

HEK 64957-4

64957-4

NO. 64957-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

D.R.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

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COURT OF APPEALS  
DIVISION I  
CLERK OF COURT  
KING COUNTY

**BRIEF OF APPELLANT**

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering an order of dismissal in this case.

2. The trial court erred by dismissing this case without making a finding of unreasonable delay, and because there was no unreasonable delay.

3. The trial court erred by dismissing this case without making a finding of government misconduct, and because there was no misconduct.

4. The trial court erred by finding prejudice when any prejudice to the defendant was purely speculative.

B. ISSUES

1. Does a judge abuse his discretion by dismissing a prosecution under LJuCR 7.14(b) without making a finding of unreasonable delay, and where there were only two days between investigation and referral?

2. Did the trial court err by dismissing a prosecution without making a finding of government misconduct under CrR 8.3(b), where there was no evidence of bad faith, negligence, or misconduct?

3. Did the trial court err in dismissing a prosecution under LJuCR 7.14(b) and CrR 8.3(b) when the defendant's ability to defend was not prejudiced, and where any other consequence was purely speculative?

C. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

In the early afternoon of May 18, 2009, David Reis was on the second floor of his home when he heard a loud boom coming from the first floor of the house. CP 2. After hearing a second loud boom, he went downstairs to investigate, where he discovered a young, heavy-set black man standing in his living room. CP 2. The young man, who was wearing a pink backpack and holding Reis' laptop, screamed and ran from the house when he saw Reis. CP 2. When Reis went to follow, he was almost trampled by two other men who emerged from the side rooms of his home. CP 2. Reis pursued the three fleeing men out to the alley behind his home and shouted to a neighbor to call 911. CP 2. He caught up with the young man he had seen in his living room with the laptop and tried to corner him, but the man was able to dodge Reis and flee down the alley. CP 2. King County sheriffs arrived a few minutes

after the men had escaped, and Reis provided a description of the three suspects to Deputy Sheriff Azevedo. CP 2. The only item missing from Reis' home was the laptop. CP 2.

In the same neighborhood, approximately two and a half hours after the Reis home was burglarized, Nancy Goree's neighbor saw two men jump a fence onto the Goree property. CP 18. She called 911 and remained on the phone with the operator as she saw a young man enter the back door of the Goree home. CP 18. Approximately five minutes later, she observed five individuals exit the Goree home, jump the back fence, and run down the street. CP 18. Based on the 911 call, dispatch provided a description of the suspects and the direction in which they were headed to King County sheriffs. Two deputies located and detained the five suspects a few blocks from the Goree home. CP 18. The group included D.R., who denied any knowledge of the Goree home burglary. CP 17-18. Goree's neighbor was brought to the location, where she identified D.R. as the person she saw enter the Goree home through the back door. CP 18.

Meanwhile, detectives found a shoe print below a broken window at the Goree home. CP 20. The detectives examined all of the detained suspects' shoes; D.R.'s shoe matched the print.

CP 20. With three of the other suspects, D.R. was transported to the local precinct and was advised of his Miranda and juvenile rights. CP 19-20. D.R. refused to provide a statement, and was released from the King County Youth Center the following day for lack of probable cause. CP 23-24.

On May 21, 2009, the Reis burglary was assigned to Detective Woodruff for further investigation. CP 29. As he reviewed the file, he noticed that the description Reis provided of the young man found in his living room matched the suspect arrested for the Goree burglary. CP 29. Detective Woodruff arranged a photographic line-up that afternoon, and Reis identified D.R. as the man he saw in his living room with the laptop and who he cornered in the alley. CP 2. After the identification, Detective Woodruff continued to investigate the case, ordering the 911 tape, fingerprints and D.R.'s criminal history. CP 29-30. He also attempted to contact D.R. to arrange an interview, but heard no response. CP 29. On August 11, 2009, Detective Woodruff was finally able to contact D.R. at his apartment and interview him. CP 29. During the interview, D.R. denied any knowledge of the Reis burglary and denied being in the Skyway neighborhood on the day of the burglary. CP 2, 29. The same day, Detective Woodruff

updated his fingerprint request and reviewed D.R.'s criminal history report. CP 29. On August 13, 2009, he completed the investigation, considered the evidence, and forwarded the case to the King County Prosecuting Attorney's Office Juvenile Division for filing. CP 29. The two other suspects who fled from Reis' home were never identified. CP 29.

As the investigation into the Reis burglary continued, charges were filed against D.R. on July 30, 2009 for the Goree burglary (No. 09-8-01851-2). CP 26. At the arraignment for the Goree burglary on August 13, 2009, charges for the Reis burglary had not yet been filed because the investigation was not complete. RP 22, CP 29. No evidence was presented that, at that time, the police, the prosecutor, the defense attorney or the judge were aware that the Reis burglary charge was forthcoming. RP 22. On September 21, 2009, an information was filed charging D.R. with the Reis burglary (No. 09-8-03344-9). CP 1. Two days later, on September 23, 2009, D.R. requested and was granted a deferred disposition for the Goree burglary. Supp. CP 48-50. The State opposed the deferred disposition because the State does not believe that deferral is appropriate in Residential Burglary cases. RP 4, 8, 9.

## 2. THE COURT'S RULING

On January 11, 2010, upon a defense motion, the court dismissed the Reis burglary charge. Supp. CP 51-54. The court considered arguments relating to the investigative and pre-filing timelines of the case, the potential for D.R.'s prior deferred disposition to be used as ER 609 and 404(b) evidence, and potential joinder of the two separate burglary charges. The court made no specific findings, oral or written, of unreasonable delay, government misconduct, actual prejudice or mandatory joinder.

The oral findings of the Court consisted of the following:

The Court: I am going to find that I think this is -- I think this case can be distinguished from the appellate law that has been cited. I think that there is sufficient prejudice in this case to grant the defense motion.

RP 23.

The court went on to comment on the policy goals of juvenile statutes, and then addressed the issue of whether a deferral *would* have been granted if the two cases had been in front of the judge, rather than just one:

The Court: I mean I can't say for sure if there were two of them there, whether the

same result would have occurred, but it seems, considering the similarity, their proximity in time, to the extent that the judge thought that it was a break or something being done for a past mistake, they occurred close enough to be sufficiently similar. My sense would be the judge would have probably made the same decision and tried to accomplish the same goal, so turning to you, [D.R.], in terms of making my decision, I hope I haven't sent the wrong message to you that all you need is a lawyer to argue your case, and perhaps a judge that is willing to go along with it.

RP 23.

The court then commented on the "incredible deal" D.R. received when the previous judge granted a deferred disposition for the Goree burglary, and the court reiterated D.R.'s obligations under that deferral. RP 24. The prosecutor then attempted to clarify the record and discern the findings of the court:

Mr. Lazowska: Under what court rule is the Court dismissing -- or what court rule or statute?

The Court: Well I have to say that I think the actions of the State as far as having knowledge of the prior incident, that not including that in their decision at the time and going forward with the deferred prosecution served to prejudice [D.R.] in terms of his

decision, and the biggest prejudice I see, and again, I am not sure if it is exactly the same because we have different types of crimes that are talked about, but again, the idea of prejudice, of course now if this case were allowed to go forward would be that [D.R.] has in fact pled guilty to a charge that could be admitted to impeach him in court, and I am not sure if he would have done that if he would have made the admissions he did in pleading guilty if he knew that was going to be a possible result.

Mr. Lazowska: So is this under 8.3B or the local--

The Court: Well, I will have to find the rules and see, so -- get my rulebook. Hold on.

(Brief pause in proceedings)

The Court: I think, in response to the prosecution's inquiry, that 8.3B would be a basis upon which the Court makes this decision. Does the defense have any additional basis that you suggest --

Ms. Boyum: Well, Your Honor --

The Court: -- that apply in this case?

Ms. Boyum: Your Honor, we move to dismiss under both 8.3B and the local juvenile rule, the 7.14B, which is -- I think is my first motion and I think Your Honor's rationale would apply equally to both so we are moving to dismiss under both.

The Court: Let me take a look and remind myself of that.

(Brief pause in proceedings)

The Court: I will also find that under the local juvenile CR 7.14B that also applies to my decision.

RP 25-26.

Following this discussion, the Court again reviewed D.R.'s deferral obligations for the Goree burglary and signed an order to dismiss the Reis burglary charge. The written order contained the following explanation: "The court grants defense motion to dismiss under both LJuCR 7.14(b) and CrR 8.3(b) as the respondent was prejudiced by the filing delay as the previously filed case that resulted in conviction could be used against respondent in a trial on this case." Supp. CP 52.

D. ARGUMENT

The court ruled that the Reis burglary charge must be dismissed because the Goree burglary was referred, filed, and adjudicated before the Reis burglary, resulting in prejudice to D.R.'s rights. The ruling was based on alleged violations of two rules: LJuCR 7.14(b) and CrR 8.3(b). Neither rule supports dismissal.

There was no unreasonable delay in referring the case under LJuCR 7.14(b), nor was there any arbitrary action or government misconduct under CrR 8.3(b). Finally, even assuming the delay or misconduct thresholds were met, there was no prejudice to D.R.

A trial court's decision to dismiss a criminal prosecution is reviewed for an abuse of discretion. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). An abuse of discretion occurs when a trial court's decision is based on untenable grounds and for untenable reasons, or is manifestly unreasonable. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). "A decision is based on 'untenable grounds' or 'untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

1. TWO DAYS BETWEEN THE COMPLETION OF AN INVESTIGATION AND REFERRAL OF THE CASE TO THE PROSECUTOR DOES NOT CONSTITUTE AN UNREASONABLE DELAY UNDER LJuCR 7.14(b).

LJuCR 7.14(b) was not applicable to the facts or circumstances of this case. The court abused its discretion when it cited the delay in filing respondent's second burglary charge as the

grounds for dismissal under LJuCR 7.14(b) because the only "delay" occurred during a time period not covered by the rule.

LJuCR 7.14(b) provides that:

The court may dismiss an information if it is established that there has been an unreasonable delay in referral of the offense by the police to the prosecutor and the respondent has been prejudiced. For purposes of this rule, *a delay of more than two weeks from the date of completion of the police investigation of the offense to the time of receipt of the referral by the prosecutor shall be deemed prima facie evidence of an unreasonable delay.*

LJuCR 7.14(b) (emphasis added).

The rule establishes a two-week standard timeline for police to refer cases for prosecution after an investigation is complete; a timeline of more than two weeks may result in dismissal. State v. Chavez, 111 Wn.2d 548, 761 P.2d 607 (1988). Two elements are required for dismissal under LJuCR 7.14(b): 1) an unreasonable delay, and 2) actual prejudice resulting from that delay. State v. Alvin, 109 Wn.2d 602, 746 P.2d 807 (1987). Dismissal is improper if there is no specific finding that an unreasonable delay resulted in actual harm to a respondent's ability to defend. Chavez, 111 Wn.2d 548, 562, 761 P.2d 607 (1988).

The two-week period applies "*only* to delay in referral from the police to the prosecutor..." State v. Cantrell, 111 Wn.2d 385,

388, 758 P.2d 1 (1988) (emphasis in original). In Cantrell, a case was submitted to the prosecutor three days after the police investigation was complete, but the trial court granted a motion to dismiss because the prosecutor did not file the charge for approximately seven weeks. Id. at 386. The Court of Appeals reversed the dismissal, finding the court erred by imposing the same time limit on a prosecutor's filing decision as the time limit imposed on law enforcement to refer a case. State v. Cantrell, 49 Wn. App. 917, 745 P.2d 1314 (1988) aff'd, 111 Wn.2d 385, 785 P.2d 1. Thus, the rule can support dismissal only when there has been more than a two-week delay by law enforcement in referring a completed investigation to prosecutors.

Applying that standard here (which the trial court never did), shows that dismissal was error. The Reis burglary investigation was completed by detectives on August 11, 2009, and the case was referred to the prosecuting attorney on August 13, 2009. CP 29. In whole, like in Cantrell, there was a two-day time span between completion of the investigation and referral to the prosecutor. CP 29. Two days to refer a case is not a delay, much less an unreasonable delay, and any time taken by the prosecutor to file the charge was irrelevant under this rule. The referral

timeline in this case fell cleanly within the guidelines of LJuCR 7.14(b) and cannot support a finding of unreasonable delay.

A finding of unreasonable delay is the necessary first step in the court's analysis before a court can consider dismissal under LJuCR 7.14(b). The plain language of the court rule dictates the standard: "Upon a *prima facie* showing of unreasonable delay the court *shall then* determine whether or not dismissal or other appropriate sanction will be imposed." LJuCR 7.14(b). (emphasis added). Because there was no unreasonable delay in D.R.'s case, the court should not have proceeded to the prejudice step in the analysis.

2. DISMISSAL UNDER CrR 8.3(b) IS ALLOWED ONLY IF THE COURT FINDS ARBITRARY ACTION OR GOVERNMENT MISCONDUCT; NO SUCH FINDING WAS MADE.

Dismissal under CrR 8.3(b) is an extraordinary remedy available only when, as a result of government misconduct, there has been prejudice which materially affects the rights of the accused. Rohrich, 149 Wn.2d at 653, 71 P.3d 641. This rule provides that:

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.

CrR 8.3(b).

Two requirements must be met before a court may dismiss charges under this rule. Michielli, 132 Wn.2d at 239-40. First, the defendant must show actual prejudice affecting his or her right to a fair trial. Id. Second, the defendant must show arbitrary action or government misconduct caused such prejudice. Id. Each must be proved by a preponderance of the evidence. Id.

To dismiss charges under CrR 8.3(b), misconduct need not be intentional; simple mismanagement is sufficient. Id. at 243. Because dismissal under this rule is an extraordinary remedy, however, dismissal is only appropriate where mismanagement is particularly egregious. State v. Flinn, 119 Wn. App. 232, 247, 80 P.3d 171, 179 (2003) aff'd, 154 Wn.2d 193, 110 P.3d 748. For instance, misconduct or mismanagement may be found when a prosecutor deliberately delays filing a charge to gain a tactical advantage, such as circumventing the juvenile justice system. Alvin, 109 Wn.2d at 604. Routine delays that do not result in prejudice, however, do not meet the requisite standard. Id. at 606.

See also State v. McConnville, 122 Wn. App. 640, 94 P.3d 401 (2004) (a preaccusatorial delay of two years did not warrant dismissal of charge absent a showing of actual prejudice caused by the delay).

Before exercising the extraordinary remedy of dismissal, the court must look to the length and reasons for a delay to determine if the delay was reasonable. Alvin, 109 Wn.2d at 604. In Alvin, the court held that a police investigation delayed four months due to a large caseload, officer training days, and officer vacations was not an unreasonable delay. Id. at 605. Although the defendant lost the benefit of juvenile court jurisdiction and was charged in adult court, the Court noted that, "[n]o suspect has a constitutional right to expect the judicial process to anticipate routine delays, common in the administrative and investigatory process, which may uniquely affect that individual's case." Id. at 606. Without evidence of deliberate or strategic conduct, such a delay was justified and reasonable. Id. at 605.

Likewise, the investigation in this case was not unusual. The investigating detective followed standard procedures by requesting the 911 tape, a fingerprint analysis, and D.R.'s criminal history. CP 29-30. The detective's reasonable attempts to obtain an interview

added to the length of the investigation. CP 29. The court's implied conclusion that the investigation constituted an unreasonable delay because it followed standard investigatory procedures and happened to overlap with the adjudication process on an entirely separate charge was erroneous. Although it may have been more efficient to resolve both charges against D.R. at the same time, "[s]pecial procedures for juvenile suspects are not required in Washington." Alvin, 109 Wn.2d at 605.

Similarly, filing two separate cases on two separate informations at two separate times cannot be considered misconduct. Three undisputed facts support this conclusion. First, at the time of D.R.'s arraignment on the Goree burglary charge, the prosecutor's office was not aware of the forthcoming charge for the Reis burglary because it had not yet been referred. RP 22. Second, the Reis home burglary charge was filed two days before D.R. entered his deferred disposition, showing that the prosecutor's office was not acting subsequently to D.R.'s adjudication on the Goree burglary, but rather prior to it. RP 22. Third, a deferred disposition had not yet been granted by the court for the Goree burglary, nor was there any guarantee that it would be granted. Supp. CP 48-40.

Finally, no evidence of negligence or vindictiveness on the part of the prosecutor was presented to the court. The prosecutor's claim that a five-week timeline between referral and filing was typical, particularly on an out-of-custody case with no birth-date rush, was not refuted by the defense. CP 37. Considering the undisputed facts, the court could not have found misconduct or mismanagement on the part of the prosecutor's office or investigating law enforcement. Thus, dismissal under CrR 8.3(b) was improper.

3. D.R. WAS NOT PREJUDICED WHEN THE REIS BURGLARY CHARGE WAS FILED LATER THAN THE GOREE BURGLARY CHARGE.

Both rules cited by the court in support of a dismissal require a finding of actual prejudice, but no prejudice was shown. The trial court mentioned several theories for believing that D.R. was prejudiced: a) that the prior case might be used against him at a second trial (RP 14, 16, 19); b) that he had been deprived of the chance to obtain a deferred sentence in the Reis burglary (RP 3-4.); and c) that mandatory joinder principles were relevant (RP 17, 23). None of these concerns justified dismissal of this case.

To warrant dismissal, actual prejudice must be proved by a preponderance of the evidence. Rohrich, 149 Wn.2d at 653-54. Speculative prejudice is not sufficient. Id. at 657. Moreover, "the mere *possibility* of prejudice is not sufficient to meet the burden of showing actual prejudice." State v. Norby, 122 Wn.2d 258, 858 P.2d 210 (1993) (emphasis in original). In D.R.'s case, each of the court's theories reflected speculative prejudice at most.

- a. The Court Did Not Find Actual Prejudice From The Potential To Use The Goree Burglary Conviction As Evidence At The Reis Burglary Trial.

At the time of the dismissal hearing, it was uncertain whether evidence of D.R.'s prior conviction for the Goree burglary would be admissible at trial for the Reis burglary under ER 404(b). Although the State conceded that such evidence might be admissible under the common scheme or plan exception, the court did not conduct an ER 404(b) analysis or make any finding that the evidence would, in fact, be admissible.

Under 404(b), "[e]vidence of other crimes is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). However, such evidence may be

admissible to prove other things such as a common scheme or plan. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible." Id. at 17. Before such evidence can be admitted, the State must meet a substantial burden when attempting to bring in evidence under one of the 404(b) exceptions. Id. The prior acts must: 1) be proved by a preponderance of the evidence, 2) be admitted for the purpose of proving a common scheme or plan, 3) be relevant to prove an element of the charged offense, and 4) be more probative than prejudicial. Id. It is only after the trial court finds that these four requirements have been met can evidence be admitted under 404(b). Id. If even one of these requirements is not met, evidence of prior acts is not admissible. Id.

ER 609 also allows evidence of some types of prior convictions to be used against a witness at trial for the purpose of attacking his or her credibility. ER 609. State v. Smith, 67 Wn. App. 81, 89, 834 P.2d 26 (1992), aff'd, 123 Wn.2d 51, 864 P.2d 1371 (1993). However, "evidence of juvenile adjudications is generally not admissible under the rule." ER 609. The only exception to the rule is that evidence of other juvenile adjudications

may, under some circumstances, be used to attack the credibility of a witness *other than the accused*. Id. (emphasis added). See State v. Scherner, 153 Wn. App. 621, 652, 255 P.3d 248 (2009), review granted on other grounds.

In D.R.'s case, the prior conviction would not be admissible under ER 609 because it was a juvenile adjudication. Furthermore, the court did not analyze ER 404(b) to determine if evidence of D.R.'s prior conviction would be admissible under 404(b); rather, the court began with a presumption that the evidence *would* be admissible. RP 17-18. This presumption, and the court's finding of prejudice, was error. First, nothing in the record suggests that the prior conviction would actually meet the common scheme or plan exception under 404(b). Second, no analysis was performed to determine if the prior conviction would survive the required balancing test. Third, the court made no specific ruling or determination as to the admissibility of the evidence, nor was the issue of admissibility in front of the court. Fourth, there was no guarantee that the Reis burglary was going to be tried, rather than resolved in a guilty plea. Fifth, the court could always exercise discretion under ER 404(b) or ER 403 to exclude the evidence if it believed presentation of the evidence was unfair.

The mere possibility that evidence of a prior conviction could be used against a defendant at a future trial is not actual prejudice. State v. Rohrich, 110 Wn. App. 832, 836-38, 43 P.3d 32, 33-34 (2002) (overruled on other grounds). In Rohrich, a defendant was charged with two counts of child molestation eight months after reaching a plea bargain arrangement on separate molestation charges. Id. The trial court dismissed, finding that the defendant's right to a fair trial was prejudiced because his prior molestation conviction from the plea bargain could be used against him at trial. Id. at 838. The Court of Appeals reversed, finding that prejudice from the "mere possibility" that a conviction could be used against the defendant was questionable. Id. Presumptively inadmissible, such evidence would likely fail the requisite balancing test once applied; thus, dismissal of the new molestation charges was an inappropriate remedy. Id. The Washington Supreme Court approved of that analysis, finding that "the trial court...abused its discretion when it concluded that the delayed filing prejudiced [defendant's] right to a fair trial." Rohrich, 149 Wn.2d at 656. Although the Rohrich court's finding was specific to ER 609, a similar analysis applies to ER 404(b). A finding of prejudice 1) assumes that the defendant would actually go to trial, and

2) presupposes the prior conviction would actually be admissible at that trial.

Just as the trial court erred in Rohrich, the court erred in this case, too. The ability of a prosecutor to seek admission of a prior conviction at a future trial under ER 404(b) is not actual prejudice. The possibility that evidence might be admissible and might be used at trial is purely speculative prejudice, and is not sufficient for the extraordinary remedy of dismissal.

b. D.R. Could Not Have Obtained A Deferred Disposition On Two Separate Cases.

D.R. asserted prejudice warranting dismissal under LJuCR 7.14(b) and CrR 8.3(b) from the lack of ability to join the two burglary cases and seek a deferred disposition on both. But, D.R. could not have received two deferred dispositions under applicable statutory and case law. Furthermore, inability to seek a second deferral did not affect D.R.'s right to a fair trial.

A juvenile court has discretion to defer disposition of a conviction. RCW 13.40.127. By granting a deferral, the court may better meet the needs of a juvenile while promoting the rehabilitative and accountability goals of the Juvenile Justice Act.

State v. Watson, 146 Wn.2d 947, 952-53, 51 P.3d 66, 68 (2002).

To receive a deferred disposition, a defendant must plead guilty to the charged offense, stipulate to the facts contained in the written police report, acknowledge that disposition will be imposed if he or she fails to comply with the terms of supervision, and waive his or her right to a speedy trial and to call and confront witnesses. Id. at 953.

Not all juvenile offenders are eligible for a deferred disposition. Specifically, the statute authorizing deferred dispositions provides that:

- (1) A juvenile is eligible for deferred disposition unless he or she:
  - (a) Is charged with a sex or violent offense;
  - (b) Has a criminal history which includes any felony;
  - (c) Has a prior deferred disposition or deferred adjudication; or
  - (d) Has two or more adjudications.

RCW 13.40.127(1)(a-d).

In Watson, two offenses charged in separate informations under different cause numbers were brought before the juvenile court judge on the same date and at the same time. Watson, 146 Wn.2d at 956. The trial court granted deferred dispositions on both charges, and the Court of Appeals reversed that decision. State v.

Watson, 107 Wn. App. 540, 27 P.3d 249 (2001), aff'd by 146 Wn.2d 947, 51 P.3d 66 (2002). Affirming the Court of Appeals, the Washington Supreme Court held that, under the plain language of the statute, a trial court has the authority to grant a defendant only one deferred disposition. Watson, 146 Wn.2d at 958. Thus, even though the cases were before the court at the same time, the defendant became ineligible for a second deferral immediately after the judge signed the order on the first case. Id.

In this case, like Watson, D.R. was charged with the Reis home burglary in a separate information and under a separate cause number than the Goree home burglary. There was no requirement that the charges be brought in the same information or proceeding. Although it would have been convenient for D.R. to have both cases in front of the juvenile court judge at one time, granting a deferred disposition on one burglary charge precluded D.R. from seeking a deferred disposition on the other burglary. Just as in Watson, as soon as the judge signed D.R.'s first disposition order, D.R. immediately became ineligible for any other deferred disposition.

Contrary to the trial court's reasoning, a different timeline for the investigation, referral, and filing of information for the Reis

burglary was of no consequence in this case. Because D.R. could not be granted two deferred dispositions on two separate charges, the filing of the Reis burglary charge at a later time did not result in prejudice. D.R. would have been eligible for deferred disposition on both cases only if both were charged in a single information, which was not possible because the Reis burglary investigation was not complete at the time the Goree burglary charges were filed. Additionally, it is speculative at best to conclude that a judge *would* have granted a deferred disposition knowing that two burglaries, not one, had been committed.

c. Mandatory Joinder Principles Were Inapplicable.

The court briefly considered mandatory joinder of offenses under CrR 4.3.1, but made no specific finding as to what effect, if any, the rule should have in the analysis. RP 8, 14-15. Although similar, the two burglary charges were not related offenses and were not subject to the consolidation rule; hence, there was no ground for dismissal under CrR 4.3.1.

A charge must be dismissed if the respondent has already been tried for a "related offense." CrR 4.3.1(b)(3). Two offenses

are related and subject to mandatory joinder, "if they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1). The "same conduct," for the purposes of this rule means, "conduct involving a single criminal incident or episode." State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997). Offenses involving different victims, even under a common scheme or plan, do not involve a single criminal incident or episode, and are thus not based on the same conduct. Id. In Lee, a case involving rental property scams, the Washington Supreme Court held that when a defendant had previously been tried and convicted of theft, new theft charges were not precluded. Id. at 504-05. Even though the activity and methods used by the defendant were similar in each case, the charges involved separate victims. Id. Thus, the charges were not required to be joined under CrR 4.3.1(b), and dismissal was reversible error. Id. See also State v. Mitchell, 30 Wn. App. 49, 54-55, 631 P.2d 1043 (1981) (six burglaries during a one-week period were not "related" to a seventh burglary occurring on the same day as one of the six because each were not based on the "same conduct").

In this case, the Reis and Goree burglaries occurred on the same day, but over two hours apart, at different locations, and with

separate victims. "Merely because some of the allegedly criminal activity was the same is not enough to conclude all the offenses are based on the same conduct." Lee, 132 Wn.2d at 505. The fact that different victims were involved in the two separate burglary charges means the incidents were not the "same conduct." Thus, joinder was not mandatory under CrR 4.3.1(b).

Furthermore, even if the charges were related, CrR 4.3.1(b)(3) allows for dismissal only if a trial has occurred on the first charge. In D.R.'s case, however, a trial never occurred. Rather, CrR 4.3.1(b)(4) governs the issue in this case, which expressly allows for trial on a second related charge if the first charge resulted in a plea. "Entry of a plea of guilty to one offense does not bar the subsequent prosecution of a related offense unless the plea of guilty was entered on the basis of a plea agreement in which the prosecuting attorney agreed to seek or not to oppose dismissal of other related charges..." CrR 4.3.1(b)(4). While a deferred disposition in a juvenile case presents a slightly different scenario than a standard guilty plea, the situations are analogous. Even if the two charges were related, mandatory joinder principles would not apply under these circumstances. The

court erred to the extent that it relied on these principles in its reasoning.

In sum, the trial court's prejudice finding was speculative and had nothing to do with D.R.'s ability to obtain a fair trial under CrR 8.3(b), nor did the court analyze the two factors under LJuCR 7.14(b) before dismissing the case. The trial court's prejudice finding was an abuse of discretion.

E. CONCLUSION

For the foregoing reasons, the State requests that the charge against D.R. be reinstated.

DATED this 16<sup>th</sup> day of July, 2010.

Respectfully submitted,

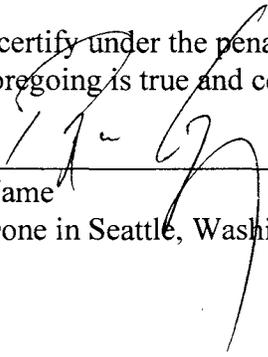
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Appellant in STATE V. DANICO ROBINSON, Cause No. 64957-4-I in the Court of Appeals of the State of Washington, Division I.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Name

Done in Seattle, Washington

07-16-10  
Date

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