IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON Plaintiff, v. TYLER W. GASSMAN WM 01/22/87 Defendant(s).	No. 08-1-02444-1 PA# 08-9-32197-2 STATE'S MOTION FOR RECONSIDERATION OF COURT ORDERED SANCTIONS

COMES NOW the State of Washington, represented by Steven J. Tucker, Spokane County Prosecuting Attorney, by and through Eugene M. Cruz, Deputy Prosecuting Attorney, and Brian O'Brien, Deputy Prosecuting Attorney, and now makes the following motion for reconsideration pursuant to CrR 7.8 and/or CR 60 regarding the Court ordered sanctions imposed against the State on January 12, 2009.

I.

FACTS

On July 28, 2008, an Information was filed charging the defendant with the crimes of First Degree Robbery, two counts of Attempted First Degree Murder or in the alternative First Degree Assault, and two counts of Drive By Shooting. The information alleged the offense date for these crimes occurring on or about April 15, 2008. (Exhibit A). The defendant was arraigned on August 5, 2008, and was represented by Assistant Public Defender Stephanie Cady who was covering for

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Steve Heintz. The Court set the defendant's omnibus hearing for September 9, 2008, and a trial date for September 29, 2008. (Exhibit B). The State filed an omnibus application with the Court at the time of arraignment requesting that the defendant, among other things, state whether or not he will rely on an alibi and, if so, to furnish a list of his alibi witnesses and their addresses. The Court ordered the defendant to respond to the State's omnibus application regarding witnesses and alibi, and required that such information be provided at least 10 days before the omnibus hearing scheduled September 9, 2008. (Exhibit C).

On August 7, 2008, the Public Defender's Office notified the State that the defendant's case was going to be conflicted from their office to Mr. David Partovi. On August 12, 2008, defense counsel filed a notice of appearance in this matter. At the September 9, 2008, Omnibus Hearing the trial date was continued to October 6, 2008, by agreed order. (Exhibit D). At the time of the Omnibus Hearing on October 6, 2008, the defendant claimed no reliance on an alibi.[1] On September 23, 2008, the State filed a motion to join the defendant's cases/trials with co-defendants Paul Statler, Anthony Kongchunji, and Robert Larson. (Exhibit F). The Court granted the State's motion and continued the defendant's trial date to November 17, 2008, which was agreed to by the parties. (Exhibit G).

Prior to the November 17, 2008, trial date a number of attorney changes occurred vis-à-vis representation of the co-defendants and the re-assignment of the case to another deputy prosecuting attorney. On November 7, 2008, the Public Defender's Office notified the State of a change of counsel for Paul Statler from Terence Ryan to Timothy Note. (Exhibit H). Additionally, on or about November 10, 2008, Assistant Public Defender Anna Nordtvedt took over for Steve Heintz in representing Robert Larson. (Exhibit I). Also around this time, Senit Lutgen took over the representation of Anthony Kongchunji from an associate of his legal group, James Kirkham.

[1] The defendant has since filed a notice of intent to rely on an alibi filed January 22, 2009. (Exhibit E).

The original deputy prosecuting attorney on the case, G. Mark Cipolla, re-assigned the matter to a subordinate in his unit, Eugene Cruz. (Exhibit J).

On November 10, 2008, Ms. Nordtvedt filed a motion to continue Robert Larson's trial date due to her recent appointment on the case. (Exhibit K). Ms. Nordtvedt's motion was granted and the Court continued the trial date to December 22, 2008. The Court also continued the defendant's trial date to December 22, 2008, over his objection and set a pre-trial hearing for December 11, 2008. (Exhibit L).

During the early part of November 2008 and December 2008, the State, per established protocol, sent the Public Defender's Office copies of Detective William Francis' reports dated October 31, 2008, and November 20, 2008, specifically for defense counsel. (Exhibit M). Both reports detailed Detective Francis' contacts with Kyle Williams who advised Detective Francis that he was present during the robbery and subsequent pursuit of the suspects and that, to the best of his recollection, the crimes occurred on or about April 17, 2008.

At the December 11, 2008, pre-trial hearing the State requested a continuance of the trial set for December 22, 2008, due to the unavailability of a material witness, Eric Wescamp. The State advised the Court and defense counsel that Wescamp was in an in-patient substance abuse treatment facility in Western Washington and his family did not anticipate Wescamp to return to Spokane County until the first part of January 2009. The State's motion was not granted. Moreover the defendant objected to a further continuance of the trial date and defense counsel represented to the Court that he was ready for trial.

On December 23, 2008, a specially set hearing was scheduled before Judge Price to address the need to continue the trial date due to the shortened work week, unavailability of trial judges, as well as the unprecedented winter weather conditions affecting Spokane County. Counsel were all in agreement that for these reasons good cause did exist to continue the trial. The Court found that there was good cause to continue the trial date to January 5, 2009. (Exhibit

N). At that time the State again brought to the Court's attention the uncertainty of Mr. Wescamp being available for trial on January 5, 2009. The State requested that the defendant's other matter, which was also trailing this case, proceed to trial first. Defense counsel again objected to the State's request and represented to the Court that he was ready to try this case first and that the defendant's other matter should trail.

On January 5, 2009, the defendant's trial in the other matter was scheduled to commence before Judge Leveque. At that time the State requested that the trial date in this case be continued. Defense counsel objected to continuing the trial date and requested that this case remain trailing in the event that circumstances develop which halts the trial and that trial in this case could begin immediately. (Exhibit O). Developments did arise throughout the initial phases of trial in the other matter that, from the State's perspective, warranted dismissing the defendant and Robert Larson's charges without prejudice. On the late morning of January 9, 2009, Judge Leveque signed the order dismissing the defendant's case. (Exhibits P & Q).

On January 9, 2009, a specially set hearing was scheduled to address the trial status in the case at hand. The State advised the Court that it was ready to proceed to trial. To that date, the defendant had neither moved for a bill of particulars, nor provided any notice of alibi. After hearing argument from counsel Judge Clark ruled that this case would proceed to trial on January 12, 2009.

Following the hearing the State received from Mr. Lutgen a request that the State schedule witness interviews as soon as possible and that he needed more time to prepare for trial. (Exhibit R). Defense counsel for the other co-defendants also received Mr. Lutgen's e-mail. Defense counsel here and Ms. Nordtvedt responded that they, too, needed to interview the State's witnesses. (See Exhibits R & S). These requests came after defendants' counsel had represented to the court at three separate hearings that they were ready for trial. The State's witnesses had been disclosed to defense counsel, and now, days prior to the start of trial,

there was an apparent urgency to interview witnesses. (See Exhibits S &T). It should be noted that the State did facilitate defense interviews with the State's cooperative witness in this case, M.D., when asked in advance. Further, Detective Francis who transported M.D. for the interview was available to answer questions defense counsel may have had.

On January 12, 2009, the State moved to amend the information to correct, among other things, the alleged incident date from on or about April 15, 2008, to on or about April 17, 2008. (Exhibit U). The Court, after hearing argument from counsel, granted the State's motion to amend the information. However, in doing so, the Court sanctioned the State $2,000.00 payable to each defense attorneys' office for their investigator and/or the defense attorneys' time invested in preparing for trial. The Court, *sua sponte*, continued the trial date to February 2, 2009, to allow defense counsel sufficient time to prepare and found that there was three weeks remaining before speedy trial expired. An order to that effect was signed by the Court and filed on January 21, 2009. (Exhibit V).

The State now moves the Court to reconsider the imposition of monetary sanctions against the State pursuant to CrR 7.8(b)(5) and/or CR 60(b)(11).

II.

ISSUE PRESENTED

1. **Whether the circumstances warrant the Court to reconsider the sanctions ordered against the State?**

III.

ARGUMENT

CrR 7.8(b) deals with issues pertaining to relief of judgment or order. CrR 7.8(b) allows either party to move for relief pursuant to its provisions. *State v. Hall*, 162 Wn.2d 901, 905, 177 P.3d 680, 682 (2008). CrR 7.8(b) reads,

> On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons: (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5; (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; or (5) any other reason justifying relief from the operation of the judgment.

Id.

In this case the State is seeking relief pursuant to CrR 7.8(b)(5) and/or CR 60(b)(11), that is, for "any other reason justifying relief from the operation of the [order]." A party seeking relief under this provision of the rule requires that a motion be brought within a reasonable time. CrR 7.8(b)(5). "'A vacation under section (5) is limited to extraordinary circumstances not covered by any other sections of the rule'" and "only in those limited circumstances where the interests of justice most urgently require." *State v. Zavala-Reynoso*, 127 Wn. App. 119, 122-23, 110 P.3d 827, 829 (Div. III – 2005). CR 60(b)(11) is the functional equivalent of CrR 7.8(b)(5). *State v. Dennis*, 67 Wn. App. 863, 865, 840 P.2d 909, 911 (Div. I – 1992). As with CrR 7.8(b)(5), "[t]he use for CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of the rule." *Id.*

The State has brought this motion within a reasonable time. The State understands that the Court's reasons for ordering sanctions was based on: (1) the State's delay in bringing its motion to amend the information on the day of trial and not sooner; and (2) the work defense attorneys and/or their investigators invested in preparation for trial that was scheduled to start on January 12, 2009. At time of trial defense counsel objected to the State's motion to amend the information arguing that his trial preparation focused on the incident occurring on or about April 15, 2008, as indicated on the information filed on July 28, 2008. That position was and is, for the reasons below, legally and procedurally unsound.

First, the original information did not specify a date certain, but charged "**on or about**" April15, 2008. The language "on or about" is sufficient to admit proof of the act at any time

within the statute of limitations, and does not limit the potential evidence from showing the crime occurred, as stated, "on or about" that date. *See State v. Hayes*, 81 Wn. App. 425, 914 P.2d 788 (1996) (proof that the victim was abused on June 4 was sufficient to show that the abuse occurred "on or about" May 31. *Hayes*, 81 Wn. App. at 433); *State v. Osborne*, 39 Wash. 548, 81 P. 1096 (1905) (prosecution for rape where evidence at trial established that the rape occurred a week or two weeks prior to the date alleged in the information); *State v. Oberg*, 187 Wash. 429, 432, 60 P.2d 66 (1936) (prosecution for sodomy where the State alleged that the act occurred "on or about April 3," but the victim testified that the act occurred on June 20, over two months later); *State v. Thomas*, 8 Wash.2d 573, 586, 113 P.2d 73 (1941). See also RCW 10.37.050(5), (7) (information is sufficient if it indicates that the crime was committed before the information was filed and within the statute of limitation, and the crime is stated with enough certainty for the court to pronounce judgment upon conviction.)

Secondly, if the defendant wanted more specificity as to the dates surrounding "on or about" April 15, it was incumbent on him to file a motion for a bill of particulars as provided under the appropriate procedural rule, CrR 2.1(e). If an information states each statutory element of crime but is vague as to some other matter significant to a defense, a bill of particulars can correct the defect, in which case the defendant is not entitled to challenge the information on appeal if he or she has failed to timely request bill of particulars. *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190, *reconsideration denied* (1991), *denial of habeas corpus affirmed* 9 F.3d 802 (1993).[2] None of the defendant's filed a request for a bill of particulars, as required by the rule, and none, therefore, can legally complain that they were relying on proof that the

[2] Where an information does not exactly allege the nature and extent of the crime of which the defendant is accused as to enable him properly to prepare his defense, he may request a bill of particulars for specification of the acts on which the prosecution intends to rely. CrR 2.1(c). Thus, the bill of particulars is designed primarily to be used as a discovery device where the information is legally sufficient but needs to be more definite or certain.

crime occurred exactly on April 15.[3] Such reliance is neither supported in law, as set forth above, nor supported in fact, in light of the discovery provided.

Third, the State's amendment to a more precise date was proper to conform to the discovery provided as the case was investigated and the anticipated testimony. None of the defendant's requested a continuance because of the amendment, because none were prejudiced.[4] *See State v. Fischer*, 40 Wn. App. 506, 699 P.2d 249 (1985) (State should have been permitted to amend information to set forth facts bringing defendant's alleged forgery offense within applicable statute of limitation, where State had facts to justify its amendment, defendant was aware of the facts, amendment did not change offense or alter material element, and defendant failed to show that he would suffer prejudice), *and see State v. Becklin*, 133 Wn. App. 610, 137 P.3d 882 (Div. III), *reconsideration denied*, *review granted* 161 Wn.2d 1001, 166 P.3d 718, *reversed* 163 Wn.2d 519, 182 P.3d 944 (2006) (three amendments including one on day trial started, and one amendment during trial, the latter two amendments including the change of charging dates - held not to prejudice defendant: "Moreover, Mr. Becklin had pretrial notice of the allegations that the conduct took place on both of the dates at issue based on pretrial discovery, which defense counsel acknowledged he received." 133 Wn. App. at 615).

Finally, and in light of the belated alibi notices provided since the trial continuance by the Court, the issue of the effect of potential alibi defenses on the case in both its present and prior

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[3] None of the defendant's provided notice of an alibi defense as ordered by the court to be provided by the time of the omnibus hearing, and only one provided such notice after all defendants declared "ready" for trial. Interestingly, some others have now provided such notice.

[4] The failure to request a continuance shows he was not prejudiced by the amendment. *See State v. Murbach*, 68 Wn. App. 509, 511, 843 P.2d 551 (1993); *State v. Brown*, 55 Wn. App. 738, 743, 780 P.2d 880 (1989). *See State v. Brisebois*, 39 Wn. App. 156, 692 P.2d 842 ,(1984) (defendant, charged with violating the welfare fraud statute, was not prejudiced by prosecution's mid-trial amendment of the information which changed the applicable dates, where State had provided defendant with discovery outlining State's witness' testimony, much of which involved defendant's actions prior to dates stated in original information, and the amended information did not require defendant to defend against any additional allegations or rebut additional testimony); *State v. Murbach, supra,* (the fact that amendment of an information would deprive defendant of a defense she otherwise would have had was not the type of prejudice which would justify denying permission to the state to amend the information).

stance should be examined. In *State v. Huston*, 71 Wn.2d 226, 428 P.2d 547 (1967), our State Supreme Court stated:

> Defendant urges that where the defense of alibi is presented the defendant is entitled to an instruction pin-pointing the exact time of the charge. *State v. Coffelt*, 33 Wash.2d 106, 204 P.2d 521 (1949). The rule is not as broad as that for which the defendant contends. In *State v. Pitts*, 62 Wn.2d 294, 299, 382 P.2d 508, 512 (1933), we held:
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> > We are now constrained to approve the rule that the state need not, by election, fix a precise time for the commission of an alleged crime, when it cannot intelligently do so. In such case, the defendant will be afforded sufficient time to defend himself and substantiate his defense of alibi. *Assignment of error will support a reversal, if, and when, too flexible an application is prejudicial to a defendant. Each case of necessity must rest on its own bottom.*
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> *Huston*, 71 Wn.2d at 235 (Italics added by the Court).

Later, in *State v. Carver*, 37 Wn. App. 122, 678 P.2d 842 (1984), the Court applied the *Pitts* rule under circumstances similar to those present in the instant case, where the change of date was due to the reinterviewing of witnesses, and stated:

> The State need not fix a precise time for the commission of the offense when it cannot intelligently do so. *State v. Pitts*, 62 Wn.2d 294, 299, 382 P.2d 508 (1963). The test is whether the lack of specificity is prejudicial to the defendant. *State v. Pitts*, *supra*; *State v. Long*, 19 Wn. App. 900, 903, 578 P.2d 871 (1978). Here, the State did everything intelligently possible to charge a more specific date, as evidenced by the four amendments to the information, and by repeated requestioning and reinterviewing of the victims and witnesses. The State's inability to charge a specific date was because the victims were young girls and could not remember. *State v. Ferguson*, *supra*. Defendant knew all along the exact dates of the offenses could not be specified. Nevertheless, he did present alibi evidence covering the time periods charged by presenting his employment and leave records. There was no prejudice.

Carver, 37 Wn. App. 126-27.

In this case, neither alibi nor the statute of limitations was an issue raised by the defendant as a basis for objecting to the State's motion to amend the information to correct the date. Therefore, the State's request to correct the date was not a material element as applied to the defendant's case. Detective Francis' reports dated October 31, 2008, and November 20, 2008,

detailed his contacts with Kyle Williams who advised that the crimes occurred on or about April 17, 2008. For purposes of due process these reports provided the defendant with notice of the actual date of the crimes. Defense counsel's claim that he did not receive either copy of the reports which narrowed the date of the offenses with more specificity would still not have prejudiced the defendant in the presentation of his case.[5] The reason being is that the defendant did not raise the issue of alibi or statute of limitations as a defense. The defendant's "defense" was simply a claim of general denial. It is also puzzling to the State how only this defense attorney claimed to be unaware of the existence of these two reports when the other defense attorneys who he was working closely with, and perhaps even spearheading the trial strategy to be employed, acknowledged full and/or partial receipt of Detective Francis' reports. The State's motion to amend the information properly was made pursuant to CrR 2.1(d) and case law and did not go to a material element of the crimes as it specifically relates to this defendant.

With respect to the how much work the defense counsel invested in preparing for trial is debatable given the history of the case. It is common knowledge in the criminal law setting that if a material witness for the State does not appear and/or can not be located in time for trial the State would be forced to dismiss a defendant's case. Here, once the defendant became aware on December 11, 2008, that a material witness was unavailable for trial on the December 22, 2008, defense counsel represented to the Court he was ready for trial. Defense counsel made the same representation on December 23, 2008, when the State again brought to the Court's attention the uncertainty of the material witness' availability for trial on January 5, 2009. From the State's perspective defense counsel's e-mail dated January 9, 2009, speaks volumes regarding what efforts defense counsel made in preparation for trial. All of sudden, only days prior to the start of trial, defense counsel states he needs to interview the witnesses and demands that the State on such short notice accommodate his request. It is interesting to note that defense

[5] On January 21, 2009, the State mailed copies of both reports to defense counsel to ensure that he

counsel's position that he was ready for trial is in stark contrast to Mr. Lutgen's perspective that because he had not interviewed material witnesses in this case he was not prepared to defend his client and was contemplating a request for a continuance of the trial to a more realistic date sometime in February or March 2009.

IV.

CONCLUSION

For the reasons above stated, the State respectfully requests this Court to reconsider its order imposing sanctions against the State. The State believes that the circumstances articulated herein justify the State's request and is made in the interests of justice.

DATED this 26TH day of January, 2009

Respectfully submitted,
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received them. (Exhibits S &T).