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NO. 30226-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

THOMAS M. KLINDWORTH,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. Thomas M. Klindworth's time-for-trial rights, along with his constitutional right to a speedy trial, were violated.

2. The trial court deprived Mr. Klindworth of his constitutional right to present a defense.

3. The trial court's failure to suppress the blood test results is contrary to *State v. Dunivin,* 65 Wn. App. 501, 828 P.2d 1150 (1992); *State v. Anderson,* 80 Wn. App. 384, 909 P.2d 945 (1996); and *State v. McNichols,* 128 Wn.2d 242, 906 P.2d 329 (1995).

4. A. Mr. Klindworth's constitutional rights were impaired by an improper evidentiary discussion with the jury present.

B. An improper comment on Mr. Klindworth's Fifth Amendment right to remain silent occurred during Sgt. Dickenson's testimony.

5. Mr. Klindworth's constitutional right to proceed *pro se* was not scrupulously honored by the trial court.

6. Failure to grant Mr. Klindworth's CrR 8.3(b) motion was error.

7. The trial court improperly imposed an ignition interlock device (IID) requirement in the Judgment and Sentence.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did a time-for-trial violation occur under CrR 3.3?

2. Was Mr. Klindworth denied his constitutional right to a speedy trial?

3. Did the trial court's pre-trial rulings concerning the blood tests deprive Mr. Klindworth of his right to present a defense?

4. Should the blood test results have been suppressed when the third vial of blood was left at the hospital and Mr. Klindworth was deprived of the opportunity to have it tested?

5. Was Mr. Klindworth's right to a fair trial impacted by an evidentiary discussion concerning his constitutional rights and a comment by an officer on his refusal to answer questions?

6. Did the trial court deprive Mr. Klindworth of his constitutional right to self-representation?

7. Should the case have been dismissed for prosecutorial mismanagement under CrR 8.3(b)?

8. Does a trial court have authority to impose an IID requirement for driving while under the influence of drugs?

STATEMENT OF CASE

Sgt. Dickenson of the Franklin County Sheriff's Office was on routine patrol on January 21, 2007. He saw a car traveling sixty (60) miles per hour in a seventy (70) mile per hour zone near Road 68, I-182 eastbound. It was 1:50 a.m. He followed the car at a distance of approximate-

ly three (3) car lengths in his unmarked patrol car. (Munoz RP 907, ll. 9-11; RP 909, ll. 3-14; ll. 20-24)

According to Sgt. Dickenson the car suddenly swerved into his lane and slammed on its brakes. The car slowed to thirty (30) miles per hour and began to pull to the shoulder of the highway. The Sgt. activated the lights on his patrol car. (Munoz RP 910, ll. 11-23)

Mr. Klindworth was the driver of the car. The Sgt. believed he smelled the odor of burnt methamphetamine when he approached the car. He described Mr. Klindworth as having red eyes, slurred speech, talkative, nervous and fidgety, with fast and deliberate movements. Mr. Klindworth did not have a problem getting out of his car. He followed the Sgt.'s instructions. (Munoz RP 912, ll. 20-25; RP 914, ll. 6-9; RP 916, ll. 9-14; RP 952, l. 15 to RP 953, l. 14)

The Sgt. did not detect any odor of intoxicants. Both Sgt. Dickenson and Cpl. Bunten noted a chemical odor on or about Mr. Klindworth's person. He arrested Mr. Klindworth for driving while under the influence of drugs (DUI). (Munoz RP 917, ll. 18-22; RP 932, ll. 17-19; RP 982, ll. 4-6; RP 989, ll. 17-19)

Mr. Klindworth consented to a blood draw after having been read his implied consent warnings. He requested an additional test as authorized by the implied consent warnings. Three (3) vials of blood were drawn at Our Lady of Lourdes Hospital. Sgt. Dickenson refused to drive Mr. Klindworth to another hospital for a separate blood draw. (Munoz RP

938, ll. 13-15; RP 942, ll. 14-24; RP 943, ll. 5-6; ll. 18-25; RP 955, l. 8 to RP 956, l. 5; Exhibit 9)

Mr. Klindworth was transported to the Franklin County Jail and booked. He declined to be evaluated by a drug recognition expert (DRE). Sgt. Dickenson left the third vial of blood at the hospital. It was his position that it was Mr. Klindworth's responsibility to retrieve it. During the booking process Mr. Klindworth became sluggish, non-talkative and fell asleep. (Munoz RP 940, ll. 1-7; RP 941, ll. 1-15; RP 944, l. 1; RP 947, ll. 16-18; RP 948, ll. 2-10)

Mr. Klindworth appeared in Superior Court on January 22, 2007 for a preliminary appearance. Charges were eventually filed in Franklin County District Court on January 25, 2007. They were later dismissed on March 22, 2007. An Information was filed in Superior Court on March 16, 2007. Mr. Klindworth was charged with one (1) count of unlawful possession of a controlled substance (suboxone); use of drug paraphernalia; driving while under the influence of drugs; reckless driving and negligent driving first degree. (CP 42; CP 347; Munoz RP 31, ll. 19-21; RP 32, ll. 6-8; ll. 16-19)

Mr. Klindworth was arraigned on March 20, 2007. Attorney Sam Swanberg was appointed to represent him. His jury trial was scheduled for June 6, 2007. (CP 341; McLaughlin RP 5, ll. 6-7)

On May 8, 2007 Mr. Klindworth challenged his time-for-trial and made a request to proceed *pro se.* The Court continued the matter for one

(1) week to May 15, 2007. Mr. Klindworth did not appear, His jury trial date was stricken. (Pelletier RP 5, ll. 10-15; RP 5, l. 21 to RP 6, l. 2; RP 15, ll. 12-16)

Mr. Klindworth appeared on May 22, 2007. The time-for-trial issue was again presented to the Court. He made a further request to proceed *pro se.* His jury trial was rescheduled to August 8, 2007. (Pelletier RP 20, ll. 18-19; RP 27, ll. 11-13; RP 34, l. 12)

An Amended Information was filed on June 6, 2007. Mr. Klindworth was now charged with two (2) counts of unlawful possession of a controlled substance. The other counts remained the same. Attorney Swanberg was removed at Mr. Klindworth's request. Mr. Klindworth stated that he had "no other choice" but to proceed *pro se.* The trial court conducted a colloquy and authorized Mr. Klindworth to represent himself. (CP 339; Adams RP 7, l. 4 to RP 13, l. 25; RP 17, ll. 8-10)

An Omnibus Hearing was conducted on June 26, 2007. Mr. Klindworth requested representation. The trial court advised him it would appoint an attorney to represent him. He stated he was going to try to hire an attorney. (Adams RP 35, l. 14 to RP 38, l. 12; RP 39, ll. 1-24)

Mr. Klindworth did not appear at a hearing scheduled on July 17, 2007. The jury trial date was stricken and a bench warrant was issued. (CP 338; Munoz RP 6, ll. 12-24)

Mr. Klindworth appeared on July 18, 2007. He had been in the wrong courtroom the previous day. He was arrested in that courtroom.

The Court and Mr. Klindworth discussed appointment of an attorney. Attorney Matt Rutt was appointed to represent Mr. Klindworth. Mr. Klindworth was released on his own recognizance. (CP 337; King RP 3, l. 23 to RP 4, l. 13; RP 5, ll. 19-22; RP 6, l. 1)

On July 23, 2007 Mr. Klindworth filed multiple motions seeking dismissal of the charges. (CP 314; CP 316; CP 318; CP 320; CP 322; CP 324; CP 327; CP 327; CP 329; CP 331; CP 333; CP 335)

Mr. Klindworth made a required appearance on July 24, 2007. The time-for-trial issue was again raised. He requested the opportunity to proceed *pro se.* A colloquy was conducted and Mr. Klindworth was authorized to represent himself. His jury trial was rescheduled to October 3, 2007. (King RP 12, l. 16 to RP 17, l. 19; RP 19, l. 19 to RP 20, l. 3; RP 21, ll. 2-8; RP 29, ll. 20-23; RP 30, ll. 13-16)

A CrR 3.5 hearing was conducted on August 7, 2007. The trial court ruled that Mr. Klindworth's statements were admissible. Findings of Fact and Conclusions of Law were entered on August 14, 2007. (CP 312; Lang RP 45, ll. 13-15)

On August 14, 2007 Mr. Klindworth again filed multiple motions for dismissal and discovery. The motions included a request for a new attorney and challenged time-for-trial. (CP 280; CP 282; CP 284; CP 286; CP 288; CP 290; CP 291; CP 295; CP 296; CP 306; CP 308; CP 310)

On September 25, 2007 the prosecuting attorney advised Mr. Klindworth that his case had been pre-assigned to Judge Yule. A pre-trial

hearing was scheduled the next day. Mr. Klindworth appeared on September 26, 2007 and again challenged time-for-trial. No specific date had yet been set for hearing Mr. Klindworth's motions. (King RP 33, ll. 3-10; Munoz RP 9, l. 21 to RP 13, l. 18)

On September 26 Mr. Klindworth was advised that his motions would be reset by the Court Administrator. They were subsequently re-scheduled to October 2, 2007. Notice of the hearing was mailed to Mr. Klindworth on September 28, 2007. Patricia Austin, the Superior Court Administrator for Benton/Franklin County, claims that she told Mr. Klindworth of the October 2 date in a telephone call on September 26, 2007. (Supp. CP 419; Supp. CP 420; Munoz RP 14, ll. 17-21; RP 78, ll. 8-12; RP 80, ll. 3-17)

Mr. Klindworth did not appear on October 2, 2007. The jury trial was stricken and a bench warrant issued. Mr. Klindworth posted a bail bond on October 5, 2007. The bond was exonerated on October 26, 2007. (CP 263; CP 268; CP 270; Munoz RP 20, ll. 21-23)

On October 16, 2007 Mr. Klindworth appeared in court. A new conditional release order was entered. A motion to quash bench warrant was argued. Mr. Klindworth claimed that he did not receive notice of the October 2 hearing until on or about October 4, 2007. The motion to quash the bench warrant was denied. The trial court ruled that he failed to appear on October 2 and also failed to appear for trial on October 3, 2007.

Bail was set at $10,000.00. (CP 261; Adams RP 42, ll. 20-24; RP 44, l. 20-24; RP 48, ll. 20-22; RP 49, ll. 15-23; RP 52, ll. 3-4; RP 50, ll. 2-10)

Mr. Klindworth's jury trial was rescheduled to December 5, 2007. He filed a motion challenging time-for-trial on October 30, 2007. He remained in custody at that time. (CP 260; Munoz RP 23, ll. 11-12; RP 24, l. 2 to RP 25, l. 23; RP 27, ll. 1-4)

Mr. Klindworth posted a bail bond on November 19, 2007. (CP 257)

The time-for-trial motion was argued on November 30, 2007. The prosecuting attorney presented a chronology of events from Mr. Klindworth's initial appearance in Superior Court, through the District Court proceedings, and up to the November 30 date. The trial court ruled that there had been no violation up to and including June 6, 2007. (Munoz RP 35, ll. 5-7; ll. 20-25; RP 36, ll. 9-11; RP 45, ll. 8-11; RP 51, l. 21 to RP 55, l. 8)

Following additional argument the trial court then ruled that there had been no violation of time-for-trial up to November 30, 2007. (Munoz RP 69, l. 2 to RP 70, l. 14; RP 72, ll. 10-22; RP 94, l. 20 to RP 97, l. 24)

Mr. Klindworth requested appointment of an attorney. The trial court denied the request. Mr. Klindworth withdrew his remaining motions until he was appointed an attorney. (Munoz RP 100, ll. 4-17; RP 124, l. 2 to RP 124, l. 25; RP 125, ll. 16-20; RP 127, ll. 16-23; RP 131, ll. 2-83; RP 132, ll. 10-13; RP 133, ll. 1-2)

At the pre-trial hearing on December 4, 2007 Mr. Klindworth requested a continuance to hire an attorney. The trial court granted a continuance to December 31, 2007. Mr. Klindworth appeared on December 31 without counsel. The trial court denied a further continuance. (Lang RP 54, ll. 1-18; RP 80, ll. 12-21)

On January 9, 2008 Mr. Klindworth appeared and was unprepared for trial. He did not have an attorney. He asked for standby counsel if trial was going to proceed that day. The trial court sent the jurors home and adjourned until the afternoon session to allow Mr. Klindworth additional time to contact an attorney. The trial was rescheduled to February 6, 2008 at Mr. Klindworth's request. (Munoz RP 167, ll. 2-22; RP 172, l. 1-13; RP 177, ll. 8-19; RP 195, ll. 13-18)

On January 22, 2008 Mr. Klindworth and the Court engaged in a colloquy concerning hiring an attorney. He again raised a time-for-trial issue. The trial court told Mr. Klindworth he could either proceed *pro se* or accept a court-appointed attorney. The option of retaining an attorney was removed. Mr. Klindworth declined to choose. He argued against a court-appointed attorney. The trial court directed that he was to proceed *pro se.* (Lang RP 83, l. 14 to RP 85, l. 25; RP 89, ll. 17-23; RP 90, ll. 12-25; RP 92, l. 13 to RP 97, l. 7)

On January 29, 2008 Mr. Klindworth made oral motions to change venue and dismiss for a violation of his time-for-trial right. He again requested time to retain counsel. All requests were denied. Mr. Klindworth

stated he was being forced to decide on court-appointed counsel and that he could not make a decision. (King RP 36, ll. 1-15; RP 50, l. 7 to RP 52, l. 5; RP 62, ll. 2-6; RP 62, l. 17 to RP 66, l. 13)

A written request for an attorney was filed on February 6, 2008. Mr. Klindworth appeared and again requested representation. The time-for-trial issue was also raised. Attorney Robert Thompson was appointed to represent Mr. Klindworth. (CP 252; Adams RP 56, ll. 2-20; RP 67, ll. 4-10; RP 82, ll. 13-14; RP 82, l. 22 to RP 83, l. 10; RP 86, ll. 13-17; RP 88, ll. 9-13; RP 89, ll. 13-15)

Numerous waivers were filed while attorney Thompson represented Mr. Klindworth. Mr. Klindworth reserved the right to continue to challenge time-for-trial occurring prior to entry of those waivers. (CP 221; CP 223; CP 232; CP 251; Munoz RP 201, l. 10 to RP 202, l. 3)

A CrR 3.6 hearing began on July 29, 2008. It concluded on August 20, 2008 following a stipulated continuance. The trial court suppressed all evidence seized from Mr. Klindworth's car on January 21, 2007. Findings of Fact and Conclusions of Law were entered on October 29, 2008. (CP 224; King RP 73, l. 23 to RP 130, l. 2; RP 133, l. 20 to RP 203, l. 17; RP 232, l. 9 to RP 233, l. 8; RP 234, ll. 13-19)

On December 2, 2008 attorney Thompson advised the Court that Mr. Klindworth was in treatment. A waiver was subsequently signed on January 6, 2009. A problem arose when attorney Thompson advised the Court that he was no longer on the public defender contract. A request

was made for appointment of attorney Karla Kane. Various hearings were held concerning attorney Thompson's status until attorney Kane was appointed. (King RP 240, ll. 5-9; Adams RP 92, ll. 11-24; RP 95, ll. 18-24; Munoz RP 243, ll. 4-11; RP 255, ll. 6-9; RP 262, ll. 1-3)

Mr. Klindworth's jury trial was rescheduled to March 25, 2009 following the appointment of attorney Kane. He did not appear on March 17, 2009 because he was in custody in Benton County. On March 24, 2009 he signed a waiver of time-for-trial reserving his right to challenge any prior delays. Mr. Klindworth's jury trial was rescheduled to May 27, 2009. (CP 220; Munoz RP 262, ll. 1-3; RP 264, ll. 10-11; RP 268, ll. 1-4; RP 270, ll. 11-12; RP 270, l. 22 to RP 271, l. 9; RP 271, l. 12)

Attorney Kane requested a continuance of the trial date on April 28, 2009. Mr. Klindworth objected on the basis of time-for-trial. He also made a request to proceed *pro se.* (Adams RP 98, ll. 17-18; RP 99, l. 15 to RP 100, l. 21; RP 101, ll. 19-24)

At an appearance on May 25, 2009 Mr. Klindworth renewed his time-for-trial challenge and his *pro se* request. He wanted attorney Kane as standby counsel only. The trial court conducted a colloquy and authorized Mr. Klindworth to proceed *pro se.* Attorney Kane was appointed standby counsel. His jury trial was continued to June 24, 2009. (Munoz RP 276, l. 1 to RP 278, l. 9; RP 279, l. 5 to RP 288, l. 20; RP 292, ll. 22-25)

Mr. Klindworth did not appear for a scheduled hearing on May 29, 2009. No bench warrant was issued. (Munoz RP 304, ll. 21-24)

Mr. Klindworth raised his constitutional right to a speedy trial at a hearing on June 11, 2009. The trial court ruled that time-for-trial had recommenced on May 5, 2009. (Munoz RP 325, ll. 2-20; RP 327, ll. 14-19)

On July 17, 2009 Mr. Klindworth filed a letter with the Court requesting an attorney other than attorney Kane. The trial court confronted Mr. Klindworth with his lack of diligence. Attorney Kane was reappointed to represent him. She requested that trial be set within time-for-trial rules. The jury trial was rescheduled to October 7, 2009. (CP 215; CP 217; Munoz RP 337, l. 25 to RP 347, l. 14; RP 352, ll. 7-17; RP 355, l. 11)

Mr. Klindworth did not appear for scheduled hearings on September 18, 2009 and October 22, 2009. (King RP 241, l. 8 to RP 242, l. 25; Munoz RP 371, ll. 7-19; RP 372, ll. 17-25)

A stipulated continuance as to the trial date was granted on November 3, 2009. The new jury trial date was January 20, 2010. (Adams RP 106, ll. 3-4)

A CrR 3.3 motion and a CrR 8.3(b) motion were filed on December 1, 2009. The motions were argued on December 23, 2009. The testimony reflected that notice of the October 2, 2007 hearing was mailed to Mr. Klindworth on September 27, 2007. Court Administrator Austin confirmed her telephone call with Mr. Klindworth. However, there was nothing noted in the Clerk's minutes for September 26 concerning an October

2 pre-trial. The trial court denied the CrR 3.3 motion. (CP 185; Munoz RP 396, l. 21 to RP 407, l. 15; RP 455, l. 11 to RP 459, l. 21; RP 480, l. 15 to RP 481, l. 22)

The trial court also denied Mr. Klindworth's CrR 8.3(b) motion on the basis that he had failed to re-note his various motions and that he seemed delusional. He would appear in Court without any documents to support his claims. (Munoz RP 481, l. 23 to RP 483, l. 18)

Mr. Klindworth made a further challenge, at that hearing, to the driving while under the influence statute on the basis that it was void for vagueness. He contended it did not include standards for driving while under the influence of drugs. The motion was denied. (Munoz RP 468, l. to RP 469, l. 17; RP 483, l. 19 to RP 484, l. 4)

Mr. Klindworth filed a letter with the Court that same date relating to his various motions and the denial of an additional blood test. (CP 142)

On January 5, 2010 Mr. Klindworth again waived his time-for-trial rights, reserving the challenges on his previous motions. His jury trial was continued to March 10, 2010. (CP 140; Munoz RP 491, ll. 12-19)

Mr. Klindworth requested removal of attorney Kane at a hearing on March 2, 2010. He refused to talk with her and mentioned a letter that he had sent to the Court asking for a new attorney. The trial court denied his request. A discussion was had concerning the blood draw, the lack of an independent test, and chain of custody. Time-for-trial rights were again

reasserted. (Munoz RP 512, l. 16 to RP 514, l. 9; RP 516, l. 22 to RP 517, l. 17; RP 523, ll. 16-24; RP 525, ll. 8-16; RP 530, ll. 7-11)

Attorney Kane filed a Memorandum of Authorities on March 11, 2010 asking the Court to reconsider its denial of Mr. Klindworth's request to proceed *pro se.* Mr. Klindworth argued that the motions filed by attorney Kane weren't his. He wanted to file a new set of motions. He refused to communicate with his attorney. (CP 130; CP 135; Munoz RP 534, ll. 1-17; RP 535, ll. 7-25)

Attorney Kane argued the motions on March 16, 2010. The trial court ruled that there was probable cause to believe that Mr. Klindworth was driving under the influence of drugs. The Court also ruled that the stop was not pretextual. Attorney Kane requested that Mr. Klindworth's letters to the Court be filed. (Munoz RP 574, l. 10 to RP 580, l. 4; RP 582, l. 10 to RP 586, l. 7)

The jury trial was rescheduled to April 21, 2010 due to Sgt. Dickenson's medical condition. (Munoz RP 588, ll. 11-25; RP 594, ll. 12-14)

Mr. Klindworth again requested to represent himself on March 23, 2010. The trial court granted his request. Attorney Kane was appointed standby counsel. Mr. Klindworth signed a time-for-trial waiver. His jury trial was rescheduled to July 7, 2010. (CP 128; Lang RP 103, l. 2 to RP 113, l. 19; RP 116, ll. 2-23; RP 127, ll. 5-12; RP 131, ll. 1-7)

Mr. Klindworth did not to appear for a scheduled hearing on June 23, 2010. A bench warrant was issued. (CP 127; Munoz RP 603, ll. 20-25)

A conditional release order was entered on July 20, 2010. Bail was set at $10,000.00. The bail was later reduced to $500.00 on July 27, 2010. The jury trial was rescheduled to September 15, 2010. (CP 125; CP 126; Munoz RP 613, ll. 13-15)

A CrR 3.6 hearing commenced on August 17, 2010. Mr. Klindworth sought to suppress evidence of the blood test results. Portions of the record are missing due to a mechanical failure. The hearing could not be concluded on August 17 due to further mechanical failure of the recording equipment. (Munoz RP 618, ll. 4-5; 618, l. 11 to RP 619, l. 4; RP 645, ll. 12-20)

During the course of the CrR 3.6 hearing the trial court would not allow Mr. Klindworth to inquire into the qualifications of the person who drew the blood or chain of custody. (Munoz RP 627, l. 25 to RP 630, l. 12; RP 631, ll. 21-25)

The CrR 3.6 hearing was continued to September 9, 2010. Mr. Klindworth remained in custody at this time. He eventually posted bail. He did not appear on September 9, 2010 and a bench warrant was issued. (CP 123;Munoz RP 649, ll. 18-19; RP 650, ll. 12-18; RP 660, ll. 5-7; ll. 17-24; RP 662, l. 24 to RP 663, l. 10)

At a hearing on October 6, 2010 attorney Kane advised the Court that Mr. Klindworth had multiple fractures of both ankles from injuries that he had incurred while in the Franklin County Jail. (Munoz RP 669, l. 14 to RP 672, l. 9)

A Motion to Quash Bench Warrant was filed on November 5, 2010. The motion was stricken on December 10, 2010. Mr. Klindworth did not appear that day. The $500.00 cash bail was forfeited. (CP 115; Munoz RP 675, l. 12 to RP 677, l. 10)

Mr. Klindworth appeared again on April 5, 2011. He requested an attorney. A conditional release order was entered. Bail was set at $1,000.00. (CP 114; Adams RP 109, l. 12 to RP 110, l. 8; RP 111, ll. 20-21)

Mr. Klindworth posted a bail bond on April 8, 2011. The hearing scheduled for April 12, 2011 was continued due to an affidavit of prejudice filed by Mr. Klindworth. (CP 113; McLaughlin RP 24, ll. 6-19)

Mr. Klindworth did not appear on May 20, 2011. A bench warrant was issued. He reappeared on May 23, 2011. Bail was set at $20,000.00. He requested an attorney. (CP 111; CP 112; Munoz RP 680, ll. 6-9; RP 681, ll. 24-25; McLaughlin RP 25, l. 24 to RP 26, l. 2; RP 29, ll. 7-8)

A scheduled hearing on June 3, 2011 did not occur even though Mr. Klindworth was in custody. His next appearance was on June 30, 2011. The State argued that this was the new commencement date. Mr. Klindworth argued a time-for-trial violation. Eventually the trial court and

Mr. Klindworth agreed that the correct commencement date was May 23, 2011. Jury trial was scheduled for July 20, 2011. (Munoz RP 684, ll. 14-17; RP 685, l. 6 to RP 689, l. 8; RP 699, l. 6)

Mr. Klindworth filed a motion to dismiss for a violation of this time-for-trial rights on July 8, 2011. He also argued that he was denied access to the law library, access to the records in his motor home, and access to an attorney. (CP 100; Munoz RP 717, l. 10 to RP 719, l. 20)

On July 8, 2011 the trial court, on its own initiative, called Sgt. Dickenson to the stand to allow Mr. Klindworth to continue his cross-examination from the adjourned August 17, 2010 CrR 3.6 hearing. Mr. Klindworth advised the Court he could not proceed in the absence of his records. The trial court excused the witness and asked for argument. Mr. Klindworth declined to argue. The trial court denied the CrR 3.6 motion. The State made an inquiry about Mr. Klindworth's desire for representation. Mr. Klindworth demanded an attorney. The trial court said he had to proceed *pro se.* A discussion was then held concerning a time-for-trial waiver versus the right to representation. (Munoz RP 722, l. 22 to RP 742, l. 2)

Mr. Klindworth continued to request an attorney. The prosecuting attorney described problems at the Washington State Patrol Crime Lab (WSPCL) concerning the blood tests. Apparently all of the records were in archives. (Munoz RP 746, ll. 20-21; RP 747, l. 3 to RP 748, l. 2; RP 749, ll. 12-14)

When the State sought to file a Second Amended Information adding four (4) counts of bail jumping the trial court denied the motion. (Munoz RP 756, ll. 1-25; RP 759, ll. 1-3)

On July 11, 2011 Mr. Klindworth made an oral motion to dismiss on the basis of:

1. The State's late addition of witnesses for trial;
2. Hobson's choice;
3. Time-for-trial violation;
4. "Fake FTAs;"
5. Lack of due process as to hearing notices;
6. Chain-of-custody on the blood;
7. Failure to appoint an attorney;
8. Inability to access his records for trial.

(Munoz RP 770, l. 8 to RP 784, l. 6)

The prosecuting attorney addressed the chain-of-custody issue. Mr. Klindworth continued to argue it. He also raised the issue of the failure of the jail to bring him to Court on June 3. (Munoz RP 789, ll. 13-20; RP 792, l 13 to RP 793, l. 14; RP 797, l. 14 to RP 798, l. 15)

The trial court reappointed attorney Kane to represent Mr. Klindworth. The reappointment was over Mr. Klindworth's objection and attorney Kane's objection. Mr. Klindworth stated he would not work with her. His motions were denied. (Munoz RP 799, l. 23 to RP 809, l. 25)

The trial court continued the motion to suppress the blood test evidence due to late discovery. (Munoz RP 810, l. 10 to RP 811, l. 1)

Findings of Fact and Conclusions of Law from the CrR 3.6 hearing were filed on July 12, 2011. (CP 94)

At a hearing on July 19, 2011 Mr. Klindworth stated that he felt he had no choice but to proceed to trial with attorney Kane. (Munoz RP 820, l. 9 to RP 821, l. 8)

A Second Amended Information was filed on July 20, 2011 which included only a charge of driving while under the influence of drugs. (CP 77)

Jury selection began on July 20, 2011. After the jury was sworn Mr. Klindworth noted that a wrong juror had been excused. The juror was later contacted and brought back into Court. The jury was re-sworn at that time. (Munoz RP 839, ll. 13-17; RP 842, ll. 21-25)

David Rohr, a clinical lab analyst for Tri-Cities Laboratories testified that he drew Mr. Klindworth's blood on January 21, 2007. He prepped Mr. Klindworth's arm with betadine. He checked the tubes for additives and the expiration date. The officer provided him the two (2) tubes within which to draw the blood. (Munoz RP 896, ll. 16-18; RP 900, ll. 13-15; RP 901, ll. 11-23; RP 902, ll. 9-23)

Mr. Rohr could not remember drawing a third vial. However, the policy at Our Lady of Lourdes Hospital is to retain a vial for only one (1) week. (Munoz RP 904, ll. 13-16)

Sgt. Dickenson indicated that the third vial of blood drawn at Our Lady of Lourdes was at Mr. Klindworth's request. He did not get to choose where the blood would be drawn. (Munoz RP 621, ll. 2-24)

Problems occurred at the WSPCL. The original analyst, Paige Long, was no longer employed. Additional testing was performed by Brian Capron. He had problems with his testing procedures. He then passed the samples to Asa Louis to complete the testing. (Munoz RP 1015, ll. 21-22; RP 1018, ll. 13-17; RP 1024, ll. 12-20; RP 1024, l. 24 to RP 1025, l. 3; RP 1029, l. 14 to RP 1031, l. 16; Pelletier RP 76, ll. 13-14)

Asa Louis is a forensic scientist with the WSPCL. He conducted tests on Mr. Klindworth's blood samples of October 2, 2007. This was the day prior to Mr. Klindworth's scheduled jury trial on October 3, 2007. Sample A contained .28 mg. of methamphetamine and .06 mg. of amphetamine. Sample B contained .27 mg. of methamphetamine and .06 mg. of amphetamine. (Munoz RP 998, ll. 2-5; RP 999, ll. 7-8; RP 1034, ll. 21-23; Pelletier RP 105, ll. 13-18)

Defense counsel objected to admission of the test results based upon non-compliance with WAC 448-14-010, -020 and -030. Additionally, an objection was made to chain of custody, denial of Mr. Klindworth's right of confrontation and an insufficient foundation being laid. (Munoz RP 1061, ll. 11-20; RP 1063, ll. 12-15; Pelletier RP 48, l. 7 to RP 65, l. 2)

Mr. Louis testified that the level of methamphetamine in the blood samples could potentially impair a person's driving. (Pelletier RP 108, ll. 10-20; RP 109, ll. 14-18)

Mr. Louis also testified to the physical indicators that someone might be under the influence of methamphetamine. These included rapid speech, being fidgety and difficulty in focusing on questions. (Munoz RP 1007, l. 17 to RP 1008, l. 9)

Sgt. Dickenson, based upon his experience, testified that a person under the influence of methamphetamine may be fidgety, talkative, twitching in his/her extremities, sweating, and confused. (Munoz RP 915, ll. 2-6)

A long exchange as to the admissibility of a proposed Exhibit occurred in front of the jury. The attorneys discussed prior rulings. The prosecuting attorney referenced protecting Mr. Klindworth's rights. It does not appear that this was at sidebar. (Munoz RP 934, l. 13 to RP 936, l. 24; *see:* Ex. 9)

Sgt. Dickenson acknowledged that Mr. Klindworth understood his rights, but then indicated that he declined to answer the questions on the DUI interview form. (Munoz RP 929, ll. 6-25)

Defense counsel objected to Instruction No. 10. She also took exception to the trial court's failure to give defense Instructions 2, 6, 7, 8 and 10. (CP 35; CP 43; CP 47; CP 48; CP 49; CP 51; Pelletier RP 165, l. 10 to RP 167, l. 3)

A jury determined that Mr. Klindworth was guilty of driving while under the influence of drugs. (CP 21)

Judgment and Sentence was entered on September 14, 2011. The Judgment and Sentence contained a requirement for an ignition interlock device. Mr. Klindworth filed his Notice of Appeal that same date. (CP 8; CP 10)

SUMMARY OF ARGUMENT

Mr. Klindworth's constitutional rights were adversely affected when he was

1) denied a speedy trial (Sixth Amendment to the United States Constitution; Const. art. I, § 22)
2) denied the right to present a defense (Sixth and Fourteenth Amendments; Const. art. I, §§ 21 and 22);
3) denied the right to self-representation at trial (Sixth Amendment); and
4) not provided a fair and impartial trial (Fifth, Sixth and Fourteenth Amendments; Const. art. I, §§ 21 and 22).

Governmental mismanagement of Mr. Klindworth's case occurred at various times by the trial court and prosecuting attorney.

The trial court improperly imposed an IID requirement in the Judgment and Sentence.

ARGUMENT

I. CrR 3.3

> While the statutes and court rules governing speedy trial rules were enacted for the purpose of enforcing the constitutional right to a speedy trial, they are not themselves a *guaranty* of constitutional rights. *State v. Brewer*, 73 Wn.2d 58, 62, 436 P.2d 473 (1968) …. Instead, CrR 3.3 provides a framework for the disposition of criminal proceedings without establishing any constitutional standards. 12 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 1207, at 256 (3rd ed. 2004). As a result, "a violation of the rules is not necessarily a constitutional deprivation." *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989) (citing *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980)).

State v. Iniguez, 167 Wn.2d 273, 287, 217 P.3d 768 (2009)

A chronology of the specific events implicating a violation of time-for-trial is attached as Appendix "A." It is Mr. Klindworth's position that the trial court and the prosecuting attorney, during the pendency of the proceedings, at various times violated the provisions of CrR 3.3.

Moreover, Mr. Klindworth asserts that the State violated local court rule LCrR 3.2(a).

CrR 3.3(a)(1) states: "It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."

Mr. Klindworth raised time-for-trial issues on the following dates: May 8, 2007; May 22, 2007; July 24, 2007; September 26, 2007; October 30, 2007; November 30, 2007; January 22, 2008; January 29, 2008; April 28, 2009; May 5, 2009; June 11, 2009; December 1, 2009; March 16, 2010; June 30, 2011 and July 11, 2011.

The trial court denied all of Mr. Klindworth's challenges to time-for-trial, including constitutional challenges.

Mr. Klindworth contends that the initial violation of time-for-trial occurred when a bench warrant was issued on July 17, 2007. He appeared for Court but was in the wrong courtroom. The State apparently knew he was in the wrong courtroom because the bailiff directed him to stay in that courtroom. (King RP 3, l. 20 to RP 4, l. 4)

Mr. Klindworth was not detained in jail at the time of the alleged failure to appear. His jury trial was scheduled for August 8, 2007. The trial court declared a new commencement date on July 18, 2007.

CrR 3.3(b)(2) provides:

> A defendant who is not detained in jail shall be brought to trial within the longer of
>
> (i) 90 days after the commencement date specified in this rule, or
> (ii) The time specified in subsection (b)(5).

Mr. Klindworth was originally arraigned on March 20, 2007. He did not appear on May 15, 2007. A new commencement date was set on May 22, 2007.

CrR 3.3(c)(2) provides, in part:

> On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. …
>
> …
>
> (ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.
>
> …

Mr. Klindworth was thus required to be brought to trial no later than August 20, 2007.

When the trial court reset Mr. Klindworth's trial date to October 3, 2007 it violated CrR 3.3.

Mr. Klindworth filed a written motion contending that time-for-trial had been violated and requesting that the case be dismissed on July 23, 2007. Mr. Klindworth complied with CrR 3.3(d)(3). (CP 335)

The trial court was aware the motion was filed. However, no action was taken on July 24, 2007 when the trial date was rescheduled.

Mr. Klindworth again tried to argue the motion on September 26, 2007. Instead, he was advised that the Court Administrator would set his

motions for a pre-trial hearing. The pre-trial hearing was subsequently scheduled for October 2, 2007.

Mr. Klindworth contends that he was not properly notified of this hearing and that his time-for-trial right was violated when a bench warrant was issued on October 2, 2007.

Notification of the October 2, 2007 date was sent to Mr. Klindworth on September 28, 2007.

LCrR 3.2(a) provides:

> **Defendants** on bail or recognizance **are expected to be available for non-scheduled appearances upon seventy-two (72) hours notice** to defendant or defendant's attorney. **They are expected to be present and on time at all scheduled appearances concerning which they have received either oral or written notice**. Failure to appear in accordance with this rule may result in forfeiture of bail, revocation of recognizance, issuance of a bench warrant for arrest or additional criminal charges.

(Emphasis supplied.)

Mr. Klindworth contends that LCrR 3.2(a) contravenes the Criminal Rules for Superior Court.

CrR 3.4(a) states:

> **The defendant shall be present at the arraignment, at every stage of the trial** including the empaneling of the jury and the return of the verdict, **and at the imposition of sentence, except as otherwise provided by these rules**, or as excused or excluded by the court for good cause shown.

(Emphasis supplied.)

CrR 3.4(c) provides:

> If in any case the defendant is not present when his or her personal attendance is necessary, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.

CrR 3.4 does not mention anything about non-scheduled court appearances.

CrR 1.1 provides:

> **These rules govern the procedure in the courts of general jurisdiction of the State of Washington in all criminal proceedings and supercede all procedural statutes and rules that may be in conflict** and shall be interpreted and supplemented in light of the common law and decisional law of this state. These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.

(Emphasis supplied.)

Mr. Klindworth recognizes that trial courts have the authority to adopt local rules. GR 7(b) provides, in part: "**All local rules shall be consistent with rules adopted by the Supreme Court**, and shall conform in numbering system and in format to these rules …." (Emphasis supplied.)

CrR 8.1 states: "Time shall be computed and enlarged in accordance with CR 6."

LCrR 3.2(a) is not in conformance with CrR 8.2, which states: "Rules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases."

CR 6(e) provides:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Notice of the October 2, 2007 hearing was mailed on September 28, 2007. Three (3) days later would have been October 1, 2007. However, CR 6(a) must be considered in light of the fact that there was less than seven (7) days within which to act. The latter part of CR 6(a) states:

> When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

Thus, the three (3) day notice did not commence until October 1, 2007. Mr. Klindworth was not properly notified of the October 2, 2007 date.

The Court Administrator testified that she gave oral notice to Mr. Klindworth on September 26, 2007. It is highly unlikely that this occurred since Mr. Klindworth was present in Court that date. Neither the Court nor the prosecuting attorney knew when the next scheduled date would be set.

It is interesting to note that the State would not have been ready to proceed to trial on October 3, 2007. The re-testing of Mr. Klindworth's blood samples was not done until October 2, 2007. It appears that the State had not informed Mr. Klindworth of this difficulty at the WSPCL.

Even if the two (2) noted violations of time-for-trial did not occur, a final violation occurred during the period April 5, 2011 to July 20, 2011.

Mr. Klindworth appeared on April 5, 2011 as a result of a bench warrant issued on September 9, 2010. No new trial date was set at that hearing. Mr. Klindworth posted bond on April 8, 2011.

The record does not reflect any notice being mailed to Mr. Klindworth that there was an appearance required on April 20, 2011. (Supp. CP 427)

A bench warrant was issued for Mr. Klindworth's arrest on May 20, 2011. He appeared in Court on May 23, 2011.

Mr. Klindworth takes the position that he was required to be brought to trial no later than July 5, 2011. In the absence of an appropriate notice of trial setting he could not object as required by CrR 3.3(d)(3).

CrR 3.3(d)(2) states:

> When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date … or a period of exclusion …, the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

There is no indication that the trial court ever complied with CrR 3.3(d)(2) after Mr. Klindworth's appearance on April 5, 2011. The fact that a new commencement date of May 23, 2011 was set at the June 30, 2011 hearing cannot cure the lack of prior notice.

If a court rule is to have any meaning it must be strictly construed as written. *See: State v. George,* 160 Wn.2d 727, 735, 158 P.3d 1169 (2007).

CrR 3.3(h) requires dismissal with prejudice if there is noncompliance with time-for-trial rules. Mr. Klindworth is entitled to have his case dismissed with prejudice.

II. CONSTITUTIONAL RIGHT

A criminal defendant is entitled to a speedy trial under the Sixth Amendment to the United States Constitution and Const. art. I, § 22. The Court in *State v. Iniquez, supra,* declared the right the same under the respective constitutional provisions. The Court stated at 290:

> [W]e hold that article I, section 22 requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights.

Mr. Klindworth's constitutional right to a speedy trial was violated by the State under the facts and circumstances of his case. Even though Mr. Klindworth was representing himself *pro se* on numerous occasions, this is no basis for a denial of that constitutional right.

Any speedy trial violation must be determined under the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed.2d 101 (1972) and *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed.2d 520 (1992).

> As a threshold to the … inquiry, a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial. [Citations omitted.] This inquiry is necessarily dependent on the specific circumstances of each case.

State v. Iniquez, supra, 283.

The *Iniquez* Court determined that an eight (8) month delay was presumptively prejudicial. *State v. Iniquez, supra*, 292.

Mr. Klindworth was arraigned on March 20, 2007. His trial commenced on July 20, 2011. A total of fifty-two (52) months elapsed.

Mr. Klindworth declares that this is more than presumptively prejudicial and severely impacted his ability to present his defense.

During the fifty-two (52) month period all evidence seized from Mr. Klindworth's car was suppressed by the trial court following a CrR 3.6 motion. This left the State with the blood test results and the observations of the arresting officers.

The CrR 3.6 motion was granted on October 29, 2008.

The State had a total of nine hundred and ninety-four (994) days within which to prepare its case and bring Mr. Klindworth to trial.

It appears that Mr. Klindworth was unavailable for a period of three hundred and twenty (320) days during that time period. He was either on warrant status or in custody in another county.

As previously noted, Mr. Klindworth raised time-for-trial issues on numerous occasions.

Since it is obvious that the delay in Mr. Klindworth's case is presumptively prejudicial, the *Barker* factors must be applied to determine whether or not his constitutional rights were violated.

As the *Iniquez* Court noted at 292-93:

> This involves a more searching examination of the circumstances, including the length of and reasons for delay, whether the defendant asserted his speedy trial rights, and prejudice to the defendant. [Citations omitted.] This is a determination to be made "'in the light of the circumstances of each particular case,'" *Alter* [*State v. Alter*, 67 Wn.2d 111, 406 P.2d 765 (1965)] at 119 (quoting *Orcutt*, [*State ex rel. Orcutt v. Simpson*, 125 Wash. 665, 216 Pac. 874 (1923) at 666], which necessarily means that other considerations may also be relevant in a particular case.

The delay in Mr. Klindworth's case requires particular scrutinization since the trial court, prior to trial, essentially gutted his defense. The Court forced him to proceed with the suppression hearing in the absence of his records. They were unavailable to him due to his incarceration in the Franklin County Jail.

Mr. Klindworth had been in custody since May 23, 2011. On July 8, 2011 he argued his need for access to his records and a law library. The trial court denied his motions. It was at this hearing that significant violations occurred.

Mr. Klindworth contends that this particular *Barker* factor weighs strongly against the State.

Mr. Klindworth contends that the second *Barker* factor (*i.e.*, the reason for the delay) should be treated as neutral under the facts and circumstances of his case. Delays were occasioned on the part of both Mr. Klindworth and the State.

The third *Barker* factor involves the assertion of time-for-trial rights. Mr. Klindworth continually asserted that right, unless otherwise waived by him in writing (*See:* reservations in waivers). This factor weighs in his favor.

The remaining factor is prejudice to Mr. Klindworth.

> Prejudice is judged by looking at the effect on the interests protected by the right to a speedy trial: (1) to prevent harsh pretrial incarceration, (2) to minimize the defendant's anxiety and worry, and (3) to limit impairment to the defense. … Even though impairment to the defense by the passage of time is the most serious form of prejudice, no show of actual impairment is required to demonstrate a constitutional speedy trial violation. .. As noted above, this is difficult to prove, and as a result, we presume such prejudice to the defendant intensifies over time. ….

State v. Iniquez, supra, 295.

Mr. Klindworth concedes that the was not incarcerated at all times during the critical period. However, he was incarcerated and denied his rights to access a law library and his records during his last incarceration.

Moreover, even though he requested appointment of an attorney on July 8, 2011, attorney Kane was not re-appointed until July 11, a mere nine (9) days prior to trial. The appointment was over both Mr. Klindworth's and attorney Kane's objection.

There can be no doubt that these actions by the trial court impaired Mr. Klindworth's ability to present a defense.

Finally, Mr. Klindworth, throughout the proceedings, continually advised the Court of the impact of the delay upon his emotional state, finances, and ability to work. (*e.g.*, Munoz RP 13, l. 23 to RP 14, l. 3; King RP 15, ll. 18-21; RP 35, ll. 5-8; RP 37, ll. 8-13; Munoz RP 253, ll. 21-24; RP 264, ll 17-19; RP 316, ll. 5-10; RP 328, ll. 14-18; RP 342, ll. 9-22; RP 368, ll. 16-23)

Mr. Klindworth asserts that his constitutional right to a speedy trial was denied under the facts and circumstances of his case and that his conviction should be reversed and the case dismissed.

III. RIGHT TO PRESENT DEFENSE

The denial of a right to present a defense is reviewed *de novo. See: State v. Jones*, 168 Wn.2d 13, 719, 230 P.3d 576 (2010).

> 'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.' *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of *jurisprudence. Id.* 'the right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions.' *State v. Darden,* 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas,* 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed.2d 1019 (1967)).

State v. Jones, supra, 720.

Mr. Klindworth maintains that the trial court's actions at the July 8 and July 11, 2011 pre-trial hearings prevented him from presenting his defense to the jury. The critical aspect of this defense was the attack on the blood test results and the denial of his ability to have independent tests conducted.

> 'Under the due process clause of the Fourteenth Amendment, it must be demonstrated that the State's prosecution … comported with prevailing notions of fundamental fairness such that [the defendant] was afforded a meaningful opportunity to present a complete defense.' *State v. Lord,* 117 Wn.2d 829, 867, 822 P.2d 177 (1991). … [A] mistrial should be granted 'only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly.' *State v. Johnson,* 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

State v. Greiff, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000).

Mr. Klindworth was prevented from continuing his cross-examination of Sgt. Dickenson due to his incarceration, lack of records, and lack of access to a law library. Mr. Klindworth had no choice but to discontinue that cross-examination.

Mr. Klindworth contends that a full cross-examination of Sgt. Dickenson could have impacted the trial court's decision in denying the CrR 3.6 motion as to the blood tests.

Mr. Klindworth relies upon the following portions of this brief to support the argument contained in this portion.

IV. BLOOD TESTS

Mr. Klindworth was denied the opportunity to have the third blood vial tested due to State action/inaction. The blood vial was left at the hospital. The hospital only retained it for a period of one (1) week. Mr. Klindworth was never advised of this limitation by the arresting officer or the State.

> The purpose of granting the defendant a right to have additional tests performed is to afford him or her an opportunity to obtain evidence with which to impeach the State's blood test results. [Citations omitted.] The State's results can be faulty because its sample was contaminated when drawn, contaminated in the interim between being drawn and being tested, switched inadvertently with another sample prior to testing, or tested improperly. Re-testing the State's sample will not reveal error arising from any of these reasons except the last. Thus, it cannot

> be said that re-testing substitutes for an additional test in such a way as to obviate prejudice to the defendant.

State v. Dunivin, supra, 505.

The record reflects that there were problems at the WSPCL. Test results by the original analyst were excluded. Test results by the second analyst were inadmissible due to problems with the testing procedures. It was only after the blood had been re-tested a third time that the trial court ruled it admissible.

The fact that Mr. Klindworth could not have the third vial of blood tested is critical. It is unknown whether that vial was one (1) of the vials provided by Sgt. Dickenson, or a vial provided by hospital staff.

It is unknown which vials were actually tested at the WSPCL.

Were all three (3) tests conducted from the same vial or from both vials?

Were the testing difficulties on the second re-test the result of contamination?

A defendant has a constitutional due process right to gather evidence in his own defense. *See: State v. McNichols, supra,* 250-51.

Mr. Klindworth asserts that the facts and circumstances of his case are substantially similar to what occurred in *State v. Anderson, supra.* In *Anderson* an additional blood sample was taken and given to the defendant's father. The *Anderson* Court ruled at 389:

> The trial court concluded the blood test was admissible because the trooper "substantially met" the legislative intent underlying the special evidence warning by arranging to take a blood sample for Anderson and giving it to his father an hour and a half later. The court found that the officer gave an appropriate explanation to a "close available family member." **The State requests this court to forge a "substantial compliance rule" for the special evidence warning. We must decline to do so**.

(Emphasis supplied.)

The fact that a third blood sample was taken and left at the hospital is not substantial compliance with the special evidence warning.

RCW 46.20.308(2) provides, in part:

> … However, in those instances … where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(5). **The officer shall inform the person of his** or her right to refuse the … blood test, and of his or her **right to have additional tests administered by any qualified person of his** or her **choosing** as provided in RCW 46.61.506. …

(Emphasis supplied.)

Mr. Klindworth does not dispute that Sgt. Dickenson properly informed him of his implied consent rights. What he does dispute is that he was not allowed to have an additional test by a person of his own choosing.

RCW 46.61.506(6) provides, in part:

> **The person tested may have a** physician, or a qualified technician, a chemist, registered nurse, or other **qualified person of his** or her **own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer**. …

(Emphasis supplied.)

Furthermore, even though an additional test was administered, he was not given the opportunity to have that blood sample analyzed due to the limited retention of the sample by the hospital.

Mr. Klindworth asserts that Sgt. Dickenson should have taken the third sample along with him and preserved it. It could then be given to Mr. Klindworth at the time of his release from jail.

As the *McNichols* Court held at 252:

> We conclude that whether the State has unreasonably interfered with a DWI suspect's right to additional testing under the implied consent laws must be determined on a case-by-case basis.

Sgt. Dickenson unreasonably interfered with Mr. Klindworth's request for an additional test at another local hospital. Sgt. Dickenson unreasonably interfered with Mr. Klindworth's right to an additional test by not securing and preserving the third blood sample.

"Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless." *State v. Turnipseed*, 162 Wn. App. 60, 70, 255 P.3d 843 (2011).

Constitutional error in this case was not harmless. It was extremely prejudicial.

V. COMMENTS ON CONSTITUTIONAL RIGHTS

> …[T]he State cannot seek comments on a defendant's silence to infer guilt. [Citation omitted.] "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

State v. Evans, 129 Wn. App. 211, 225, 118 P.3d 419 (2005).

A police officer's testimony that an individual under arrest for DUI refused to answer the DUI interview form is a direct comment on a criminal defendant's right to remain silent. The obvious inference is the individual does not want to say anything to indicate guilt. *See: State v. Perrett*, 86 Wn. App. 312, 321-22, 966 P.2d 426 (1997).

The failure to conduct a sidebar on what eventually became Exhibit 9 resulted in an exchange whereby the jury was informed that the prosecuting attorney was only trying to protect Mr. Klindworth's rights. This comment reflected adversely on defense counsel and the trial itself. *See: State v. Bromley*, 72 Wn.2d 150, 151, 432 P.2d 568 (1967) (accumulation of matters of dubious propriety can deprive a defendant of a fair trial).

VI. SELF-REPRESENTATION

> The United States Supreme Court recognizes a constitutional right of criminal defendants to waive assistance of counsel and to represent themselves at trial. In *Faretta v.*

> *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed.2d 562 (1975), the rule was announced that a court cannot force a defendant to accept counsel if the defendant wants to conduct his or her own defense, as the Sixth Amendment grants defendants the right to make a personal defense with or without the assistance of an attorney. The rationale for this rule is respect for the defendant's individual autonomy. [Citations omitted.] The right to representation by counsel of choice is, however, limited in the interest of both fairness and efficient judicial administration. *United States v. Wheat*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed.2d 140 (1988).

State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991).

Mr. Klindworth was granted the right to self-representation at various times during the pendency of the proceedings. He represented himself during the following periods of time:

> June 5, 2007 to July 18, 2007 (13 days)
>
> July 23, 2007 to February 6, 2008 (198 days)
>
> May 5, 2009 to July 17, 2009 (73 days)
>
> March 23, 2010 to July 11, 2011 (475 days)

Mr. Klindworth did not want to be represented by attorney Swanberg. Mr. Klindworth never met with attorney Rutt. Mr. Klindworth accepted attorney Thompson and later objected to his removal. Mr. Klindworth continually vacillated concerning attorney Kane.

> The Supreme Court's holding that a criminal defendant has a right under **the Sixth Amendment** to represent himself if he chooses **does not encompass a right to**

> **choose any advocate** if the defendant wishes representation. [Citation omitted.] **Whether** an indigent defendant's **dissatisfaction with** his **court-appointed counsel is meritorious** and justifies the appointment of new counsel **is a matter within the discretion of the trial court**. *State v. Sinclair,* 46 Wn. App. 433, 730 P.2d 742 (1986), *review denied,* 108 Wn.2d 1006 (1987). When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current appointed counsel or to represent himself. *Sinclair,* at 437-38. **If the defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed *pro se* does not violate the defendant's constitutional right to be represented by counsel**, and may represent a valid waiver of that right. *State v. Staten,* 60 Wn. App. 163, 802 P.2d 1384 (1981).

State v. DeWeese, supra, 375-76. (Emphasis supplied.)

Mr. Klindworth was adamant that he did not want attorney Kane to represent him at trial. Attorney Kane was adamant that she could not represent Mr. Klindworth. The trial court still reappointed her to represent him.

Even though attorney Kane felt that there was irreconcilable differences with Mr. Klindworth, the Court ordered her to remain on the case. RPC 1.16(c) provides, in part: "… When ordered to so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

Attorney Kane had no choice but to remain on the case. Nevertheless, this still constituted a violation of Mr. Klindworth's right to self-representation.

> … [A] defendant's desire not to be represented by a particular court-appointed counsel does not by itself constitute an unequivocal request by the defendant for self-representation. *State v. Garcia,* 92 Wn.2d 647, 655, 600 P.2d 1010 (1979). The requirements of a knowing and valid waiver must be met.

State v. DeWeese, supra, 377.

Mr. Klindworth did not want attorney Kane to represent him at trial. Mr. Klindworht wanted to proceed to trial representing himself. The trial court denied Mr. Klindworth's request and in doing so violated his constitutional rights.

> It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys.

State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007).

Mr. Klindworth took the position that he was not going to communicate with attorney Kane. Attorney Kane advised the Court that this created difficulties for her. She felt that she could not, in good conscience, continue representation of Mr. Klindworth.

The *Schaller* Court noted in *fn.* 24, *supra,* the following quote from *Harding v. Davis,* 873 F.2d 1341, 1344, n. 2 (11th Cir. 1989): "[A]n ac-

cused cannot force the appointment of new counsel by simply refusing to cooperate with his attorney, notwithstanding the attorney's competence and willingness to assist."

Mr. Klindworth distinguishes *Schaller* based upon the quote from *Harding.* Attorney Kane was not willing to continue to assist him at trial. The trial court should have allowed him to proceed *pro se.*

Consideration must also be given to *State v. Bebb*, 108 Wn.2d 515, 525-26, 740 P.2d 829 (1987) where it was stated that

> … [C]ourts generally find that relinquishment of the right to proceed *pro se* is a far easier matter than waiver of the right to counsel. *Dorsey v. State*, 171 Ind. App. 408, 357 N.E.2d 280 (1976) (defendant's request for counsel subsequent to request to proceed *pro se* and acquiescence in proceedings renders moot the issue of whether the trial court erred in denying the defendant the right to represent himself at trial). *See also People v. Lindsey*, 84 Cal. App. 3d 851, 149 Cal. Rptr. 47 (1978); *Tucker v. State*, 92 Nev. 486, 553 P.2d 951 (1976) (noting that the record showed that the defendant had voluntarily accepted representation by the public defender and had made no objection to such representation after it commenced).

Mr. Klindworth's case is distinguishable from the cited cases in that he objected to his representation by attorney Kane on multiple occasions.

Mr. Klindworth takes the position that continued representation by attorney Kane amounts to ineffective assistance of counsel since he was not entitled to represent himself.

> A criminal defendant has a constitutional right to receive effective representation from his attorney. *Wheat v. United States, supra,* 486 U.S. at 159. This right does not guarantee a defendant the right to her counsel of choice or to his counsel of choice or to counsel with whom he has a meaningful attorney-client relationship. *Wheat, supra.* Nevertheless, a defendant's loss of confidence or trust in his attorney is not sufficient reason to appoint a new one. But **if the attorney-client relationship completely collapses, the refusal to substitute new counsel violates the defendant's right to effective assistance of counsel**.

See: United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998). (Emphasis supplied.)

VII. CrR 8.3(b)

CrR 8.3(b) provides, in part:

> 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. …

Mr. Klindworth's CrR 8.3(b) motion should have been granted. The notification procedures utilized by the State in this case constitute mismanagement. The mismanagement resulted in substantial prejudice to Mr. Klindworth including his incarceration on various occasions.

"… [G]overnmental misconduct need not be of an evil or dishonest nature; simple mismanagement also falls within such a standard." *State v.*

Sulgrove, 19 Wn. App. 860, 863, 578 P.2d 74 (1978). *See also: State v. Chichester,* 141 Wn. App. 446, 170 P.3d 583 (2007).

"A trial court's decision in denying a CrR 8.3(b) motion is reviewed for abuse of discretion." *State v. Michielli,* 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

A trial court abuses its discretion

> Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Klindworth relies upon argument contained in the other portions of this brief to support the position that he takes as to the trial court's abuse of discretion in denying the CrR 8.3(b) motion.

VIII. IID

RCW 46.20.720(1) provides, in part:

> **The court may order** that after a period of suspension, revocation, or denial of driving privileges, and for up to as long as the court has jurisdiction, **any person convicted of any offense involving the use, consumption, or possession of alcohol** while operating a motor vehicle may drive only a motor vehicle equipped with a functioning ignition interlock. …

(Emphasis supplied.)

RCW 46.20.720 contains no provision allowing imposition of an IID in connection with a drug-related driving offense.

CONCLUSION

Mr. Klindworth's conviction should be reversed and the case dismissed under CrR 3.3(h) due to a violation of his time-for-trial rights.

Mr. Klindworth's conviction should be reversed and the case dismissed for a violation of his right to a speedy trial under the Sixth Amendment and Const. art. I, § 22.

Mr. Klindworth's conviction should be reversed and the case dismissed pursuant to the holdings in *State v. Dunivin, supra; State v. Anderson, supra* and *State v. McNichols, supra.*

Mr. Klindworth's conviction should be reversed and the case dismissed for violation of his constitutional right to present a defense.

Mr. Klindworth's conviction should be reversed and the case dismissed under CrR 8.3(b) for both trial court and prosecutorial mismanagement.

Alternatively, Mr. Klindworth's conviction should be reversed and the case remanded for a new trial based on evidentiary error, a comment on his constitutional right to remain silent and violation of his constitutional right to self-representation.

The trial court lacked authority to impose an IID requirement, and if Mr. Klindworth's case is neither dismissed nor remanded for a new trial, then the judgment and sentence needs to be corrected.

DATED this __5th___ day of November, 2012.

Respectfully submitted,

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APPENDIX "A"

03/20/07	Arraignment	JT 06/06/07	Swanberg
05/08/07	Time-for-trial raised *Pro se* Raised		Swanberg
05/15/07	FTA		Swanberg
05/22/07	Time-for-trial raised *Pro se* Raised	JT 08/08/07	Swanberg
06/05/07	Amended Information		*Pro se*
06/26/07	Attorney request or will hire		*Pro se*
07/17/07	FTA/Bench Warrant (wrong courtroom)		*Pro se*
07/18/07	Δ Appr BW		Rutt
07/23/07	Misc Motions Filed		*Pro se*
07/24/07	Time-for-trial again *Pro se* again		*Pro se*
08/14/07	Misc Motions Filed		*Pro se*
08/20/07	Affidavit of Prejudice Vanderschoor		*Pro se*
09/26/07	Time-for-trial again		*Pro se*
10/02/07	Δ FTA; Bench Warrant		*Pro se*
10/05/07	Bail bond		*Pro se*
10/16/07	Conditions of Release increased bail (in custody)		*Pro se*
10/30/07	Time-for-trial again	JT 12/05/07	*Pro se*
11/19/07	Bail bond		*Pro se*
11/30/07	Argue time-for-trial Attorney request Motions withdrawn until attorney		*Pro se*
12/04/07	Δ Cont to hire attorney	JT 01/09/08	*Pro se*
12/31/07	Δ cont; w/o attorney (denied)		*Pro se*
01/09/08	Δ unprepared Stand-by attorney request Cont to hire attorney	JT 02/06/08	*Pro se*
01/22/08	No attorney Time-for-trial again TC *pro se* or court-appointed		*Pro se*
01/29/08	Time-for-trial again Change of venue		*Pro se*

02/06/08	Attorney request	JT 03/05/08	Thompson
02/26/08	Waiver (Reserves priors)	JT 07/16/08	Thompson
03/25/08	FTA		Thompson
07/01/08	Stipulated continuance JT	JT 08/06/08	Thompson
07/29/08	3,6 Hearing (1st day)		Thompson
08/20/08	3.6 Hearing (2nd day)		Thompson
09/02/08	Waiver	JT 11/05/08	Thompson
10/29/08	3.6 FF/CL Δ Atty Cont	JT 11/19/08	Thompson
11/10/08	Waiver	JT 01/07/09	Thompson
12/16/08	FTA (in treatment)		Thompson
01/06/09	Waiver	JT 03/11/09	Thompson
02/10/09	FTA		Thompson
02/17/09	Δ Atty Cont		?Cont as atty? Thompson
02/24/09	TC 1 wk cont re: atty status		Thompson
03/03/09	Atty chg	JT 03/25/09	Kane
03/17/09	FTA; (Benton County Jail)		Kane
03/24/09	Waiver (Reserves Priors)	JT 05/27/09	Kane
04/28/09	Δ Atty Cont Time-for-trial again *Pro se* again		Kane
05/05/09	Time-for-trial again *Pro se* again Stand-by request	JT 06/24/09	*Pro se*
05/29/09	FTA		*Pro se*
06/11/09	Const speedy trial TC says 5/5/09 new com-mencement		*Pro se*
07/17/09	Ltr requesting atty; n/Kane Kane reappointed	JT 10/07/09	*Pro se*
09/18/09	FTA		Kane
10/22/09	FTA		Kane
11/03/09	Stip Cont	JT 01/20/10	Kane
12/01/09	Time-for-trial again 8.3 motions [Denied]		Kane
01/05/10	Waiver (Reserves Priors)	JT 03/10/10	Kane
03/02/10	*Pro se* request [Denied]		Kane
03/16/10	Ltr re: time-for-trial State cont off unavail	JT 04/21/10	Kane
03/23/10	Waiver Kane Stand-by *Pro se* granted	JT 07/07/10	*Pro se*
06/23/10	FTA; BW		*Pro se*

07/20/10	BW Appr		*Pro se*
07/27/10	Bail Reduced	JT 09/15/10	*Pro se*
08/17/10	Blood draw hrg Mech Malfunction in Crt Cont 9/9/10 [in custody]		*Pro se*
09/09/10	FTA; BW		*Pro se*
10/06/10	BW Hrg		*Pro se*
11/05/10	Motion to Quash		*Pro se*
11/08/10	Motion to Quash cont		*Pro se*
12/10/10	FTA		*Pro se*
04/05/11	BW appr $1000 bail 6/04 outside? 4/12 hrg Atty request	JT Not set	*Pro se*
04/08/11	Bond posted (outside 7/5/11)		*Pro se*
04/12/11	TC cancels hrg ?Notice to Δ?		*Pro se*
05/20/11	FTA; BW		*Pro se*
05/23/11	BW appr; $20,000 bail Atty request	6/3 hrg (not held)	*Pro se*
06/30/11	Time-for-trial again TC/Δ agree 5/23 new commencement	JT 07/20/11	*Pro se*
↑ 4/8/11- 6/30/11 Mutual Mistake			
07/08/11	Access to recs Access to law lib Atty Request	3.6 Cont [9/9/10] TC denies all	*Pro se*
07/11/11	Time-for-trial again Atty request Hobson's choice Due process Chain of Custody Lack of records (Denied - Kane reappoint- ed over Δ's and atty's ob- jection		*Pro se*
07/18/11	Kane appt @ issue Δ says no choice		Kane
07/20/11	JT		

NO. 30226-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. THOMAS M. KLINDWORTH, Defendant, Appellant.	))))))))))))	FRANKLIN COUNTY NO. 07 1 50040 4 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this _5th_ day of November, 2012, I caused a true and correct copy of the *APPELLANT'S BRIEF* and *MOTION AND AFFIDAVIT TO EXTEND TIME TO DATE OF FILING APPELLANT'S BRIEF* to be served on:

Court of Appeals, Division III — E-FILE
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Spokane, WA 99201

FRANKLIN COUNTY PROSECUTOR'S OFFICE — E-MAIL(per agreement)
Attn: Shawn P. Sant — appeals@co.franklin.wa.us
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CERTIFICATE OF SERVICE

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