

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

STATE OF WASHINGTON,

Plaintiff,

v.

ANTHONY EDWIN PAUL,

Defendant.

Co-Defendant:

HAZEN GRAHAM SHOPBELL, 18-1-00621-29

CASE NO. 18-1-00622-29

DEFENDANTS' JOINT MOTION TO
DISMISS PURSUANT TO CrR 8.3(b) AND
RENEWED MOTION TO DISMISS
PURSUANT TO CrR 8.3(c)

I. INTRODUCTION

Defendants Anthony Edwin Paul and Hazen Graham Shopbell, by and through their undersigned counsel, hereby moves this Court to dismiss Counts I, II, III, IV and V of the Amended Information pursuant to CrR 8.3(b) in the furtherance of justice, and renew their motions to dismiss these counts under CrR 8.3(c) and *State v. Knapstad*, 107 Wn.2d 346, 352–53, 729 P.2d 48 (1986), as the prosecution's evidence is insufficient as a matter of law to prove the elements of the charged offenses.

II. FACTS

Given the court's familiarity with this matter, its factual and procedural histories will not be repeated here. As will be explained herein, the motions to dismiss are based on the State's December 30, 2021 Bill of Particulars and its ongoing mismanagement of discovery.

1 **III. EVIDENCE RELIED UPON**

2 This Motion relies upon the December 31, 2021 Declaration of David H. Smith in Support
3 of Defendants’ Joint Motion to Dismiss Under CrR 8.3(b) and Renewed Motion to Dismiss
4 Pursuant to CrR 8.3(c), with the exhibits thereto.

5 **IV. ARGUMENT**

6 **A. Dismissal in the Furtherance of Justice is Required.**

7 CrR 8.3(b) authorizes a trial court to dismiss any criminal prosecution in the
8 furtherance of justice. The rule provides:

9 The court, in the furtherance of justice, after notice and
10 hearing, may dismiss any criminal prosecution due to
11 arbitrary action or governmental misconduct when there
12 has been prejudice to the rights of the accused which
13 materially affect the accused's right to a fair trial. The
14 court shall set forth its reasons in a written order.

15 The purpose of the rule is to ensure that defendants are fairly treated. *State v. Whitney*,
16 96 Wn.2d 578, 637 P.2d 956 (1981). Grounds supporting dismissal include constitutional
17 violations, failure to comply with discovery rules, arbitrary action or misconduct by the
18 prosecution. *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990). Government
19 misconduct, however, need not be of an evil or dishonest nature, simple mismanagement is
20 sufficient. *State v. Sulgrove*, 19 Wn. App. 860, 578 P.2d 74 (1978). These grounds for dismissal
21 exist in this case.

22 **B. The State’s Bill of Particulars Constitute Grounds for Dismissal Pursuant to CrR
23 8.3(b).**

24 To obtain a dismissal based on CrR 8.3(b), the defendant must show the following:
25 (1) arbitrary action or governmental misconduct; and (2) prejudice materially affecting the
26 defendant's right to a fair trial. *State v. Moore*, 121 Wn. App. 889, 894, 91 P.3d 136 (2004).
Violation of the State's discovery obligations can support a finding of governmental
misconduct. *State v. Brooks*, 149 Wash. App 373, 375, 203 P.3d 397 (2009). Because dismissal

1 under CrR 8.3(b) is discretionary it is subject to review for abuse of discretion only. *Id.*
2 Furthermore, the decision to dismiss a case in furtherance of justice involves "weighing justice
3 to society and fairness to the defendant and involves consideration of such factors as the
4 availability of evidence of guilt." *State v. Knapstad*, 41 Wn. App. 781, 788, 706 P.2d 238
5 (1985). Courts act in furtherance of justice when to do so would "protect accused persons from
6 arbitrary, albeit infrequent, actions of some prosecutors." *State v. Sonneland*, 80 Wn. 2d 343,
7 494 P.2d 469 (1972).

8 *I. The State's Bill of Particulars is Legally Insufficient and appears to be made in Bad faith.*

9 The State's Bill of Particulars is legally insufficient and appears to be made in bad faith.
10 It claims, for example, that Defendant "Anthony Paul instructed Torpey to buy these clams and
11 Anthony Paul instructed her to not document the purchases with fish receiving tickets."
12 Declaration of David H. Smith in Support of Defendants' Joint Motion to Dismiss Under CrR
13 8.3(b) and Renewed Motion to Dismiss Pursuant to CrR 8.3(c) (hereinafter "Smith Decl."), Ex.
14 A (p. 2).

15 At the time the Bill of Particulars was filed the prosecution possessed the transcript of
16 Ms. Torpey's (now Gregory) December 23, 2021 recorded defense interview in which she
17 specifically denied that Mr. Paul ever instructed her not to complete fish receiving tickets.
18 Smith Decl., Exs. C and H. It is the height of bad faith for the prosecution to ignore this
19 statement by its star witness and to instead make factual assertions that if now knows are
20 untrue.

21 Likewise, the State's bad faith is demonstrated by its failure to provide any facts that
22 would serve as the basis for Defendants' legal culpability for Ms. Torpey's actions under RCW
23 9A.08.020 and RCW 9A.08.030. *Id.* (p. 3). Accomplice liability attaches only when the
24 accomplice acts with knowledge of the specific crime that is charged, rather than with
25 knowledge of a different crime or generalized knowledge of criminal activity. *State v. Carter*,
26 154 Wn. 2d 71, 109 P.3d 823 (2005). Here, the Bill of Particulars fails to disclose any facts

1 supporting a claim that Ms. Torpey's conduct was a crime, let alone that the Defendants had
2 knowledge that her conduct was criminal. The Bill of Particulars is also silent as to how
3 Defendants allegedly solicited, commanded, encourages, requested or aided her in planning or
4 committing a specific crime.

5 The Defendants have constitutional rights to be informed of the nature and cause of the
6 accusations against them in order to prepare their defenses. *State v. Peerson*, 62 Wn. App. 755,
7 816 P.2d 43 (1991). Yet, on the eve of trial neither Defendant is aware of any facts that would
8 establish their criminal culpability for Ms. Torpey's actions. This is exactly the type of
9 situation a Bill of Particulars is intended to avoid. See, e.g. *State v. Noltie*, 116 Wn. 2d 831,
10 835, 809 P.2d 190 (1991). The inadequacy of the Bill of Particulars in clarifying the many
11 vague aspects of the Amended Information smacks of bad faith.

12 In addition, the Bill of Particulars ignores the legal reality that Tulalip Tribal laws,
13 regulations and customs control the activities at issue in this case. This Tribal sovereignty
14 cannot be dismissed by the State in its blind pursuit of convictions. The Tulalip Tribe has the
15 right to regulate the shellfish activities of its enrolled members and the State cannot pretend
16 Tribal sovereignty does not exist.

17 2. *Defendants Do Not Have to Prove Bad Faith, Simple Mismanagement is Sufficient.*

18 As the party seeking relief, Defendants bear the burden to show misconduct by a
19 preponderance of the evidence. See, e.g., *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638
20 (2003). However, he does not have to prove bad faith on the part of the prosecutor. See *State v.*
21 *Dailey*, 93 Wash.2d 454,457, 610 P.2d 357 (1980). As noted in *Dailey*, the "governmental
22 misconduct" need not be of an evil or dishonest nature; simple mismanagement is sufficient." *Id.*

23 3. *Defendants Have Met Their Burden by Demonstrating Actual Prejudice.*

24 Defendants have met their burden of demonstrating actual prejudice. See, e.g., *Michielli*, 132
25 Wash.2d at 240,937 P.2d 587; *Rohrich*, 149 Wash.2d at 649, 71 P.3d 638 (noting "dismissal
26 under CrR 8.3(b) requires a showing of not merely speculative prejudice but actual prejudice to the

1 defendant's right to a fair trial;" *City of Seattle v. Orwick*, 113 Wash.2d 823, 829, 784 P.2d 161
2 (1989) (" [A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the
3 indictment is plainly inappropriate." (quoting *United States v. Morrison*, 449 U.S. 361,365, 101
4 S.Ct. 665, 66 L.Ed.2d 564 (1981))). Importantly, late disclosure of material facts can support a
5 finding of actual prejudice. See, *State v. Price*, 94 Wash.2d 810,814,620 P.2d 994 (1980). In the
6 dismissal context, a defendant is prejudiced when, as here, delayed disclosure interjects "new
7 facts" shortly before litigation, forcing him to choose between his right to a speedy trial and to
8 be represented by an adequately prepared attorney. *Id.* Here, the material prejudice is that
9 Defendants agreed to proceed to trial with the understanding that the State's bill of Particulars
10 would clarify the many vague aspects of the Amended Information. That has not occurred and
11 they face the Hobson's Choice of proceeding to trial unprepared or having to again give up
12 their rights to a speedy trial. The interests of justice did not require them to make this choice.

13 V. CONCLUSION

14 For these reasons stated herein, Defendants respectfully request that the court dismiss all
15 counts in the Amended Information.

16
17 DATED this 31st day of December, 2021.

18 Respectfully submitted,

19 SUMMIT LAW GROUP, PLLC

20
21 By 
22 David H. Smith, WSBA #10721
davids@summitlaw.com

23 *Attorneys for Defendant Anthony Edwin Paul*

CERTIFICATE OF SERVICE

I, Patricia Shillington, certify under penalty of perjury under the laws of the State of Washington that, on December 31, 2021, I caused to be served on the person(s) listed below the foregoing Defendants’ Joint Motion to Dismiss under CrR 8.3(b) and Renewed Motion to Dismiss Pursuant to CrR 8.3(c).

Skagit County Prosecuting Attorney Attn: Rosemary Kaholokula 605 S. Third Mount Vernon, WA 98273 Email: rosemaryk@co.skagit.wa.us [] United States Mail, First Class [] By Legal Messenger [] By Facsimile [] By Federal Express [x] By Email

Gabriel S. Galanda Galanda Broadman P.O. Box 15146 Seattle, WA 98115 Email: gabe@galandabroadman.com [] United States Mail, First Class [] By Legal Messenger [] By Facsimile [] By Federal Express [x] By Email

DATED this 31st day of December, 2021.

s/Patricia Shillington Patricia Shillington

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