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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it found as a fact that the Court analyzes credibility as part of its probable cause determination. (Finding of Fact 2.)
2. The trial court erred when it found as a fact that the Court has to be fully aware of any and all statements made by witnesses. (Finding of Fact 3.)
3. The trial court erred when it found as a fact that the State knew that the probable cause statement relied heavily, if not exclusively on statements made by Francisco Nava as to counts three through six. (Finding of Fact 4.)
4. The trial court erred when it found that an amended probable cause statement should have been immediately resubmitted to the court following the December 2, 2009, interview of Francisco Nava. (Finding of Fact 9.)
5. The trial court erred when it concluded that by not filing an amended probable cause affidavit setting forth the discrepancies in Francisco Nava's second statement, the

original affidavit on file with the court became a misrepresentation. (Conclusion of Law¹ 1.)

6. The trial court erred when it concluded that the probable cause affidavit was without probable cause when read without considering the statements of Francisco Nava. (Conclusion of Law 2.)
7. The trial court erred when it concluded that whenever information is relied on by the Court or anyone else, the immediate revealing of that change has to occur or all credibility in the system is under question. (Conclusion of Law 3.)
8. The trial court erred when it concluded that law enforcement and/or the prosecution had the duty to disclose the statement made by Francisco Nava on the same date that the statement had been given and that the failure to do so constituted a discovery violation and/or a *Brady* violation. (Conclusion of Law 4.)
9. The trial court erred when it suppressed evidence that had the effect of terminating the State's ability to continue prosecution and when it dismissed the case.

¹ Although entitled "Findings of Fact" in the Findings of Fact, Conclusion of Law and Order, it is clear that this is a typo and is meant to be "Conclusions of Law." CP 76-77.

Issues Pertaining to Assignments of Error

1. Did the trial court err when it concluded that the provision of the two statements of the confidential informant two court days after the omnibus hearing and three to four weeks prior to the trial date constituted a CrR 4.7 discovery violation justifying the sanction of suppression?
(Assignments of Error 8, 9.)
2. Did the trial court err when it concluded that the provision of the two statements of the confidential informant two court days after the omnibus hearing and three to four weeks prior to the trial date constituted a *Brady* violation justifying the sanction of suppression? (Assignments of Error 8, 9.)
3. Did the trial court err in entering Findings of Fact unsupported by the record and irrelevant to the trial court's reason for suppressing evidence and in entering Conclusions of Law unsupported by the facts found and irrelevant to a consideration of whether the State violated the discovery rules and whether suppression was an appropriate sanction? (Assignments of Error 1-7.)

B. STATEMENT OF CASE

1. Procedural History

On November 20, 2009, the respondent, Samuel A. Gonzalez², was charged by Information with the crimes of Harassment, Riot, three counts of Assault in the First Degree, and Unlawful Possession of a Firearm in the Second Degree³. CP 76, 88-90. On that date, after finding probable cause to support the arrest of Gonzalez based on the affidavit of Detective Thompson, the court issued a warrant for Gonzalez's arrest pursuant to CrR 2.2. CP 2, 91-94.

On November 24, 2009, Gonzalez was arrested on the warrant. Supp. CP ____ (sub 6.100).

On December 3, 2009, Gonzalez was arraigned and an order was entered setting the omnibus hearing for December 31, 2009, and the trial date for January 25, 2010. CP 76, 95. Time for trial was available through February 1, 2010. CP 95.

On December 31, 2009, an Omnibus Application and Order was filed. CP 7-10. On December 31, 2009, January 4, 2010, and January 14,

² Although Gonzalez was a juvenile, the Superior Court had exclusive jurisdiction of the case pursuant to RCW 13.04.030.

³ The Information was later amended to add firearm enhancements and the allegation of aggravating factors. CP 27-29.

2010, Gonzalez filed motions to suppress for discovery violations relating to Francisco Nava. CP 11-16, 17-22, 32-52.

On January 15, 2010, the trial court orally ruled that the State had violated the discovery rules and that any evidence offered through Nava would be suppressed. 1RP 16-17⁴. Also on that date, the trial was continued for one week to February 1, 2010. 1RP 18.

On January 19, 2010, the State filed its Motion for Reconsideration. CP 56-57. Supporting declarations were filed January 20, 2010. CP 61-67.

On January 27, 2010, the trial court entered written findings and conclusions suppressing evidence based on violation of the discovery rules and /or Brady. CP 76-78. The court then orally denied the State's motion to reconsider. 2RP 47. The trial court entered an order dismissing counts three through six because the suppression of evidence had the practical effect of terminating prosecution of those counts.

The State filed its Notice of Appeal on February 9, 2010. CP 81 – 87.

2. Substantive Facts

⁴ 1RP refers to the Verbatim Report of Proceedings of January 15, 2010. 2RP refers to the Verbatim Report of Proceedings of January 27, 2010.

On July 11, 2009, at about 1:32 a.m., Mount Vernon Police Department Officers responded to 218 Maple Lane regarding a shooting that had just occurred. Upon arrival, officers found that three young men had been shot with shotgun pellets. Two had been struck in the head and one in the leg. One of the men had to be flown to Harborview Medical Center to care for his head injuries. CP 92.

The resident of 218 Maple Lane, Janet Ramos, told officers that earlier that night, around midnight, a person she knows as "Sammy" knocked on her door asking if "Scrapas" were there. Scrap is a derogatory term for a Sureno gang member. When told to leave, Sammy turned to the vehicle parked in the driveway and told someone inside to get the gun. The person in the car seated behind the driver got out of the car and retrieved a gun from the trunk. Ramos closed the door and she and the other occupants of the house hid. CP 92.

The shooting then occurred shortly before law enforcement arrival at 1:30 a.m. Officers determined that a single shotgun round consistent with 20 gauge was fired into the living room of the residence from the outside. CP 92.

Officers learned that "Sammy" Gonzalez lived directly southeast of the Ramos residence, with only a fence separating them. Gonzalez has been documented by law enforcement as a Norteno gang member. CP 92.

Nortenos are enemies of Surenos. CP 93. Gonzalez's parents said that he could not have done the shooting because he was at home when the shot was fired. CP 92.

Detective Thompson spoke with Daniela Solis. Solis said that she spoke with Norteno associate Daniel Garcia on the night of July 10, 2009. Garcia told her that he was going to be with Gonzalez at Gonzalez's house having just left a house where there were Surenos "trying to start stuff with them" meaning the Nortenos. CP 92-93. Garcia told Solis that "they" got out of the car at the party and the Surenos were trying to "start stuff" when the door was opened at the house. CP 93. At the time that Garcia was telling Solis about this confrontation, he was about three blocks from the Ramos residence. CP 93.

On October 29, 2009, Detective Thompson spoke with Francisco Nava. CP 51, 93-94. After speaking with him, Detective Thompson determined that Nava's identity needed to be protected because of safety concerns and also because he had provided information about several other ongoing investigations in the county involving shootings and a murder. CP 61, 67.

Relating to this Maple Lane shooting, Nava indicated that he had met with Gonzalez at about 3:30 a.m. on July 11 at Alfredo Sanchez's house and that Gonzalez told him that he had gone to the Ramos residence

with Garcia in the vehicle. While there, a Sureno called Gonzalez derogatory names. Garcia got out of the car and pulled a gun out of the trunk. The people at the Ramos house went back inside and locked the door because they were scared. Gonzalez told Nava that he and Garcia then went back to Gonzalez's house to plot something but ultimately Gonzalez "took it in his own hands." Gonzalez told Nava that he jumped the fence separating his property from Ramos's, he "crept up" on the window, and he shot inside the house twice. CP 93. Gonzalez said he used a 20 gauge shotgun. CP 94. Gonzalez told his parents to lie and say he was at home all night. Gonzalez's dad picked him up at Sanchez's house to take him to work later that morning. Nava went on to provide information on other criminal activity in the county, including other shootings and a murder. CP 73, 94.

On November 18, 2009, Nava entered into a plea agreement with the State. CP 51-52, 73. The written plea agreement included requirements that Nava be truthful and willing to take a polygraph. CP 51-52.

On December 2, 2009, at the request of Nava's lawyer through the State, Detective Thompson recontacted Nava and took another statement from him. CP 61, 64, 73. In this statement, Nava said that he did not meet with Gonzalez at Sanchez's house at 3:30 a.m. on July 11, 2009. He said

that there was some texting activity between them that night but they did not meet. CP 73. Nava said that about six weeks after the Maple Lane shooting, he and Gonzalez were at Gonzalez's house when Gonzalez told Nava that he had shot two times through the Ramos window. CP 73-74. Nava said that the specifics about what Gonzalez had told him about the shooting itself was the same as what he said in the October statement and that Gonzalez had shot through the window with a 20 gauge shotgun. Nava's explanation for the differences between his statements was that he was "trying to remember everything that all and at once, and like basically trying to put everything together. I didn't really think I would have to think back, all the way back to that time." He also said, "basically since I've been here (in detention) and like I've like I was just thinking about like everything I've said. Just to, you know, make sure I clarify everything, you, so like basically I made a timeline form where all the shootings basically started happening, and like the start. You know like everything I know about, and just so I didn't get mixed up, you know, when I talked to you guys. You know? And if you want I can run you through that." CP 74.

On January 20, 2010, Detective Thompson spoke with Nava a third time. In that interview, Nava was again questioned about the discrepancies between the two prior statements. Nava explained, as he

had before, that he'd been "trying to remember it all at once 'cause a lot of stuff has happened" and then for the second statement he'd had opportunity to think about it and relate accurately what had happened. Nava elaborated that he'd had time to think about it and realize that what he'd said the first time was not completely accurate. He said he'd thought about the terms of the plea agreement and that he'd have to take a polygraph. Nava decided that he needed to contact his lawyer and made a second statement in order to clear up the inaccuracies in the first statement. Nava maintained that Gonzalez had told him about the initial harassment with Garcia, that he had jumped the fence between the houses and shot the gun into the Ramos house, and that he had told his parents to lie for him. When Detective Thompson reminded him that he would be taking a polygraph that day, Nava reiterated that he was telling the truth. CP 74.

3. Additional Facts Relating to Discovery Issues

On October 30, 2009, the Mount Vernon Police Department created a separate report number and file for the statements made by Nava that related to this case as well as the other investigations for which he provided information. CP 61, 67. The purpose was to protect him as a confidential informant in this case as well as in other ongoing investigations. CP 61.

On November 24, 2009, Gonzalez was arrested on the November 20, 2009, arrest warrant. Supp. CP ____ (sub 6.100).

On December 2, 2009, Detective Thompson took the second statement from Nava. CP 61.

On December 3, 2009, Gonzalez was arraigned. CP 95.

On December 9, 2009, the State requested that law enforcement provide a copy of the transcript from the October interview and “any other reports stemming from that”. CP 64, 67.

On December 16, 2009, the State forwarded defense requests for discovery (request for 22 items, primarily audio recordings of witness statements, the transcripts of which had already been provided; also request for statement of informant) to law enforcement. CP 64, 67.

On December 17 and 28, 2009, the State forwarded additional defense requests for discovery (request for additional items unrelated to Nava). CP 64, 67.

The police department evidence custodian was gone from the office Friday, December 18 through Friday December 25. CP 67. December 24, 2009, was a county furlough day and December 25, 2009, was a county and court holiday. On December 30, the defense made a second request for informant information. CP 64.

On Thursday, December 31, the Omnibus order was filed. CP 7-10. Friday, January 1, 2010, was a holiday and January 2 to January 3, 2010, was the weekend.

On Tuesday, January 5, 2010, the second court day after omnibus, the State provided the identity of Nava to the defense as well as a copy of his plea agreement. CP 65. Also on that date, the State received from law enforcement the transcripts of Nava's two statements and provided those to the defense. CP 65, 77.

C. ARGUMENT

1. IF THE STATE VIOLATED CRR 4.7, THE VIOLATION WAS DE MINIMUS AND THE TRIAL COURT ABUSED ITS DISCRETION IN SUPPRESSING EVIDENCE WITHOUT CONSIDERING THE APPROPRIATE LEGAL STANDARD

The trial court abused its discretion when it determined, without consideration of the appropriate legal standard, that the provision of informant statements of impeachment value two court days after the omnibus hearing constituted a delayed disclosure pursuant to CrR 4.7 such that suppression of the evidence was warranted.

CrR 4.7 provides that the “prosecuting attorney shall disclose to the defendant the following material and information [to include witness names, addresses and statements] within the prosecuting attorney’s possession or control no later than the omnibus hearing”. CrR 4.7(a)(1). The prosecuting attorney is also to disclose any material or information tending to negate guilt. CrR 4.7(a)(3). The disclosure of an informant’s identity is not required where the constitutional rights of the defendant are not infringed upon. CrR 4.7(f)(2). The sanction for failure to comply with these obligations is to order discovery, grant a continuance if necessary, “dismiss the action or enter such other order as [the court] deems just under the circumstances.” CrR 4.7(h)(7).

“The purpose of [CrR 4.7] is to protect against surprise that might prejudice the defense.” State v. Smith, 67 Wn. App. 847, 851, 841 P.2d 65, rev. denied, 121 Wn.2d 1019 (1993); State v. Bradfield, 29 Wn. App. 679, 682, 630 P.2d 494, rev. denied 96 Wn.2d 1018 (1981). The concern is that delayed discovery may create a conflict between the right to a speedy trial and the right to an adequate opportunity to prepare a defense. Smith, 67 Wn. App. at 853.

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, and the factors to be considered in deciding whether to exclude evidence as a sanction are: (1)

the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution⁵ will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

State v. Hutchinson, 135 Wn.2d 863, 882-883, 959 P.2d 1061, cert. denied, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999). Violations of CrR 4.7 involving late disclosure of information are “appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence.” Hutchinson, 135 Wn.2d at 881.

The trial court's decision regarding sanction is reviewed for a manifest abuse of discretion. Smith, 67 Wn. App. at 851. “There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons.” State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546, cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). “A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard.” Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). See also T.S. v. Boy Scouts of America, 157 Wn.2d 416, 423-424, 138 P.3d 1053

⁵ Of course in this case, the question would be whether the defense would be surprised or prejudiced.

(2006), and State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court abuses its discretion when it bases its ruling on an erroneous view of the law. Washington State Physicians Ins. Exchange and Ass'n v. Fisons, Inc., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

In the case at bar, while there may have been a technical violation of CrR 4.7(a) in that the identity of the informant and his statements were provided after omnibus, by any interpretation, this violation is *de minimus*. This information was provided within two court days of omnibus. This information was provided only four and a half weeks after arraignment and three weeks before the originally set trial date.

This two day delay should also be considered in light of the informer's privilege, recognized by court rule in CrR 4.7(f)(2). "Unquestionably, the State has a legitimate interest in protecting confidential informants." State v. Moen, 150 Wn.2d 221, 230, 76 P.3d 721 (2003).

Here, Nava had been involved in providing information in several ongoing investigations. Law enforcement, and the State, had a legitimate interest in protecting his identity⁶ to preserve the integrity of those

⁶ Of course, protecting his identity was achieved not just by withholding his name, but also material which would lead to the discovery of his identity, i.e., his plea agreement with the State and the recorded statements he made to law enforcement.

investigations, as well as to ensure his safety. When it became apparent that Gonzalez was uninterested in resolving his case and that he wanted to exercise his right to trial, the State provided the requested information.⁷

If there was a CrR 4.7 violation, the trial court abused its discretion in suppressing all evidence and testimony from Nava because it based its ruling on an erroneous view of the law and it did not apply the legal standard set forth in Hutchinson. The trial court failed to make any findings of fact or conclusions of law as to any of the factors that the court is to consider *per* Hutchinson. The complete failure to apply the correct standard, in itself, constitutes a manifest abuse of discretion.

Had the trial court applied the correct standard, it would have been clear that the extraordinary remedy of suppression would not have been appropriate. Less severe sanctions were available, specifically, there was still a week within time for trial to continue the trial date if necessary, and, in fact, the trial date was continued for a week for a different reason, thus allowing the defense four weeks to prepare for the testimony of the informant. The impact of the trial court's ruling was to terminate the State's ability to prosecute the three class A felonies and the unlawful

⁷ It appears that part of the problem in not getting the information any sooner was that the informant records were kept under a different case number by the police department and so when their records division sent over all the records within their file, the informant file was not connected with that until January. CP 67.

possession of a firearm. As a further result, the adult court lost jurisdiction over the case for the remaining two charges. The defendant had ample time to prepare for the informant's testimony and was not prejudiced by receiving the information three to four weeks prior to trial. Finally, in neither its oral comments nor its written order did the court make any finding of a willful or bad faith violation of the discovery requirement. Indeed, the declarations filed in this matter and made a part hereof clearly indicate to the contrary; the prosecution and law enforcement were attempting to comply with the discovery rules within a very short time frame⁸.

Because the court not only did not make any findings as to the Hutchinson factors, but did not appear to even consider them, the court abused its discretion in suppressing the State's evidence.

2. THERE WAS NO VIOLATION OF BRADY
JUSTIFYING THE SANCTION OF SUPPRESSION

The trial court abused its discretion when it determined that the disclosure of informant statements of impeachment value three weeks prior to the original trial date, and four and a half weeks after the

⁸ The request for informant information was made December 16, 2009, and was provided January 5, 2010. Considering the holidays (December 25, 2009, and January 1, 2009), and the weekends, and the county furlough day (December 24, 2009), there were ten working days to comply with the request. Within this ten day period, the defense was making multiple requests for other discovery that law enforcement was attempting to comply with. Further, the evidence custodian was out of the office for four of those ten days.

arraignment date, constituted a Brady violation such that suppression of the evidence was warranted.

The prosecution has a due process obligation to turn over evidence in its possession or knowledge that is both favorable to the defendant and material to guilt. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). This includes evidence known to the police. Kyles v. Whitley, 514 U.S. 419, 437-438, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995). “There are three components to a Brady violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material, meaning that the evidence must have resulted in prejudice to the accused. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L.Ed.2d 286 (1999).” State v. Sublett, 156 Wn. App. 160, 200, 231 P.3d 231 (2010); In re: Delmarter, 124 Wn. App. 154, 167, 101 P.3d 111 (2005). As to the second component, whether the evidence was “suppressed”, “[e]vidence is suppressed for Brady purposes only if (1) the prosecution failed to disclose evidence that it or law enforcement was aware of before it was too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.” Boss v. Pierce,

263 F.3d 734, 740 (7th Cir.) cert. denied, 535 U.S. 1078 (2002) (citing United States v. Earnest, 129 F.3d 906, 910 (7th Cir. 1997)); United States v. Morris, 80 F.3d 1151, 1169-1170 (7th Cir.), cert. denied, 519 U.S. 868 (1996); United States v. Zambrana, 841 F.2d 1320, 1340 (7th Cir. 1988)).

Here, the State does not dispute that the statements of Nava to law enforcement constituted evidence required by Brady to be disclosed.

However, the trial court erred in entering its suppression order because the State, *in fact* disclosed the evidence “before it was too late for the defendant to make use of [it]”; in other words, Brady does not require suppression because the defense, in fact, had the information in a timely manner. Because the defense had four weeks to prepare to make use of the impeachment evidence, there was no prejudice to the defendant.

3. THE TRIAL COURT ERRED IN ENTERING FINDINGS UNSUPPORTED BY THE RECORD AND CONCLUSIONS UNSUPPORTED BY THE FINDINGS. FURTHER, MOST OF THE FINDINGS AND CONCLUSIONS ENTERED WERE IRRELEVANT TO THE DISCOVERY ISSUES WHICH THE TRIAL COURT REASONED JUSTIFIED SUPPRESSION.

There is no support in the record for a finding that the Court has to be aware of all statements made by witnesses in a case (finding of fact 3), that the State knew that the probable cause statement relied heavily, if not exclusively on statements made by Nava (finding of fact 4), or that an

amended probable cause affidavit should have been filed after Gonzales's arrest and after the December 2, 2009, statement of Nava was taken (finding of fact 9).

None of the conclusions reached by the trial court are supported by the findings that the trial court made.

Most of the findings and conclusions entered by the trial court address issues relating to the trial court's position that upon learning of the discrepancies between Nava's first two statements, it was incumbent upon law enforcement and/or the State to (a) bring this to the court's attention and (b) to file an amended probable cause affidavit. This trial court assertion is completely irrelevant to the basis actually provided by the trial court for why suppression was being imposed as a sanction. The trial court's assertion that the State has an obligation to file an amended probable cause affidavit, after the original warrant has already been executed, upon learning of a second statement of impeachment value, is irrelevant to and completely separate from the suppression issue as framed by the trial court. The trial court ruled orally and in writing that the

suppression was a sanction justified by noncompliance with CrR 4.7 and/or a violation of Brady. CP 78; 2RP 10⁹, 23¹⁰, 45¹¹.

The trial court did recognize that the findings as to the probable cause issue was not “directly tied into a sanction,” 2RP 10, however included the finding for purposes of emphasizing the importance of the evidence of the second statement in impeaching the credibility of the informant and therefore the importance of the defense having that evidence in a timely manner. 2 RP 23.

Because this position of the trial court with regard to an obligation to file another probable cause affidavit is not relevant to the discovery and Brady issues in the case at bar, the State does not herein offer legal argument on the issue.¹²

⁹ “Ms. Kaholokula: And, your Honor, was that a discovery violation finding of the Court? The Court: Yes. The Court is finding that either law enforcement and/or the prosecution and/or both had a duty to disclose to the defense promptly any information which could be deemed as exculpatory. And the confidential informant, whose sole statement was the strength or basis for the charge, contradicted himself in a subsequent interview. That contradiction was not made known to the defense. So that is a discovery violation and/or a Brady violation. Both probably.”

¹⁰ “I’m not sure that it ties back to any specific remedy when the remedy is under Brady and discovery.”

¹¹ “Ms. Kaholokula: . . . To my understanding, the suppression is based on a discovery issue. . . . The Court: It’s discovery and Brady.”

¹² The State does briefly note that the purpose of the probable cause affidavit is to support a warrant of arrest. Here the warrant of arrest was issued and already executed some time prior to the second statement of Nava. There is no purpose and no requirement in amending a probable cause affidavit in support of a warrant which has already been executed. Furthermore, one need look no further the “typical” domestic violence case where victim recantation is quite common, to see that there is no requirement for the

D. CONCLUSION

Where the defendant had possession of the statements of the informant four weeks prior to trial, and two court days after the omnibus hearing, the trial court erred in suppressing that evidence based on Brady and abused its discretion when it found a “delayed disclosure” such that suppression was the appropriate remedy pursuant to CrR 4.7.

This Court should reverse the order of suppression.

Respectfully submitted this 19 day of August, 2010.


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State to refile a probable cause affidavit in the middle of the criminal case whenever the victim recants or otherwise provides different information. Rather, the obligation is to provide that information to the defense.