

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	No. 67348-3-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
B.M., d.o.b. 5/26/92,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 4, 2012
	)	

Ellington, J. — Juvenile appellant B.M. appeals his conviction for second degree robbery. He alleges he was prejudiced by the State’s unreasonable delay in bringing the charges against another juvenile charged in the same incident, that his attorney was ineffective in failing to renew a motion to dismiss after witness memories proved frail at trial, and that the delay violated due process. His arguments have no merit and we affirm.

BACKGROUND

Khamtanh Pholwapee’s purse was stolen from her on August 17, 2010. Witnesses at the scene led police to three juveniles. On August 20, 2011, the State charged B.M. in juvenile court with robbery in the second degree.

On February 11, 2011, the State charged A.H. in the same incident. The cases were consolidated. Trial was set for April 25, 2011.

On April 22, A.H. moved to dismiss under LJuCR 7.14(b) and CrR 8.3(b),<sup>1</sup>

arguing that the five-plus months between the incident and the filing of the information established a prime facie case of unreasonable delay and that he was prejudiced thereby. B.M. orally joined in A.H.'s motion, arguing that in the months since the incident, the memories of the witnesses had "faded."<sup>2</sup>

The court agreed there was "a prima facie case of unreasonable delay" as to A.H., but found insufficient prejudice to justify dismissal.<sup>3</sup> The court reasoned that issues regarding the sufficiency of the evidence would go to whether the State established proof beyond a reasonable doubt.

Trial was held and the witnesses testified. Counsel for B.M. did not renew the motion to dismiss. The court found B.M. guilty as charged.<sup>4</sup>

#### DISCUSSION

B.M.'s chief contention is that the witnesses' memories were shown at trial to have faded during the eight months between the incident and trial, and defense counsel's failure to renew the motion to dismiss on this basis was therefore ineffective assistance. He also argues denial of the pretrial motion to dismiss violated his due process rights under the United States Constitution.

#### *Ineffective Assistance of Counsel*

To sustain a claim of ineffective assistance of counsel, an appellant must show that counsel's representation fell below an objective standard of reasonableness, and a

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<sup>1</sup> Despite the reference to CrR 8.3(b) in the motion, A.H. made no separate argument under that rule in his briefing.

<sup>2</sup> Report of Proceedings (RP) (Apr. 25, 2011) at 7.

<sup>3</sup> Id. at 8.

<sup>4</sup> The court found A.H. not guilty.

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.<sup>5</sup> We engage in a strong presumption that counsel's representation was effective.<sup>6</sup>

A.H.'s motion, in which B.M. joined, was based upon LJuCR 7.14(b), which provides:

To Dismiss for Delay in Referral of Offense. 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 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. Upon a prima facie showing of unreasonable delay the Court shall then determine whether or not dismissal or other appropriate sanction will be imposed. Among those factors otherwise considered the Court shall consider the following: (1) the length of the delay; (2) the reason for the delay; (3) the impact of the delay on the ability to defend against the charge; and (4) the seriousness of the alleged offense. Unreasonable delay shall constitute an affirmative defense which must be raised by motion not less than one week before trial. Such motion may be considered by affidavit.<sup>[7]</sup>

The rule plainly addresses only delay by law enforcement in referring a criminal case to the prosecutor. Although there was prima facie evidence of such delay in the charging of A.H.,<sup>8</sup> charges were filed against B.M. just three days after the robbery. There was never a basis for dismissal of the charges against B.M. under LJuCR 7.14(b). B.M. fails to establish ineffective assistance of counsel.

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<sup>5</sup> State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citations omitted).

<sup>6</sup> Id. at 335 (citations omitted).

<sup>7</sup> (Emphasis added.)

<sup>8</sup> Charges against A.H. were filed well after the two-week period, establishing prima facie evidence of delay under the rule

*Due Process*

B.M. next argues the court's denial of his motion to dismiss violated his due process rights under the United States Constitution.<sup>9</sup> B.M. did not make this argument below, but issues of constitutional magnitude may be addressed for the first time on appeal.<sup>10</sup> This argument also invokes CrR 8.3(b).<sup>11</sup>

B.M. contends the State's unreasonable delay in filing charges against A.H. resulted in unreasonable and prejudicial delay of his own case. He cites no authority, however, for the assertion of preaccusatorial delay analysis in favor of a defendant other than the one against whom charges were delayed.

We need not resolve whether such an analysis is appropriate, however, because B.M. can point to nothing in the record supporting his contention that the delay in filing charges against A.H. caused a delay in his own case. Rather, the record shows the numerous continuances in his B.M.'s case were granted either at his request or by agreement, and contains no reference to the charges against A.H.:

- (1) September 20, 2010: B.M. waived the time for case setting, which was continued to September 23, 2010 due to an emergency closure of the court;

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<sup>9</sup> Dismissal for delay in bringing criminal charges is rooted in due process. See United States v. Lavasco, 431 U.S. 783, 789, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977); State v. Calderon, 102 Wn.2d 348, 352, 684 P.2d 1293 (1984).

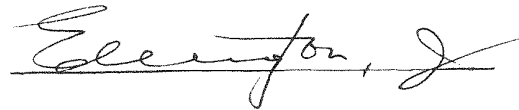
<sup>10</sup> RAP 2.5.

<sup>11</sup> See State v. Lidge, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989); State v. Oppelt, 172 Wn.2d 285, 296-98, 257 P.3d 653 (2011) (preaccusatorial delay analysis under CrR 8.3(b) is substantially the same as the due process balancing test ). CrR 8.3(b) provides: "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." B.M makes no separate argument under CrR 8.3 and we do not further address it.

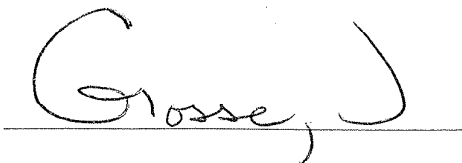
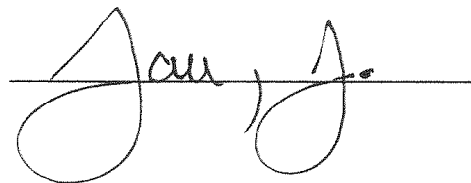
- (2) September 21, 2010: B.M. waived the time for case setting, which was continued to October 13, 2010;
- (3) October 13, 2010: B.M. again waived the time for case setting, which was continued to October 27, 2010. The State agreed to this as the last continuance;
- (4) October 27, 2010: B.M. again waived the time for trial and continued case setting to November 10, 2010. The State again agreed to this as the last continuance;
- (5) November 12, 2010: B.M. set the case for fact-finding on January 6, 2011;
- (6) December 14, 2010: The parties agreed to a continuance to February 3, 2011;
- (7) January 25, 2011: The State requested a continuance due to the unavailability of a witness. B.M. agreed to a new trial date of March 10, 2011;
- (8) March 2, 2011: B.M. requested a continuance because he was assigned a new defense attorney. Trial was set for April 19, 2011;
- (9) April 12, 2011: The parties agreed to a continuance to April 25, 2011.

B.M. fails to demonstrate any connection between his trial date and the delay in filing charges against A.H. Any due process argument necessarily fails.

Affirmed.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Grosse, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Jan, J.", written over a horizontal line.

