IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. JOSHUA MICHAEL WILSON, Respondent.	No. 40279-3-II UNPUBLISHED OPINION

Van Deren, J. — The State seeks review of the trial court's order dismissing assault and harassment charges against Joshua Michael Wilson with prejudice after the State was unable to locate the alleged victim/witness and make her available to the defense for a pretrial interview. Because we hold that the trial court abused its discretion in dismissing the charges with prejudice under the facts of this case, we reverse and remand for further proceedings.

FACTS

On November 10, 2009, the State charged Wilson with second degree assault and felony harassment, alleging that Wilson had assaulted and strangled Catherine Hall. Wilson planned to present a consent defense, arguing that his actions were part of a consensual sex act. On November 20, Wilson pleaded not guilty to the assault and harassment charges. The trial court set trial for January 11, 2010, noting that Wilson's speedy trial period ended on January 19, and

issued a discovery and scheduling order that directed the State to provide contact information and statements from its witnesses and to provide other documentary evidence by December 4, 2009. The order also set a status conference for December 18, at which time the parties were to certify that they had complied with the November 20 discovery order.

In addition to the assault and harassment charges under cause number 09-1-00490-0, Wilson had bail jumping charges pending under cause number 09-1-00135-8. At the December 18 status hearing for both cases, Wilson noted that the parties had reached a plea agreement in the bail jumping case: Wilson would plead guilty to one count of bail jumping, additional charges would be dismissed, and sentencing would be postponed until after the assault and harassment charges had been resolved.

At the status hearing, Wilson asked that the State help set up a pretrial interview with Hall, who had been difficult to locate. Wilson noted that additional preparation was needed before the January 11, 2010, trial but that he did not wish to waive his right to a speedy trial. The State "made a notation in the file to follow up with [the] victim." Report of Proceedings (RP) (Dec. 18, 2009) at 5.

On December 29, Wilson entered a guilty plea in the bail jumping case. At that time, Wilson told the trial court that, despite his counsel's contrary advice, he wished to proceed to trial on January 11 on the assault and harassment charges. Wilson indicated that the State had not provided photographs of Hall's injuries or her medical records, nor had it arranged an interview with her.

The State asserted that it was trying to locate Hall. The State indicated that the police had forwarded a compact disk containing the photographs and the parties would receive it shortly.

But the State needed Hall's consent to get the medical records. The trial court noted that the trial date was less than two weeks away and stated, "[W]hat I don't want to do is to have this come down to the last second where either we're going to get a material witness warrant or the victim is unavailable." RP (Dec. 29, 2009) at 9. Another status hearing was set for January 5, 2010, to assess, in the State's words, "whether [they we]re going to be able to proceed or not." RP (Dec. 29, 2009) at 10.

At the third status hearing on January 5, 2010, Wilson moved to dismiss because the State still had not located Hall and trial was set for January 11. The State revealed that it was still unable to reach Hall and that she had likely left the county. The State then indicated that it would ask for a material witness warrant so law enforcement could attempt to find Hall, if necessary, but moved to dismiss the charges without prejudice. Wilson argued that the trial court should dismiss the charges with prejudice. Wilson noted that he was expecting a twelve month plus one day sentence in the bail jumping case, that he would be prejudiced in preparing a defense from prison, and that the parties had agreed to delay sentencing on the bail jumping charge until resolution of the assault and harassment charges.

The trial court dismissed the assault and harassment charges with prejudice. When the State commented that it had tried to find Hall, the trial court responded, "I understand that, . . . [t]he fault is on the victim who has made herself deliberately unavailable."[1] RP (Jan. 5, 2010) at 7. The trial court entered a handwritten order stating, "Upon [Wilson]'s motion, the State being unprepared for trial, it is hereby ordered that this matter is dismissed with prejudice. [The] State is unable to locate [the] complaining witness after good faith effort to do so." Clerk's Papers

[1] We disagree with the trial court's decision that the victim of the alleged domestic violence is in any way to be faulted for the dismissal of the charges in this matter.

(CP) at 6. The State appeals.

ANALYSIS

The State argues that the trial court abused its discretion when it dismissed the assault and harassment charges with prejudice because there was (1) no evidence of governmental misconduct, (2) no showing of prejudice to defendant's right to a fair trial, and (3) no consideration of intermediate and less drastic remedial steps. We agree with the State that the trial court abused its discretion, vacate the order dismissing the case with prejudice, and remand for further proceedings.

I. CrR 8.3

CrR 8.3 governs dismissal of criminal actions for governmental misconduct. CrR 8.3(b) states, "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." "The purpose of the rule is to see that one charged with a crime is fairly treated." *State v. Whitney*, 96 Wn.2d 578, 580, 637 P.2d 956 (1981). Nevertheless, "'dismissal of charges is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial.'" *State v. Blackwell*, 120 Wn.2d 822, 830-31, 845 P.2d 1017 (1993) (internal quotation marks omitted) (quoting *Spokane v. Kruger*, 116 Wn.2d 135, 144, 803 P.2d 305 (1991)).

A. Standard of Review

We review a trial court's dismissal of charges under the manifest abuse of discretion standard. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). "'Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or

for untenable reasons.'" *Michielli*, 132 Wn.2d at 240 (quoting *Blackwell*, 120 Wn.2d at 830).

B. Governmental Misconduct

"To support CrR 8.3(b) dismissal, a defendant must show both 'arbitrary action or governmental misconduct' and 'prejudice affecting [his or her] right to a fair trial.'" *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (alteration in original) (quoting *Michielli*, 132 Wn.2d at 239). "Governmental misconduct 'need not be of an evil or dishonest nature; simple mismanagement is sufficient.'" *Wilson*, 149 Wn.2d at 9 (emphasis omitted in original) (internal quotation marks omitted) (quoting *Michielli*, 132 Wn.2d at 239). "[D]ismissal is an extraordinary remedy to which the court should resort only in 'truly egregious cases of mismanagement or misconduct.'" *Wilson*, 149 Wn.2d at 9 (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)).

For instance, in *State v. Sulgrove*, 19 Wn. App. 860, 862, 578 P.2d 74 (1978), the trial court found that the State's conduct in charging the wrong crime, amending the information to correct it the day before trial after defense counsel moved for dismissal, and failing to produce necessary evidence to support the correct charge on the day of trial was sufficiently careless to constitute misconduct and grounds for dismissal in the furtherance of justice. Similarly, in *State v. Stephans*, 47 Wn. App. 600, 604-05, 736 P.2d 302 (1987), the court found governmental misconduct when witnesses disobeyed a court order following the State's incorrect advice, there was no indication that the State was ready for trial, and no remedy would have served the interest of justice short of dismissal.

And, in *State v. Sherman*, 59 Wn. App. 763, 768, 801 P.2d 274 (1990), Division One of this court held that the State had agreed to undertake production of a witness's Internal Revenue

Service (IRS) records, as reflected on an omnibus order, but the State failed to produce the records by the court imposed deadline, even though the State was given several weeks to comply. The records were not in the State's possession but they were available to the State's chief witness, who could not find them in his files. *Sherman*, 59 Wn. App. at 769. The State did not follow up to ensure that the records would be available in time for trial. *Sherman*, 59 Wn. App. at 769. The *Sherman* court determined that the State's actions amounted to mismanagement, holding that the failure to produce the IRS records was in itself a sufficient ground to affirm the dismissal. 59 Wn. App. at 772.

Here, relying on our Supreme Court's decision in *Wilson*, the State argues that it "made every effort to facilitate the witness interview" and, thus, it did not commit misconduct in this case. Br. of Appellant at 10. *Wilson* was a consolidated case (*State v. Wilson* (72104-1) and *State v. Taylor* (72780-5)) in which the State alleged that "the trial court in each case abused its discretion when it found that the prosecutor committed misconduct by failing to produce the witness for pretrial interview." 149 Wn.2d at 8. In *Wilson*, a robbery case, the defense moved for dismissal because the witness, a high school student, would not cooperate and the boy's mother refused access to her son. 149 Wn.2d at 4. The trial court denied the motion but set an interview deadline in two business days. *Wilson*, 149 Wn.2d at 4-5, 11. The State attempted to contact the witness, assigned a detective to contact the witness's family, and ultimately managed to track down the witness and arrange either a last minute interview at the witness's home or by telephone, options which Wilson rejected. *Wilson*, 149 Wn.2d at 5-6.

In *Taylor*, a theft prosecution, the State called numerous times and left messages for the

witness, who was a busy student. *Wilson*, 149 Wn.2d at 6-8. The student returned the State's telephone calls, leaving messages, and returned two telephone calls from the defense investigator, who did not respond. *Wilson*, 149 Wn.2d at 6-8, 11. On the last day of the speedy trial period, the witness was took a school exam in the morning but went to the State's office that afternoon for an interview; however, the trial court had dismissed the case earlier the same afternoon. *Wilson*, 149 Wn.2d at 8. The Court of Appeals reversed the trial court's dismissals with prejudice. *Wilson*, 149 Wn.2d at 6, 8.

Our Supreme Court agreed with the Court of Appeals and held that there was no misconduct in *Wilson* or *Taylor* because the State "took reasonable steps to comply with the court order." *Wilson*, 149 Wn.2d at 10-11. In each case, the State had some contact with the witness but the interview did not occur due to the parties' busy schedules and the short time frame available to arrange the interviews. *Wilson*, 149 Wn.2d at 11-12.

Here, although the record is slender, it is clear that the State faced similar, but greater, hurdles to producing the victim/witness. Even after repeated telephone calls and messages to family members, the State was unable to speak with or communicate with the witness to try to secure an interview or permission to release her medical records. In fact, the evidence shows that the prosecutor was never able to locate the witness: 1) the State made a notation in its file to "follow up with our victim" in response to Wilson's written request for the State's assistance in arranging a witness interview, RP (Dec. 29, 2009) at 8-9; 2) the State told the trial court that it had been in touch with the witness's family and its witness coordinator was still trying to locate the witness; and, 3) at the third status conference, the State was still trying to find the witness by

leaving messages with her family members but the latest information was that the witness "[wa]s not even in the county." RP (Jan. 5, 2010) at 5-6.

The State's telephone calls to the witness's family members over more than six weeks yielded no results. Indeed, the trial court found that the "State [wa]s unable to locate [the] complaining witness after [a] good faith effort to do so." CP at 6. Under these facts, the State's attempts to contact the victim, who may have left the county, and its request for dismissal without prejudice were reasonable.

We hold that the trial court abused its discretion in dismissing the charges with prejudice because the prosecutor's actions under the circumstances were reasonable and did not amount to mismanagement.

C. Prejudice

The State also contends that the defendant did not show and the judge did not find any prejudice affecting the defendant's right to a fair trial. CrR 8.3(b) requires that a defendant show prejudice affecting his right to a fair trial. *Michielli*, 132 Wn.2d at 240. "Such prejudice includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'" *Michielli*, 132 Wn.2d at 240 (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

In *Wilson*, our Supreme Court did not reach the prejudice prong of the CrR 8.3(b) inquiry

because it found the State's actions were not misconduct.[2] *Wilson*, 149 Wn.2d at 12; *see also Michielli*, 132 Wn.2d at 240, 245; *Sherman*, 59 Wn. App. at 771 n.3. Similarly, we do not reach the issue of prejudice and hold that the State did not mismanage the case under CrR 8.3(b). We also do not reach the State's argument that the trial court should have considered intermediate remedial steps before dismissing the case with prejudice.

We hold that the trial court abused its discretion in dismissing with prejudice the assault and harassment charges against Wilson. Thus, we vacate the dismissal and remand for further

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[2] We note that *Michielli* appears to incorporate *Price*'s "'new facts'" requirement into the CrR 8.3(b) prejudice analysis. *Michielli*, 132 Wn.2d at 245 (quoting *Price*, 94 Wn.2d at 814). Neither party here mentions this requirement. *Price* addressed the introduction of "new facts" resulting from the State filing a late amended information. *Price*, 94 Wn.2d at 814. The *Price* court explained:

> [I]f the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights. The defendant, however, must prove by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of these rights.

94 Wn.2d at 814. In *State v. Woods*, 143 Wn.2d 561, 582-83, 23 P.3d 1046 (2001), our Supreme Court rearticulated this requirement to address the State's late production of evidence (there deoxyribonucleic test evidence). Addressing the above quoted passage from *Price*, the *Woods* court held:

> Thus, before a trial court should exercise its discretion to dismiss a criminal prosecution, a defendant must prove that it is more probably true than not true, that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process which essentially compelled the defendant to choose between two distinct rights.

Woods, 143 Wn.2d at 583. Here, neither requirement as articulated in *Woods* is met.

proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.