

## One Too Many

By: Wayne C. Fricke; March 2004

Recently, I was confronted with a situation wherein a Pierce County prosecutor insisted upon witnesses being interviewed jointly. The witnesses happened to be two wildlife agents who headed the investigation against my client. I was forced to file a motion before the prosecutor agreed to change his position. However, I could find no law on the precise issue.

Typically, the issue of whether witnesses should be allowed to hear the testimony of other witnesses occurs during trial. ER 615 allows the court to order that witnesses who are not testifying be excluded from the courtroom so they cannot hear the testimony of other witnesses. As stated in State v. Johnson, 77 Wn.2d 423, 427, 462 P.2d 933 (1969):

The power to exclude witnesses from the courtroom, we think, falls within the general discretionary powers of the court to be exercised during trial in aid of eliciting the truth, promoting the orderly presentation of evidence, and to assure that all parties, in the exercise of reasonable diligence, are afforded fair opportunity to offer all relevant evidence.

Citing State v. Weaver, 60 Wn.2d 87, 371 P.2d 1006 (1962).

As noted by Teglund, the purpose of the rule “embodies a long established practice of sequestering witnesses when desirable to discourage or expose inconsistencies, fabrication, or collusion.” See 5A Karl B. Teglund, Wash. Prac., Evidence §615.2, at 516 (4<sup>th</sup> Ed. 1999).

Unquestionably, though, a defendant’s right to compulsory process includes the right to interview a witness in advance of trial. State v. Wilson, 149 Wn.2d 1, 12-13, 65 P.3d 657 (2003).

This guarantee of compulsory process “is a fundamental right and one in which the court should safeguard with meticulous care.” State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976), quoting Feguer v. United States, 302 F.2d 214, 241 8th Cir. 1962).

The violation of this constitutional right to compulsory process is presumed to be prejudicial, regardless of whether the prosecutor believes his conduct to be lawful. 87 Wn.2d at 181.

It appears that the only time where a right exists to have another individual present during interviews is in the context of the interviews of victims of violent crimes and that right is restricted to advocates. See RCW 7.69.030(10) and RCW 7.69A.030(2). Moreover, the presence of the advocate is only to provide emotional support. *Id.*

There is no other corresponding rule or statute that allows for the presence of other individuals during an interview of a witness in any other situation.

While Division II has held that a witness may refuse to be interviewed, neither the witness nor the prosecutor may dictate how the interview is to occur. *See State v. Hofstetter*, 75 Wash. App 390, 878 P.2d 474 (1994). However, should the witnesses refuse to be interviewed, the State risks that, should the Court not dismiss the case, their testimony may be excluded from trial. *Wilson*, supra, at 12. Moreover, should the witnesses refuse to be interviewed, the Court may order them to be subject to deposition pursuant to CrR 4.6(a), which provides:

The court, in the furtherance of justice...may dismiss any criminal prosecution due to an 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...

Under this rule, the defendant need only show arbitrary action or governmental misconduct and prejudice resulting from the misconduct. See *Wilson*, supra, at 9, citing *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). While dismissal is an extraordinary remedy resorted to in only egregious cases, governmental misconduct need only be based on mismanagement as opposed to evil or dishonest nature. *Id.* at 9.

The *Wilson* court indicates that “unfair gamesmanship” may be sufficient to warrant dismissal. *Id.* at 10-11. Included among the rights to be protected and warranting a dismissal under CrR 8.3 is a right to a speedy trial and to be represented by counsel who has had a sufficient opportunity to adequately prepare a material part of his defense. *State v. Teems*, 89 Wn.App 385, 388-89, 948 P.2d 1336 (1997) citing *Michielli*, supra, at 240.

While the prosecution eventually acquiesced in the interviews, the defense spent needless hours preparing a motion. I would be interested in hearing if anyone has been faced with this situation in any other county and whether anyone has found any law on the issue.

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