IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. D.W. (d.o.b. 09/13/93), Respondent.	)	No. 67752-7-I DIVISION ONE UNPUBLISHED OPINION FILED: September 24, 2012

Becker, J. — The State appeals the trial court's order dismissing all charges against DW under Local Juvenile Court Rule 7.14(b). The rule permits a trial court to dismiss charges against a juvenile defendant where the State's unreasonable delay in referring the matter to the prosecutor caused prejudice to the defendant. Evidence on the record did not provide the court adequate grounds to conclude that the delay caused prejudice to DW, and the type of prejudice the court found existed was not of a type contemplated by the rule. We reverse.

According to police statements and affidavits in the record, Robert Dyer was house-sitting at his father's Enumclaw home in late July 2010 while his father was away. Dyer went to the house on the morning of July 20, 2010. He

found the house in disarray and noticed several items were missing, including various electronics and two collectible World War I firearms. He found a package of edible sunflower seeds outside the house. Dyer called 911. Enumclaw Police Officer Tony Ryan responded.

After examining the house and speaking with Dyer, Officer Ryan asked a neighbor, Rachel Parker, if she had seen anything suspicious the night before. Parker said she had not, but told Officer Ryan that there had been a party in her house the night before for her housemate, 16-year-old Chris Waddell. Waddell agreed to speak to the officer and permitted him to search his room. Waddell denied any knowledge of a burglary. When Ryan asked Waddell what was contained in two plastic garbage bags in a closet, Waddell said they contained things leftover from when he moved in. Waddell's friends DW and AT were there while Ryan spoke to Waddell.

Several hours later, Waddell telephoned police to report that he had looked into the garbage bags in his closet and discovered items he suspected were stolen property. An officer confirmed the items matched those stolen from the Dyer residence. When Officer Ryan spoke to Waddell again the next day, Waddell reported that he had heard DW and AT talking about having stolen two shot glasses off of a neighbor's porch.

Officer Ryan went to AT's home to inquire further. AT immediately confessed to the burglary. Officer Ryan placed him under arrest. AT provided a full confession and a written statement.

AT's confession implicated DW, whom AT said had been eating and spitting out sunflower seeds as they broke into the house.

Officer Ryan then went to DW's home. DW initially denied any involvement in the burglary, but when Officer Ryan told him that he had left his sunflower seeds at the scene and that there was other evidence placing him there, DW confessed. DW was placed under arrest and informed of his Miranda[1] rights. DW provided a full confession and a written statement. He admitted to burglarizing the home along with AT and stealing two firearms.

DW and AT were booked into the juvenile detention center. DW was released the following day.

About two weeks later, on August 2, 2010, Enumclaw Police Detective Grant McCall sent the stolen items to the Washington State Patrol for fingerprint analysis. McCall was officially assigned to the case for follow-up investigation. In mid-September 2010, DW turned 17.

The state patrol took more than 5 months to complete the fingerprint analysis, which found no usable prints. In the interim, Detective McCall went on administrative leave. The report was returned to Enumclaw police on January 24, 2011, where it sat on McCall's desk for a further 3 months. After returning from leave, McCall referred the matter to the King County Prosecutor on April 22, 2011. On June 7, 2011—nearly 11 months after the burglary—the

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L .Ed. 2d 694 (1966).

prosecutor charged DW with residential burglary, unlawful possession of a firearm, and theft of a firearm.

DW was going to turn 18 on September 13, 2011. At arraignment on June 21, the court extended the juvenile court's jurisdiction over DW until April 1, 2012. Case-setting was initially set for July 7, 2011. DW obtained three consecutive continuances of case-setting. Case-setting then took place on September 9, 2011. The court set an omnibus hearing for October 13 and the fact-finding hearing for October 24, 2011.

On the day of case-setting, DW filed a motion for dismissal of all charges against him under Local Juvenile Court Rule 7.14(b). DW argued his defense had been prejudiced by the delay in referring his case because several witnesses to the events surrounding the burglary, including Robert Dyer, Rachel Parker, and Chris Waddell, were not contactable at their former telephone numbers, AT was now stating that he had no memory of the night in question, and homeowner Darren Dyer refused to speak to defense counsel. DW also argued that he had been "rehabilitated" in the intervening months and was planning to go back to school, so the purposes of the Juvenile Justice Act had already been served.

At the hearing on the motion, DW also argued that he had learned from his juvenile probation counselor that he was now facing a loss of access to juvenile services because he would be over 18 by the time of sentencing, if convicted. The court granted DW's

motion, dismissing all charges. The State now appeals.

In King County, a court may dismiss an information against a juvenile defendant "if it has been established that there has been an unreasonable delay in referral of the offense by the police to the prosecutor and respondent has been prejudiced." LJuCR 7.14(b). Dismissal is unwarranted unless the court makes a finding of actual prejudice resulting from the delay. State v. Chavez, 111 Wn.2d 548, 562, 761 P.2d 607 (1988). Prejudice under this rule is that which affects the "defendant's ability to defend against the charges" or which harms "the defendant's right to a fair trial." Chavez, 111 Wn.2d at 563. While a dismissal is reviewable only for a manifest abuse of discretion, dismissal of charges remains an extraordinary remedy that is appropriate only if the defendant's right to a fair trial has been prejudiced. Chavez, 111 Wn.2d at 562.

The State concedes there was an unreasonable delay between the completion of the police investigation in January 2011 and the referral to prosecutors in April 2011. Under the rule, even a two-week delay provides "prima facie evidence of an unreasonable delay." LJuCR 7.14(b).

The only issue before us, then, is whether the court abused its discretion in finding that DW was prejudiced by the referral delay. A court abuses its discretion if its decision "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).

The court's oral ruling mentions

two types of prejudice. First, DW lost access to "juvenile services" provided by the juvenile justice system because, if convicted, he would be 18 years old by the time of sentencing. Second, if DW was sentenced to incarceration, "it now would not be in the detention facility but it would be in the King County jail."

The finding that DW lost access to juvenile services was based on a remark by defense counsel at oral argument:

> Finally, there's prejudice in the case against [DW] because of the loss of the benefits of juvenile jurisdiction. Defense counsel spoke with [DW]'s juvenile probation counselor Michelle Higa and she stated that [DW]'s loss of juvenile status would affect the outcome of this case. He would receive fewer services and at greater cost.

This vague assertion is unsupported. Having obtained an extension of juvenile jurisdiction into April 2012, DW retained his legal classification as a juvenile offender. RCW 13.40.020(15). The court nevertheless adopted wholesale the defense's speculation that the delay in referral made it impossible for DW to access the unspecified juvenile services:

> I will put my reasoning completely on the fact that at this point, [DW] would no longer be able to utilize the, any benefit that the juvenile justice system would have for a person who commits a crime that would have been available, not just available but would have been available for a significant amount of time, if the case had been submitted to the prosecutor's office for a filing decision in a timely manner.

To warrant dismissal, prejudice must be proved by the defendant by a preponderance of the evidence. Rohrich, 149 Wn.2d at 653-54. A showing of speculative or slight prejudice is not enough. Rohrich, 149 Wn.2d at 657. The comment about "fewer services and at

greater cost" provided the court far too little to warrant dismissal.

Second, the court found that DW was prejudiced in that he would now face incarceration in the King County jail:

> And also too, the real prejudice in my mind, if there was any incarceration, it now would not be in the detention facility but it would be in the King County jail.

This finding, with its implicit suggestion that such incarceration would be measurably harsher than if DW were under 18, was also unsupported by evidence in the record. Again, DW remained a juvenile offender under the law. RCW 13.40.020(15). As such, he remained potentially eligible for confinement until age 21 in a juvenile correctional facility. See RCW 13.40.300(1)(a) (extending authority for confinement in a juvenile facility past age 18 where the offender obtains a court-ordered extension of juvenile jurisdiction, as occurred here). The risk of DW's confinement in an adult facility postconviction was purely speculative. A showing of speculative or slight prejudice is not enough to warrant dismissal. Rohrich, 149 Wn.2d at 657.

Not only were the court's findings of prejudice unsupported factually, they did not fall within the types of prejudice envisioned by LJuCR 7.14(b). The rule requires the court to consider "the impact of the delay on the ability to defend against the charge." LJuCR 7.14(b). Prejudice under the rule must be of a type that harms the "defendant's ability to defend against the charges" or his "right to a fair trial." Chavez, 111 Wn.2d at 563.

The record did not support a

finding that the referral delay prejudiced DW in his ability to defend against the charges. DW asked the court to find that he had been prejudiced in this regard because counsel had tried but failed to contact several potential witnesses, the homeowner victim refused to speak to her, and AT was claiming a lack of memory. A mere allegation that witnesses are unavailable or that memories have dimmed is insufficient to warrant dismissal; the defendant must specifically demonstrate the delay caused actual prejudice to his defense. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). In addition, the court considered this theory of prejudice a weak one since DW had made a full written confession to the crimes charged:

> I'm not that impressed, using the term loosely, with the significance of the unavailability of witnesses considering we have a confession and it would probably not be a very hard case to prove.

The court properly refused to find that the delay caused actual prejudice to DW in the form of the unavailability of witnesses.

Under Chavez, prejudice is that which harms a defendant's right to a fair trial. Chavez, 111 Wn.2d at 563. DW points out that fairness in sentencing is an element of a defendant's right to a fair trial. Blakely v. Washington, 542 U.S. 296, 310-14, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Therefore, he argues, the delay was prejudicial because he "lost access to juvenile justice benefits such as less-harsh juvenile sentencing options."

By virtue of being tried in juvenile court, a defendant avoids "the stigma of an adult criminal conviction" and receives

less harsh penalties. State v. Calderon, 102 Wn.2d 348, 352, 684 P.2d 1293 (1984). Thus, delay that results in a loss of juvenile jurisdiction may satisfy the prejudice prong. State v. Dixon, 114 Wn.2d 857, 861, 792 P.2d 137 (1990); State v. Alvin, 109 Wn.2d 602, 604, 746 P.2d 807 (1987). Alvin and Dixon are not controlling because DW was not facing a loss of juvenile court jurisdiction.

The order of dismissal is reversed.

Becker, J.

WE CONCUR:

Cox, J.