (2) court days prior to hearing. No brief to be required from: Plaintiff Defendant.

VI. OTHER ORDERS

VII. COURT DATE

MOTION HEARING is set for November 4 2014, at 1:00 P.M.
 BENCH TRIAL DATE READINESS is set for Nov 12 2014, at 8:45 A.M.

ALL PARTIES AND ATTORNEYS ARE TO BE PRESENT FOR THE READINESS CALENDAR AND ASSIGNMENT OF A SPECIFIC DATE FOR TRIAL THE FOLLOWING WEEK.

All previously ordered conditions of release shall remain in effect. Non-Pattern Jury Instructions to be filed by Readiness.

VIII. SPEEDY TRIAL WAIVER

I give up my right to a trial within 60/90 days. My new commencement date is _____
My new expiration date is _____

Order dated this 11 day of August, 2014.
The undersigned parties have agreed that the correct expiration date for purpose of CrRLJ 3.3 is accurately set forth above.
The Court-ordered pre-trial conference on the above matter having been held.

Judge/Judge Pro-Tem _____
Prosecutor [Signature] 424106
Defense Attorney _____
Defendant [Signature]
Address 6415 NE 138th Pl.
Kirkland, WA 98034
City State Zip Phone
KMC 180 (5/2011)

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

March 09, 2018 - 5:01 PM

Transmittal Information

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Appellate Court Case Number: 93812-1
Appellate Court Case Title: City of Kirkland v. Hope Stevens
Superior Court Case Number: 15-1-01772-8

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