

## A Request Unheeded

By: Wayne C. Fricke, Jan 2005

Recently, we were successful in having a first degree arson case dismissed for failure to prosecute after a five-year delay. Our client was arrested at the scene of a fire that destroyed a hotel under construction, resulting in over a million dollars of damage. Several witnesses identified our client at the scene and heard him exclaiming, “Burn, baby, burn.”

At his initial appearance in court the prosecution indicated that it was not ready to charge and moved to exonerate bail. We requested the preservation of evidence so that an independent investigation of the circumstances of the fire, including taking photographs and analysis of the fire, as well as interviewing witnesses, could be accomplished. The prosecution did not respond and the hotel was leveled. Witness contact information was not provided. Sixty-two months later the case was charged.

In order to determine whether preaccusatorial delay violates due process, the Washington Supreme Court has developed the following three-step test: (1) the defendant must show prejudice resulting from the delay; (2) the court must consider the reasons for the delay; and (3) if the state can justify the delay, the court will engage in balancing the state’s interest against the prejudice to the accused. State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995) (citing Dixon, 114 Wn.2d at 860, 792 P.2d 137 (citing Lovasco, 431 U.S. at 783, 97 S.Ct. at 2045)). Prejudice is usually the most difficult step to demonstrate.

However, a case that was helpful to use in establishing prejudice was State v. Scriver, 20 Wn.App. 388, 580 P.2d 265 (1978), which appears to be contrary to many cases that have been charged since. As stated therein:

In order to render the duty to disclose an effective obligation, “...before a request for **discovery** has been made, the duty of disclosure is operative as a duty of preservation.”

...Before any testing or disposition of evidence occurs, the defendant should be given notice of the type of evidence involved and its planned disposition.” State v. Wright, *supra*, 87 Wn.2d at 793, 557 P.2d at 7. The **police** and **prosecutor** have an **obligation** to preserve all evidence material in a criminal case until the defendant has been given reasonable notice that they intend to destroy it or otherwise cease to preserve it. If this is not possible, or the defen-

dant is not yet represented by counsel, they must petition the court as to its disposition. State v. Wright, *supra*. 20 Wn.App. at 395-96.

After years of alcohol and drug abuse, our client's ability to recall the specific events regarding this incident were limited. Id. Because our earlier request was ignored and our client was essentially no help, the court found that prejudice was established.

Consequently, the next issue was whether the state could justify the delay. Legitimate reasons for delay have included: (1) "sequential prosecution in order to secure testimony of codefendant" (State v. Boseck, 45 Wn.App. 62, 67, 723 P.2d 1182 (1986)); (2) "waiting for lab results because of backlog at state crime lab" (Calderon, 102 Wn.2d at 354, 684 P.2d 1293); (3) 55-day delay between confession and filing during "ongoing large scale undercover drug buying operation" (State v. Robbers, 46 Wn.App. 558, 564-65, 731 P.2d 522 (1986), *review denied*, 108 Wn.2d 1005 (1987)); and (4) 1.5 month delay between signed confession and filing due to "routine administrative practices such as vacation time, compensation time, and training time" (State v. Alvin, 109 Wn.2d 602, 605-06, 746 P.2d 807 (1987)).

In our case, the investigation had been completed within two months of the incident. At arraignment the court stated: "This is a very, very serious charge. So far the prosecutor has not indicated a real reason for lack of diligence." Other than a rotation within the office, the prosecution never did explain the delay.

Without a legitimate justification, the court never reached the third step which entails balancing the state's interest against prejudice to the accused. State v. Frazier, 82 Wn.App. 576, 918 P.2d 964 (1996). Having demonstrated more than "minimal prejudice" to our client by the preaccusatorial delay, and the state having failed to provide justification for such a significant and substantial delay, the court dismissed.

Ultimately, this dismissal was the result of the request (in writing) to preserve all evidence so an immediate investigation could occur. The case languished for 62 months in the prosecutor's office before arraignment resulting in our successful motion. But even with that delay, the case might not have been dismissed had it not been for the initial request which went unheeded.

While the delay was extreme in this case, a simple letter requesting discovery at the outset might have a profound affect on the success of a motion in a less extreme situation.

End

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