Kittitas County Prosecuting Attorney

GREGORY L. ZEMPEL

Our Mission:
Seeking Justice; Serving Victims, and Holding Offenders Accountable

205 W 5th AVE Suite 213
Ellensburg WA 98926
509-962-7520
prosecutor@co.kittitas.wa.us

April 5, 2024

Clerk of the Washington Supreme Court
P. O. Box 40929
Olympia WA 98504-0929

Madam Clerk:

This letter is in response to certain proposed rule changes as listed below, and is the official response of the Kittitas County Prosecuting Attorney.

Release of the Accused CrR 3.2

The proposed amendment to CrR/CrRLJ 3.2 (although these two sets of rules do sometimes vary, they will be treated as one for this purpose) is ill-advised. The purpose of setting bail in criminal cases has two major purposes. One is to ensure that the defendant appears as ordered for scheduled proceedings. The amount of bail is usually set after argument to a trial judge, who is presumed to consider the history of the accused, the nature of the offense with regard to incentives to flee or otherwise fail to appear, and the resources of the accused. There are nine factors listed in the current version of CrR 3.2(c). In addition, CrR3.2(d) addresses the consideration of risk to the community, including the criminal justice process. Judicial officers should be presumed to give proper consideration and weight to these factors when crafting pre-trial release orders. While there is a cost to defendants for obtaining release if the Court finds some bail to be necessary, that is a realistic market analysis by those engaged in the bail bond industry as to their own risk. There is also a very real cost to members of society, and many of the

victims are at least as disadvantaged as the accused. It is increasingly difficult to have any real chance of restitution, which is only a financial matter. The emotional impact on victims from being victimized is substantial, and part of the goal of the criminal justice system is attempting to prevent criminal predation. These impacts are glaringly obvious to those who work with the vulnerable victim population, most of whom do not have the resources to engage in conduct that discourages criminal actors.

Summary Input/Recommendation: The proponents of the amendment refer to the presumption of innocence. The presumption is actually a procedural protection at trial, but for the purposes of pre-trial release is not the only issue. The Court must consider the facts alleged in determining if there is probable cause for the charge(s). The risk presented by making release more easily attained has been demonstrated by repeated recidivist offender behavior in this State and others, to the extent that this Court can and should take judicial notice of the level of risk to society. This Court should continue to allow trial judges to make the appropriate decisions when balancing the rights of the defendant and the right of community members to be safe from criminals who damage their interests in personal and property security.

CrR/CrRLJ 3.3

These rules are not listed in the same location as the other proposals, but I have been informed that amendments are being considered. If a defendant fails to appear for any court appearance, time-for-trial should not restart until the defendant appears in person. Only in the most unusual circumstances should a trial court accept a remote appearance from a defendant who has already failed to appear. To restart time-for-trial before a defendant appears generates more work for the prosecutor's office and witnesses without any promise by the defendant that they will appear for the next trial or hearing date. It also detracts from the authority of the trial court if an order is not treated seriously.

CrR/CrRLJ 4.7

With regard to CrR/CrRLJ 4.7, this proposal is an answer in search of a problem; the actual problems are with the performance and conduct of (some) defense counsel. This office and others have experienced defense counsel blatantly violating the existing rule by refusing to make the needed redactions, and judicial

officers not holding them accountable for the misconduct. Trial judges have contributed to the problem by tolerating the misconduct of defense counsel. Local rules would be ill-advised as it would result in inconsistencies across counties, often to the detriment of victims. Making it even easier for defendants and their counsel to abuse victims for being victims is not a reasoned act. Personal information must be redacted to protect victims from direct witness tampering/intimidation and other misdeeds; victims do not give up their personal security and privacy interests because they sought assistance from criminal justice agencies. The same concerns apply to other witnesses, many of whom are unwilling to testify for similar reasons.

Summary Input/Recommendation: Defendants are not prejudiced by prosecutor conduct with regard to redactions; defense counsel can always discuss the facts and law with their client based on the discovery they have been provided. A claimed lack of necessary support funding for public defense counsel is not a reason to change the rule from what it is today. The best answer is a uniform rule that sets a standard for redactions to be applied before disseminating discovery.

CrR/CrRLJ 8.3

Arguably the worst proposal presented is that regarding CrR/CrRLJ 8.3. At the very least, it turns the Constitutional separation of powers on its head. The people elect prosecutors and judges to separate offices for good reason. The Prosecuting Attorney is the person elected to vindicate the interests of the people in making criminal activity an unappealing concept. They also have to consider the allocation of their limited resources; as a general rule, trials are only a possibility in 5 percent of caseloads, and under odd circumstances this might go to 10 percent. The fact that defense attorneys do not agree with charging decisions made possible by legislative enactments, or a prosecutor's decision as to the outcome to seek, does not make those decisions improper. This would be analogous to a sports referee (the judicial role) being allowed to determine what plays a coach (the prosecutor role) views as advantageous, without regard to the rules committee or some similar body of that sport and its pronouncements (the legislative role).

The proponents of this amendment cite to an Iowa case, *State v. Brumage*, 435 N.W.2d 337 (1989). The page citation given is not accurate (330, when the opinion

does not start until 337), and that is the mildest criticism one may put forth. The case simply does not stand for the position asserted and is rife with procedural flaws based on what reasonably appears to be a judicial abuse of potentially legitimate authority. First, there was a lack of notice to the State, which is simply unacceptable for any motion. The Iowa Supreme Court called this an abuse of discretion, which is a challenging standard. "In summary, we hold that the trial court abused its discretion by dismissing the charges 'in the furtherance of justice' based on the lack of evidence before the State had an opportunity to present its case at trial." *Brumage*, at 342.

In Washington, a motion under CrR 8.3(c), often incorrectly referred to as a "*Knapstad*" motion based on the leading case, is analogous to a summary judgment motion based on insufficiency of the provable facts. For good reason, these rarely succeed, and prosecutors have many incentives to not file cases that will fall to such a motion.

The Iowa Supreme Court also relied on other out-of-state law. In the California case cited, the Court noted that the language of the similarly-worded statute required consideration of both the rights of the defendant **and** the interests of society in considering a possible dismissal in the interests of justice. Likewise, in a New York case, the Appellate Court[1] found that the trial judge had failed to properly balance the interests of the defendant and the State.

Similar to California, New York interpreted its statute to require a court to attain a sensitive balance between the individual and the State. *People v. Insignares,* 109 A.D.2d 221, 231, 491 N.Y.S.2d 166, 173 (1985). The court warned that the trial court's discretion to dismiss in the interest of justice, should be "exercised sparingly" and only in that "rare" and "unusual" case where it "cries out for fundamental justice beyond the confines of conventional consideration." *Id.* at 234, 491 N.Y.S.2d at 175 (citation omitted). *Brumage*, at 340. The Iowa Supreme Court concluded that California and New York had a better reasoned rule and adopted it. "We hold that our trial court should dismiss only after considering the substantive rights of the defendant and the interests of the state." *Id*, at 341. In addition, "... we would also note that a court has broader discretion to dismiss a case in the

[1] New York trial courts of general jurisdiction are called "Supreme Court", analogous to our Superior Courts. The first level of appeal is the Appellate Division of the Supreme Court, and their top court is the "Court of Appeals."

furtherance of justice after the verdict than during the trial. After the verdict, the judge has heard the prosecution's evidence, whereas before trial, there is always a possibility that without a dismissal, more evidence may be received." *Id.*

Summary Input/Recommendation: Prosecutors are in the best position to make decisions about charging, opportunities for negotiated pleas, and consideration of the outcome of efforts to hold offenders accountable.

The proponents of this last proposed amendment have utterly failed in providing even modest authority in support of the position asserted. This is essentially true of all these proposals. They reflect a belief system but fail to provide any logical support for that position. Instead, they wish to continue the damage to interests of society as a whole, and victims in particular. This Court should summarily reject these proposals. They are devoid of merit or any intellectual foundation.

Respectfully submitted,

Gregory L. Zempel
Prosecuting Attorney

furtherance of justice after the verdict than during the trial. After the verdict, the judge has heard the prosecution's evidence, whereas before trial, there is always a possibility that without a dismissal, more evidence may be received." *Id.*

Summary Input/Recommendation: Prosecutors are in the best position to make decisions about charging, opportunities for negotiated pleas, and consideration of the outcome of efforts to hold offenders accountable.

The proponents of this last proposed amendment have utterly failed in providing even modest authority in support of the position asserted. This is essentially true of all these proposals. They reflect a belief system but fail to provide any logical support for that position. Instead, they wish to continue the damage to interests of society as a whole, and victims in particular. This Court should summarily reject these proposals. They are devoid of merit or any intellectual foundation.

Respectfully submitted,

Gregory L. Zempel
Prosecuting Attorney

Kittitas County Prosecuting Attorney
205 W. 5th, Suite 213
Ellensburg, WA 98926

SEATTLE WA 980
7 MAY 2024 PM 7L

quadient
FIRST-CLASS MAIL
IMI
$000.88 0
05/06/2024 ZIP 98926
043M31222296

US POSTAGE

Clerk of the Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

98504-0929