

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

R.M.S.,

Respondent.

No. 42255-7-II

UNPUBLISHED OPINION

Hunt, J. – The State of Washington appeals a juvenile court order granting RMS’s¹ CrR 8.3(b) motion to dismiss the State’s contempt of court charge with prejudice. The State argues that the juvenile court abused its discretion (1) in not finding that RMS had waived his right to a timely capacity hearing under JuCR 7.6(e) when he failed to object to the court’s setting an untimely capacity hearing date; (2) in finding that the State had mismanaged the case; (3) in finding that this mismanagement prejudiced RMS’s right to a fair trial; and (4) in failing to consider alternative remedies. Holding that the juvenile court did not abuse its discretion in dismissing the case for failure to hold a timely mandatory capacity hearing, we affirm.

¹ Under RAP 3.4, this court changes the title of the case to the juvenile’s initials and uses pseudonyms for the other juveniles to protect their privacy.

FACTS

On April 7, 2011, the State charged 11-year-old RMS with one count of contempt of court for “several unexcused [school] absences.” Clerk’s Papers (CP) at 1. RMS initially failed to appear at his April 15 arraignment hearing, and the trial court issued a bench warrant. When RMS appeared later that day, the court quashed the bench warrant and set a “continued” arraignment and omnibus hearing for May 3, 18 days later. CP at 6. The record of the April 15 hearing does not show that (1) the court conducted a mandatory JuCR 7.6(e) capacity determination hearing that day, (2) either the State or RMS asked the court to conduct or to set such a hearing within 14 days, (3) the State asked the court to extend the 14-day period within which such hearings must be conducted, (4) the court set such a hearing, or (5) the court advised RMS of his right to such a hearing because he was under the age of 12.

At the May 3 hearing, RMS entered a not guilty plea. A juvenile court administrator stated:

Your Honor, a trial date of June 9th, which is a juvenile offender docket day, and I know Counsel² has also talked about the possibility of setting a capacity hearing based on age at the time of the alleged offense and whether or not the Court would like to have that just prior to the trial on the same date.

Verbatim Report of Proceedings (VRP) (May 3, 2011) at 3. The juvenile court asked:

[D]o either Counsel see any reason why we can’t just have the [capacity] hearing prior to trial? I would imagine we’re talking—well, how long would you—who’s requesting the hearing, or is it mandatory at his age?

VRP (May 3, 2011) at 3-4. After the court administrator explained that the capacity hearing was

² The administrator did not identify to which “[c]ounsel” he was referring or whether he was referring to both counsel. Verbatim Report of Proceedings (VRP) (May 3, 2011) at 3.

mandatory because of RMS's age, the juvenile court agreed that it would address the capacity issue on the first day of trial, June 9. Neither party either objected to or affirmatively agreed to the court's decision to conduct the capacity hearing at that time. Nor did the juvenile court expressly advise RMS that he had the right to a capacity hearing within 14 days of his first court appearance, which had been on April 15.

On June 9, RMS moved to dismiss the contempt charge based on the State's failure to move for a capacity hearing within 14 days of RMS's first court appearance on April 15. Noting that it had been the administrator, not the State, who had raised the capacity issue at the May 3 omnibus hearing, RMS argued that under *State v. Golden*,³ the court lacked personal jurisdiction over RMS and, therefore, lacked authority to do anything other than to dismiss the case until the court had first determined the capacity issue.⁴

Opposing RMS's motion to dismiss, the State argued that (1) RMS had not shown that the State's failure to move for a timely capacity hearing was prejudicial, (2) RMS had not presented any authority establishing that dismissal was the proper remedy, and (3) the court could resolve the issue by simply holding the capacity hearing that day. RMS responded that there was no prejudice requirement and that dismissal was appropriate because RMS was presumed to lack capacity because of his age. The juvenile court first appeared to conclude that *Golden* did not

³ 112 Wn. App. 68, 77, 47 P.3d 587 (2002), *review denied*, 148 Wn.2d 1005 (2003) (holding that juvenile court lacked authority to adjudicate a criminal charge against a 10-year-old without first conducting a capacity hearing).

⁴ Although RMS referred to a "competency" hearing throughout this discussion, it appears that he was referring to the required capacity hearing. *See* VRP (June 9, 2011) at 5.

require dismissal; noting that capacity was a “status” issue, the court agreed with the State that RMS had not established any prejudice and stated it would consider the issue after some additional research. VRP (June 9, 2011) at 13.

When the administrator reminded the court that there had been a “discussion on the record” about the capacity hearing at the May 3 hearing, the court asked the parties to respond. VRP (June 9, 2011) at 13. RMS responded that there had been nothing to object to on May 3 because (1) the State (as opposed to the administrator) had not brought a motion related to the capacity issue, (2) he “didn’t have any objection to the Court hearing [the capacity issue] today [June 9]” but the hearing would still be untimely and RMS had not waived any untimeliness argument, and (3) even the May 3 hearing itself had been beyond the 14-day time period, which began at RMS’s April 15 first appearance. VRP (June 9, 2011) at 14. The State replied that RMS had waived any objection by failing to raise the issue when the court set the untimely capacity hearing for June 9, the day of trial.

After reviewing the juvenile court rules, *Golden*, and *State v. Gilman*, 105 Wn. App. 366, 19 P.3d 1116, *review denied*, 144 Wn.2d 1011 (2001), the court stated (1) it had determined it could dismiss the case if other lesser sanctions would not remedy any prejudice to RMS’s right to a fair trial; (2) at that point, the June 9 trial date was within the speedy trial window, at 54 days; and (3) it did not find any prejudice and that the next step was to hold the capacity hearing. RMS’s counsel responded that he was prejudiced because the lack of capacity hearing had “ma[de] it relatively impossible for [counsel] to present a defense on [RMS’s] behalf . . . until [the capacity] determination is made” and that counsel was not prepared to present a defense if the

case went to trial that day. VRP (June 9, 2011) at 22. The juvenile court “continu[ed] the trial date for cause” because defense counsel could not be prepared until the capacity issue was resolved and there was no possibility they could address the capacity issue and proceed to trial that day. VRP (June 9, 2011) at 22.

RMS then moved to dismiss for “prosecutorial misconduct and/or mismanagement of the case” under CrR 8.3(b). VRP (June 9, 2011) at 23. He asserted that similar oversight or mismanagement was a frequent occurrence, which often required the parties and the court to address, shortly before trial, matters that should have been addressed and resolved earlier. The State replied that dismissal was an extraordinary remedy, but that it was unable to “speak to some of the things that [RMS] was discussing” because it had not “been on this juvenile court docket for quite some time.” VRP (June 9, 2011) at 25.

Displeased with the State’s response, the court ruled that the State’s failure to pursue a timely capacity hearing was “mismanagement”⁵; and it asked RMS to address how this mismanagement had prejudiced his right to a fair trial. VRP (June 9, 2011) at 27. RMS responded that the State’s failure to address such matters timely, coupled with the court’s having only “one juvenile docket day per month,” was disruptive and adversely impacted his counsel’s “ability to represent [his] client effectively.” VRP (June 9, 2011) at 28. Defense counsel further explained that, because that the court would have to set RMS’s trial soon to comply with the speedy trial period, he would have to “juggle [his] schedule” and possibly neglect other clients’

⁵ Although the court cited JuCR 7.6, it appears that it meant to cite CrR 8.3(b), the rule under which RMS had brought its motion to dismiss and which specifically prescribes dismissal as a sanction for “governmental misconduct.”

matters. VRP (June 9, 2011) at 29. Stating it was ready to go to trial that day, the State argued that the impact on RMS's counsel's schedule was not sufficient to justify dismissal and that conducting the capacity hearing that day would not impair RMS's ability to prepare for trial because the capacity issue was unrelated to any evidence relevant to the charge against RMS.

The trial court granted RMS's CrR 8.3(b) motion and dismissed the case with prejudice under CrR 8.3(b) without entering written findings. The order stated only that the court had based its dismissal "upon the findings of the court as announced on the record." CP at 14. The State appeals.

ANALYSIS

The State argues that the juvenile court abused its discretion (1) in not finding that RMS had waived his right to a timely JuCR 7.6(e) capacity hearing when he failed to object to the untimely capacity hearing the court scheduled for June 9; (2) in finding that the State had mismanaged the case; (3) in finding that this mismanagement prejudiced RMS's right to a fair trial; and (4) in not considering alternative remedies. We first hold that RMS did not waive his right to a capacity hearing. We next hold that, under the circumstances of this case, the juvenile court did not abuse its discretion in dismissing the charge against RMS, rather than choosing some other alternative, assuming, without deciding, that alternatives were available.

I. Standard of Review

We review a trial court's CrR 8.3(b) decision for an abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable

reasons. *Michielli*, 132 Wn.2d at 240. 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.

CrR 8.3(b). Thus, to obtain the extraordinary remedy of dismissal under CrR 8.3(b), a defendant must demonstrate (1) arbitrary action or governmental misconduct and (2) actual prejudice affecting his right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 658, 71 P.3d 638 (2003), *Michielli*, 132 Wn.2d at 239-40. Simple mismanagement can be sufficient to establish governmental misconduct. *Michielli*, 132 Wn.2d at 239-40.

We consider dismissal of a case an extraordinary remedy of last resort; accordingly, the trial court's authority to dismiss under CrR 8.3(b) is limited to "truly egregious cases of mismanagement or misconduct by the prosecutor." *State v. Koerber*, 85 Wn. App. 1, 4-5, 931 P.2d 904 (1996) (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)). A trial court may also abuse its discretion where it ignores reasonable intermediate remedial steps. *Koerber*, 85 Wn. App. at 4; *see also State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003) (dismissal under CrR 8.3(b) is improper absent material prejudice to the rights of the accused). Such is not the case here.

II. No Waiver of Capacity Hearing

The State first argues that the juvenile court erred in not finding that RMS had waived the 14-day requirement when his counsel failed to object to the juvenile court's May 3 setting of the capacity hearing for June 9, past the 14-day limit for holding a capacity hearing. We disagree.

RCW 9A.04.050⁶ provides:

Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

(Emphasis added.) JuCR 7.6(e) provides:

When a determination of capacity is required pursuant to RCW 9A.04.050, a hearing to determine the juvenile's capacity shall be held within 14 days from the juvenile's first court appearance, separate from and prior to arraignment. Notice of the hearing to determine capacity and its purpose shall be given in accordance with rule 11.2.⁷

(Emphasis added.)

RCW 13.40.140(1) requires that “[a] juvenile shall be advised of his or her rights when appearing before the court.” RCW 13.40.140(9) provides:

Waiver of any right which a juvenile has under this chapter must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.

(Emphasis added.) An 11-year-old defendant has the right to a capacity determination within 14 days of his first court appearance. RCW 9A.04.050; JuCr 7.6(e). Nothing in the record shows

⁶ The legislature amended RCW 9A.04.050 in 2011, effective July 22, 2011, adding gender neutral language. It did not otherwise alter this statute. Laws of 2011, ch. 336, §347. Accordingly, we cite to the current version of the statute.

⁷ JuCR 11.2 provides:

(a) Applicability. This rule applies whenever another Juvenile Court Rule states that notice shall be given in accordance with this rule.

(b) Content of the Notice. The notice shall specify the time, place, and purpose of the proceeding.

(c) Method of Giving Notice. Notice may be given by any means reasonably certain of notifying the party, including, but not limited to, notice in open court, mail, personal service, telephone, and telegraph.

that RMS was advised of this right and expressly waived it at any time, let alone before the 14-day period expired.⁸

Furthermore, as Division Three of our court held in *Golden*:

In Washington, a determination of capacity is required to confer general jurisdiction to punish a 10-year-old for a crime. The State has criminal jurisdiction only over people who commit a crime in the state. RCW 9A.04.030(1). A child of 10 is presumptively incapable of committing a crime. RCW 9A.04.050. The presumption of incapacity may be overcome only by proof that is clear, cogent, and convincing. RCW 9A.04.050; *State v. Q.D.*, 102 Wn.2d 19, 25, 685 P.2d 557 (1984).

When a capacity or competency determination is required by the statute creating jurisdiction, the failure to comply does not deprive the court of jurisdiction over the subject matter or the person. [*Gilman*, 105 Wn. App. at 369]. But it *does* deprive the court of the authority to act. *People v. Superior Court*, 1 Cal.4th 56, 820 P.2d 613, 617, 2 Cal.Rptr.2d 389 (1991).

The juvenile court, therefore, had jurisdiction solely to conduct a capacity hearing. Until that was done, the court had no authority to do anything but dismiss the charge.

Golden, 112 Wn. App. at 77 (emphasis added).

Here, the record is clear that the juvenile court did not advise RMS of his right to a capacity hearing, RMS did not expressly waive his right to a capacity hearing within 14 days of his first appearance,⁹ and the juvenile court did not conduct a capacity hearing. Under *Golden*,

⁸ At best, the record shows that RMS's counsel did not object to the trial court's already belated May 3 setting of the capacity hearing for June 9—something that occurred without anyone explaining JuCR 7.6(e)'s requirements to RMS. The State, however, analogizes RMS's failure to object to the untimely capacity hearing to a failure to object to a speedy trial violation. But the State cites no authority establishing that a juvenile's right to a timely capacity hearing under JuCR 7.6(e) is analogous to an adult's speedy trial rights, particularly in light of RCW 13.40.140(9). Thus, we find this argument unpersuasive.

⁹ The State cites no law nor are we aware of any caselaw holding that a juvenile can impliedly waive his right to have a capacity hearing within 14 days of his first appearance, especially in the absence of express advice about this right.

unless and until the juvenile court conducted a capacity hearing, it had no authority to do anything in RMS's case other than to dismiss the charge.¹⁰ 112 Wn. App. at 77. The State's waiver argument fails.

III. Misconduct Finding

The State next argues that the juvenile court erred in finding that the State's conduct amounted to prosecutorial mismanagement or governmental misconduct and in dismissing the case on that ground. It contends that the "mismanagement" here "stems primarily from the action of the *court*" in setting the capacity hearing beyond the 14-day limit. Br. of Appellant at 11-12 (emphasis added). But the State ignores that it failed to move for a timely capacity hearing or to move to extend time within the 14-day time limit, which had expired *before* the May 3 hearing. The record shows that RMS's first appearance, separate from and before his arraignment (as JuCR 7.6(e) requires), was on April 15; accordingly, the 14-day period expired on April 29.

The law is clear that juveniles under 12 are presumed to lack the capacity to commit crimes¹¹ and that the State has the burden of overcoming this presumption. *State v. T.E.H.*, 91 Wn. App. 908, 913, 960 P.2d 441 (1998). If the State needs additional time to overcome this presumption, it must request an enlargement of this 14-day period. *See State v. B.P.M.*, 97 Wn. App. 294, 299-300, 982 P.2d 1208 (1999); CR 6(b)(1).¹² If it makes this request before the time

¹⁰ We acknowledge that *Golden* involved a collateral attack on the juvenile court's failure to conduct a capacity hearing, years after the juvenile had become an adult, and that *Golden* did not involve facts similar to those here where the juvenile court offered to conduct a capacity hearing at the beginning of trial, some 33 days *after* RMS's first appearance.

¹¹ RCW 9A.04.050.

¹² CR 6(b) applies to juvenile proceedings through JuCR 1.4(b) and CrR 8.1. *See B.P.M.*, 97 Wn.

period expires, it must establish good cause to enlarge. *See B.P.M.*, 97 Wn. App. at 299-300; CR 6(b)(1). If it makes this request after the time period expires, it must show excusable neglect. CR 6(b)(2). The State did neither. Accordingly, we hold that the juvenile court did not abuse its discretion in finding that the State's failure to pursue a timely capacity hearing was mismanagement under CrR 8.3(b).

IV. Prejudice Finding and Dismissal

Finally, the State argues that the juvenile court erred in finding that its failure to ensure a timely capacity hearing prejudiced RMS's right to a fair trial. The State contends that (1) RMS's counsel "failed to provide any evidence or even assert how having the capacity hearing on the same day as the trial would affect his ability to prepare for trial"¹³; (2) the court never asked counsel how a belated capacity hearing would have impacted defense counsel's ability to prepare for trial; (3) the prejudice required for dismissal must be more than delay—"the misconduct must interfere with the defendant's ability to present his case"¹⁴; and (4) the court failed to consider alternatives to dismissal. This argument also fails.

The juvenile court questioned RMS's counsel about how the delay would prejudice RMS. Counsel responded that he would not be prepared to go to trial that day if the mandatory capacity hearing were held first, that a delay would impair his ability to prepare RMS's case for trial

App. at 300.

¹³ Br. of Appellant at 14.

¹⁴ Br. of Appellant at 15-16 (quoting *City of Kent v. Sandhu*, 159 Wn. App. 836, 841, 247 P.3d 454 (2011)).

because of scheduling conflicts, and that he was unlikely to be ready for trial within the speedy trial period without adversely impacting his other clients. The State disputed this assertion, claiming that the capacity hearing should not prevent RMS's counsel from preparing a defense for trial. Nevertheless, we cannot say that the juvenile court abused its discretion in relying on RMS's counsel's representations about the prejudicial effect of a delay on his ability to provide effective representation at a timely trial.

Furthermore, although delay within the speedy trial period may not, on its own, justify dismissing the case,¹⁵ forcing a defendant to choose between his speedy trial rights and effective assistance of counsel can justify dismissal. *State v. Brooks*, 149 Wn. App. 373, 387, 203 P.3d 397 (2009); *Michielli*, 132 Wn.2d at 240. Here, the court noted that they were on the 54th day of a 60-day speedy trial period.¹⁶ It was not beyond the court's discretion to conclude that any additional delay would impair RMS's speedy trial rights, which would expire within mere days. We hold, therefore, that the State has failed to show that juvenile court abused its discretion in

¹⁵ *Sandhu*, 159 Wn. App. at 841.

¹⁶ *See* JuCR 7.8(b)(2)(i).

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granting RMS's motion to dismiss. We affirm.

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.

Hunt, J.

We concur:

Armstrong, P.J.

Penoyar, J.