90245-3

FILED

APR 30 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 30226-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

FILED
MAY 19 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

THOMAS M. KLINDWORTH,

Defendant/Appellant.

RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
Telephone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

1. IDENTITY OF PETITIONER

THOMAS M. KLINDWORTH requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Klindworth seeks review of an unpublished Opinion of Division III of the Court of Appeals dated April 1, 2014. (Appendix "A" 1-30)

3. ISSUES PRESENTED FOR REVIEW

A. Did the trial court's actions in connection with the CrR 3.6 motion result in a denial of Mr. Klindworth's constitutional right to present a defense?

B. Is Mr. Klindworth entitled to the benefit of LAWS OF 2013, Ch. 35, Second Sp. Sess., § 36 which amended the implied consent law (RCW 46.20.308) as it pertains to blood draws? *See also: State v. Gauthier,* 174 Wn. App. 257 (2013).

4. STATEMENT OF THE 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 approximately 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. Mr. Klindworth was arrested 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)

Sgt. Dickenson left the third vial of blood at the hospital. He asserted that it was Mr. Klindworth's responsibility to retrieve it. (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)

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

On August 14, 2007 Mr. Klindworth again filed multiple dismissal motions. (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 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. Mr. Klindworth did not appear on October 2, 2007. (Supp. CP 419; Supp. CP 420; Munoz RP 14, ll. 17-21; RP 20, ll. 21-23; RP 78, ll. 8-12; RP 80, ll. 3-17)

On November 30, 2007 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)

A written request for an attorney was filed on February 6, 2008. Mr. Klindworth appeared and again requested representation. 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)

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)

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 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 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)

Mr. Klindworth requested removal of his attorney 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. (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)

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)

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)

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)

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)

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. 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)

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. Mr. Klindworth filed his Notice of Appeal that same date. (CP 8; CP 10)

On April 1, 2014 the Court of Appeals entered an unpublished decision affirming Mr. Klindworth's conviction.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) contains the provisions relating to discretionary review by the Supreme Court. The rule states:

> A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> ....

Mr. Klindworth contends that RAP 13.4(b)(1), (2) and (3) are all applicable to the Court of Appeals decision in his case.

The Court of Appeals did not address whether or not Mr. Klindworth is entitled to the benefit of *State v. Gauthier, supra,* or the legislative amendment to RCW 46.20.308. Mr. Klindworth asserts that he is entitled to that benefit since his case is still on appeal.

A. <u>Right to Present Defense</u>

Mr. Klindworth was denied his right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as well as Const. art. I, §§ 21 and 22.

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. A critical aspect of his defense was the attack on the blood test results and the denial of his ability to have independent tests conducted. By short-circuiting Mr. Klindworth's ability to proceed with the CrR 3.6 hearing, the trial court allowed the jury to be exposed to evidence that would have been and/or should have been suppressed.

> '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 would have impacted the trial court's decision 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.

B. 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 addi-

> tional test in such a way as to obviate prejudice to the defendant.

State v. Dunivin, 65 Wn. App. 501, 505, 828 P.2d 1150 (1992).

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 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,* 128 Wn.2d 242, 250-51, 906 P.2d 329 (1995).

Mr. Klindworth asserts that the facts and circumstances of his case are substantially similar to what occurred in *State v. Anderson,* 80 Wn. App. 384, 909 P.2d 945 (1996). 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:

> ... 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.)

Subsequent to the trial court's ruling on the CrR 3.6 motion, as well as the trial, a change in the law occurred as to blood draws under the implied consent law. The statute was amended by LAWS OF 2013, Ch. 35, Second Sp. Sess., § 36.

RCW 46.20.308(1) now reads, in part:

> Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath ... if arrested for any offense where,

> at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug .... Neither consent nor this section precludes a police officer from obtaining a warrant for a person's breath or blood.

Sgt. Dickenson elected to have Mr. Klindworth's blood drawn. The reason was the sergeant's belief that Mr. Klindworth was under the influence of a drug.

The Legislature recognized that a search warrant is required whenever a blood draw is requested by law enforcement as a result of the decision in *State v. Gauthier, supra* at 263, where the Court held:

> A blood test or cheek swab to procure DNA evidence constitutes a search and seizure under the Fourth Amendment and article I, section 7 of the Washington Constitution. *State v. Garcia-Salgado,* 170 Wn.2d 176, 184, 240 P.3d 153 (2010); *State v. Curran,* 116 Wn.2d 174, 184, 804 P.2d 558 (1991), *overruled on other grounds by State v. Berlin,* 133 Wn.2d 541, 947 P.2d 700 (1997). Because taking a DNA sample constitutes a search, a warrant or court order is first required. *Garcia-Salgado,* 170 Wn.2d at 184, 186. As a result, individuals have a constitutional right to refuse consent to warrantless sampling of their DNA. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 228, 93 S. Ct. 2041, 36 L. Ed.2d 854 (1973); *State v. Morse,* 156 Wn.2d 1, 13, 123 P.3d 832 (2005).

Sgt. Dickenson did not apply for a search warrant. He proceeded under the law as it existed.

However, Mr. Klindworth maintains that he receives the benefit of the change in the law.

In *State v. Mann,* 146 Wn. App. 349, 359, 189 P.3d 843 (2008) it was recognized that

> ... [T]he fact that the legislature adopted an amendment in response to a ... Supreme Court ruling does not automatically render the amendment clarifying or curative. [Citations omitted.] ... [L]egislative enactments which respond to judicial interpretations of a prior statute, and which materially and affirmatively change that statute, are not simply "clarifications" of the original intent of the legislature; rather, such enactments are "amendments" to the statute itself. [Citation omitted.]
>
> "Nor is the legislature prohibited from 'pass[ing] a law that directly impacts a case pending in Washington courts.'" *Wash. State Farm Bureau Fed'n v. Gregoire,* 162 Wn.2d 284, 304, 174 P.3d 1142 (2007) (alteration in original) (quoting *Port of Seattle v. Pollution Control Hearings Bd.,* 151 Wn.2d 568, 625, 90 P.3d 659 (2004)).

The *Mann* Court went on to hold at 360:

> ... [B]arring a constitutional limitation, we will apply a statutory amendment *retroactively* "when it is (1) intended by the Legislature to apply retroactively, (2) curative in that it clarifies or technically corrects ambiguous statutory language, or (3) remedial in nature." *Barstad v. Stewart Title Guar. Co.,* 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002). Washington courts disfavor retroactive application of a statute, absent legislative direction to the contrary.

Mr. Klindworth contends that the amendment to RCW 46.20.308 is

remedial in nature. The statutory amendment, in effect, clarifies and reaffirms the constitutional prohibition against warrantless searches and seizures insofar as blood tests are concerned.

Moreover, since the implied consent statute is criminal in nature, it is subject to both Fourth Amendment and Const. art. I, § 7 analysis. *See: State v. Yallup,* 160 Wn. App. 500, 508, 248 P.3d 1095 (2011).

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 State's failure to preserve it and the limited retention of the sample by the hospital.

Mr. Klindworth asserts that Sgt. Dickenson should have taken the third sample along with him. It could have 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.

6. CONCLUSION

RAP 13.4(b)(1), (2) and (3) are all implicated by the Court of Appeals decision.

Mr. Klindworth asserts that the trial court's actions with respect to his CrR 3.6 motion undermined his ability to present a defense contrary to *State v. Jones, supra.*

Additionally, the Court of Appeals decision is in direct conflict with *State v. Gauthier, supra*, and RCW 46.20.308 as amended by LAWS OF 2013, Ch. 35, Second Sp. Sess., § 36.

Finally, the Fourth Amendment and Const. art. I, § 7 are directly implicated in this specific suppression motion and a published decision is needed to address the current state of the law.

Mr. Klindworth respectfully requests that review be accepted.

DATED this 30th day of April, 2014.

Respectfully submitted,

DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant
P.O. Box 1019
Republic, Washington 99166
Telephone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

APPENDIX "A"

FILED
APRIL 1, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30226-1-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
THOMAS MICHAEL KLINDWORTH,	)	
	)	
Appellant.	)	

PRICE, J.* — Thomas M. Klindworth appeals his driving under the influence (DUI) conviction, arguing the trial court violated both his constitutional right and rule based right to a speedy trial under CrR 3.3. He also contends (1) he was denied his right to present a defense, (2) a State's witness improperly commented on his constitutional right to remain silent, (3) the trial court violated his right to represent himself, (4) the trial court erred in denying his CrR 8.3 motion to dismiss for prosecutorial and court mismanagement, and (5) the court erred in imposing an ignition interlock requirement at sentencing. In his statement of additional grounds for review (SAG), he alleges (1) his

* Judge Michael Price is serving as judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

speedy trial rights were violated, (2) the prosecutor failed to release exculpatory evidence, (3) the prosecutor released slanderous information to a local newspaper to create negative pretrial publicity, (4) the blood evidence was tainted, (5) willful court misconduct and wrongful incarceration hampered his ability to present a defense, (6) the removal of defense counsel added one year to the pretrial process, (7) improper denial of public funds for his defense, and (8) the court improperly disallowed evidence that Mr. Klindworth spent months in jail before trial. Finding no reversible error, we affirm.

FACTS

During the early morning of January 21, 2007, Franklin County Police Sergeant Jim Dickenson was on patrol and noticed a car traveling under the speed limit. The car swerved abruptly into the officer's lane of travel and quickly braked, almost causing a collision. Sergeant Dickenson had to slam on his brakes to avoid hitting the car. The car then slowed to 30 miles per hour in a 60 mile per hour zone. When the car crossed into the fog line, the sergeant activated his emergency lights.

When the sergeant approached the car, he could smell burnt methamphetamine. He observed that the driver, later identified as Mr. Klindworth, had extremely red eyes, dilated pupils, slurred speech, and was nervous, fidgety, and very talkative. Mr. Klindworth was reaching all over inside the car and appeared confused about the stop.

Sergeant Dickenson arrested Mr. Klindworth for driving under the influence of drugs.

After Sergeant Dickenson placed Mr. Klindworth in the back of his patrol car, Mr. Klindworth continued to be very fidgety and extremely talkative. Most of what he said did not make sense. The patrol car had a strong odor of methamphetamine. Mr. Klindworth eventually consented to a blood draw. Sergeant Dickenson took Mr. Klindworth to a local hospital for the blood test and advised Mr. Klindworth of his right to have an independent blood test. Mr. Klindworth requested that a third vial be drawn. However, he later failed to retrieve it.

On March 16, 2007, the State charged Mr. Klindworth with various counts related to the incident, including reckless driving and driving while under the influence. The State amended the information just before trial to a single count of driving while under the influence. Due primarily to Mr. Klindworth's failures to appear for scheduled court appearances, including a lengthy absence between September 9, 2010, and April 5, 2011, the case did not go to trial until July 2011.

At trial, Sergeant Dickenson testified that traveling under the speed limit is "one indicator of many for an impaired driver." Report of Proceedings (RP) (Vol. VI of VI) at 911. He characterized Mr. Klindworth's driving as "erratic and abnormal." RP (Vol. VI of VI) at 912. He explained that typical signs of methamphetamine use include fidgeting,

excessive talking, twitching of arms and legs, sweating, restlessness, being argumentative, and irritability. Sergeant Dickenson stated, "When I walked up to the vehicle [Mr. Klindworth] was moving about the vehicle very rapidly. He was reaching. The entire vehicle where he could reach, he was reaching in the backseat, the consul [sic], the passenger floor, in his pockets." RP (Vol. VI of VI) at 916-17.

Asa Louis, a Washington State Patrol toxicologist, testified that he tested the two vials of blood drawn by the State and found "significant" levels of methamphetamine in both vials. RP (Vol. II of III) at 108. He testified that these levels would cause fidgeting, rapid speech and body movements, dilated pupils, and could potentially impair driving.

Mr. Klindworth did not testify or present witnesses. A jury found Mr. Klindworth guilty as charged. Mr. Klindworth appeals.

ANALYSIS

Violation of CrR 3.3 Rights. Mr. Klindworth first contends that the trial court failed to bring him to trial within the time required under CrR 3.3. He also contends that the State violated LCrR 3.2(a). We review the application of court rules de novo. *State v. Carlyle*, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996). Whether a speedy trial rule was violated, mandating dismissal, is a question of law, also reviewed de novo. *Id.* at 35.

CrR 3.3 governs the time for trial in criminal cases. Under CrR 3.3(b)(2), a

criminal defendant must be brought to trial within 90 days if not incarcerated. The 90 day period commences on the arraignment date, but the commencement date may be reset for various reasons under the rule. For example, the commencement date is reset when counsel is disqualified from representation. CrR 3.3(c)(2)(vii). In such a case, the 90 day period begins on the disqualification date. CrR 3.3(c)(2)(vii).

The commencement date is also reset for a defendant's failure to appear at any proceeding that requires the defendant's presence. CrR 3.3(c)(2)(ii). The defendant's presence is required 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." CrR 3.4(a). The defendant's presence is also required where the court orders him to appear. *State v. Branstetter*, 85 Wn. App. 123, 128-29, 935 P.2d 620 (1997). CrR 3.3(c)(2)(ii) states:

> 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 contends that his time for trial rights were violated when the trial court issued a bench warrant on July 17, 2007. He claims he appeared for court, but was in the wrong courtroom. On July 18, 2007, after being arrested the day before for failing to appear, he told the court, "We were delayed in getting there. I was late, but I was there

for a long time. I was in the wrong courtroom . . . . And anyway I didn't intend to do anything wrong." RP (July 18, 2007) at 3-4. Mr. Klindworth contends the speedy trial time period expired on August 20, 2007, based on a commencement date of May 22, 2007. He argues "[w]hen the trial court reset Mr. Klindworth's trial date to October 3, 2007 it violated CrR 3.3." Br. of Appellant at 25.

The record undermines Mr. Klindworth's claim. Mr. Klindworth was arraigned on March 20, 2007. After Mr. Klindworth failed to appear for a scheduled court date on May 15, 2007, the court rescheduled the court date for July 17, 2007. Mr. Klindworth failed to appear on July 17, 2007. The judge noted that witnesses were present and that he waited close to one hour for Mr. Klindworth to appear. After Mr. Klindworth failed to appear, the court struck the court date and issued a bench warrant. The court scheduled the next trial date for October 3, 2007.

The trial court did not violate Mr. Klindworth's speedy trial rights when it reset the trial date to October 3, 2007. Washington law is well settled that a failure to appear, even if inadvertent, resets the commencement date of speedy trial. *State v. Wachter*, 71 Wn. App. 80, 856 P.2d 732 (1993) (trial court correctly reset time for trial when the defendant inadvertently failed to appear when her case was called). Our Supreme Court has explained:

> [T]he "failure to appear" provision is intended to apply to a defendant who thwarts the government's attempt to provide a trial within the time limits specified under the rule by absenting himself from a proceeding. Thus, the phrase "failure to appear" refers to a defendant's unexcused absence from a court proceeding. A defendant who negligently or even inadvertently fails to appear when required to do so forfeits the right to a trial within the statutory time-for-trial period, even if the defendant has not deliberately or intentionally absconded.

State v. George, 160 Wn.2d 727, 739, 158 P.3d 1169 (2007).

Mr. Klindworth's failure to appear on July 17, 2007, even if inadvertent, as he claims, reset the speedy trial clock. There was no speedy trial violation.

Mr. Klindworth next contends that he was not properly notified of an October 2, 2007 court date in violation of LCrR 3.2(a). He claims that the court did not mail notice to him until September 28, 2007. Citing CR 6(a), which excludes weekends from computing the period of time, he contends his notice was inadequate. He also contests that he received oral notice on September 26, 2007, from a court administrator.

LCrR 3.2(a) provides:

> Defendants on bail or recognizance are expected to be available for non-scheduled appearances upon seventy-two 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.

The record contradicts Mr. Klindworth's claim. Patricia Austin, the Franklin County Superior Court Administrator, stated that she called Mr. Klindworth on

September 26, 2007, and informed him of the October 2, 2007 court date. This provided timely notice to Mr. Klindworth. His failure to appear reset the speedy trial clock.

Mr. Klindworth next asserts that a "final violation occurred during the period April 5, 2011 to July 20, 2011." Br. of Appellant at 29. He claims that after he appeared on April 5, 2011, the court failed to set a new court date and there is no indication the trial court complied with CrR 3.3(d)(2) after Mr. Klindworth's appearance on April 5, 2011. He maintains that the record does not reflect that any notice was mailed regarding an April 20, 2011 court date.

Initially, we note that Mr. Klindworth fails to provide an adequate record to support his claim. He asserts that a hearing occurred on April 20, 2011, and that he did not get notice of this court date, but fails to designate as part of the record on appeal the April 20, 2011 hearing, contrary to RAP 9.1. Mr. Klindworth's only reference to the record regarding this portion of his argument is to a "Notice of Issue and Note for Motion Docket," filed on April 20, 2011, indicating that on April 19, 2011, the State set a new hearing date for May 20, 2011. Clerk's Papers (CP) at 427.

The appellant has the burden of complying with the rules and presenting a record adequate for review on appeal. *In re Marriage of Haugh*, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990). Failure to provide an adequate record precludes appellate review. *Olmsted*

v. Mulder, 72 Wn. App. 169, 183, 863 P.2d 1355 (1993). Here, in the absence of a transcription of the April 20, 2011 hearing, we are unable to address what occurred on that date or the merits of Mr. Klindworth's claim.

However, to the extent we can address the issue without a complete record, Mr. Klindworth's claim fails. In his statement of facts, Mr. Klindworth notes that a hearing scheduled for April 12, 2011, was continued because he filed an affidavit of prejudice. He then notes that the next court date was May 20, 2011, and that he did not appear. The record before us supports this version of the facts. The record shows that Mr. Klindworth appeared for court on April 5, 2011, after arrest on a bench warrant that was issued in December 2010. The court set the next court date for April 12, 2011. On April 12, 2011, the case was continued because Mr. Klindworth filed an affidavit of prejudice against the assigned judge. On April 19, 2011, the court reset the hearing date for May 20, 2011. The note for motion docket stated, "Karla Kane, attorney for the defendant **will provide notice to defendant**." CP at 427. Mr. Klindworth did not appear on May 20, 2011. As indicated, the note for the motion indicates that Ms. Kane was instructed to give Mr. Klindworth notice of the date. Nevertheless, Mr. Klindworth did not reappear until May 23, 2011, which reset the commencement date. Mr. Klindworth's rule-based speedy trial right was not violated.

Violation of Constitutional Speedy Trial Rights. Mr. Klindworth also argues that the trial court violated his right to a speedy trial under the Sixth Amendment and article I, section 22 of the Washington Constitution. His argument fails under the facts of this case.

Both the United States Constitution and the Washington Constitution provide a criminal defendant with the right to a speedy public trial. U.S. CONST. amend. VI; CONST. art. I, § 22. Our state constitution "requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights." *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). We review de novo constitutional speedy trial claims. *Id.* at 280.

Any "inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *see State v. Ollivier*, 178 Wn.2d 813, 826-27, 312 P.3d 1 (2013). Because some delay is both necessary and inevitable, the appellant bears the burden of demonstrating that the delay between the initial accusation and the trial has crossed a line between ordinary and unreasonable to create a "presumptively prejudicial" delay. *Iniguez*, 167 Wn.2d at 283. Once this showing is made, courts must consider several nonexclusive factors in order to demonstrate whether the appellant's constitutional speedy

trial rights were violated. *Id.* These factors include the length and reason for the delay, whether the defendant has asserted his right, and prejudice to the defendant. *Id.*

Here, there was over a 50 month delay between arraignment and trial. This time period is more than sufficient to meet the defendant's initial burden. *Id.* at 291-92. Mr. Klindworth meets his burden of showing presumptive prejudice. Therefore, it is necessary to turn to the *Barker* factors to determine if the constitutional guarantee was violated.

The first factor is the length of the delay. Unlike the presumptive prejudice inquiry, this factor requires us to consider the length of time beyond that which triggers a *Barker* inquiry. Specifically, the concern is the difference between the time necessary to prepare for trial and the time the case is actually tried. As a relatively simple DUI case, this matter should have been fairly easy to prepare for trial. This factor weighs in Mr. Klindworth's favor. *Iniguez*, 167 Wn.2d at 292.

The second factor is the reason for the delay; this factor looks to the comparative contributions of the parties to the delay. *Id.* at 294. While some of the responsibility for the delay is attributable to the State, the vast bulk of the delay is overwhelmingly attributable to Mr. Klindworth. By Mr. Klindworth's own account, he failed to appear for court on many occasions. In his brief, Mr. Klindworth concedes the following missed

court dates: May 15, 2007; July 17, 2007; October 2, 2007; March 17, 2009; May 29, 2009; September 18, 2009; October 22, 2009; June 23, 2010; September 9, 2010; December 10, 2010; and May 20, 2011. These frequent failures to appear resulted in numerous delays and resetting of court dates. Moreover, he was on bench warrant status between September 2010 and April 2011.

Additionally, a substantial part of the delay is attributable to Mr. Klindworth's request for continuances. At a pretrial hearing on December 4, 2007, Mr. Klindworth requested a continuance to hire an attorney. At the next court appearance, Mr. Klindworth appeared without an attorney. On January 9, 2008, Mr. Klindworth appeared for trial, but was not prepared. Trial was rescheduled at his request. On April 28, 2009, Mr. Klindworth, through counsel, requested another continuance. Delays caused by defense counsel are also attributed to the defendant because the attorney is acting on the defendant's behalf. *Vermont v. Brillon*, 556 U.S. 81, 90-91, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009); *see State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984).

Since the delays in this case are significantly the responsibility of Mr. Klindworth, this factor weighs heavily in favor of the State.

The third factor is whether Mr. Klindworth has asserted his right to a speedy trial. *Iniguez*, 167 Wn.2d at 294-95. This factor favors Mr. Klindworth. He raised speedy trial

issues on multiple occasions during the five years between arraignment and trial.

The final factor is whether the defendant was prejudiced by the delay. *Id.* at 295. Our Supreme Court recently held that "[a] defendant . . . must establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized." *Ollivier*, 178 Wn.2d at 840. Mr. Klindworth fails to articulate a sound case for prejudice. He concedes that he "was not incarcerated at all times during the critical period." Br. of Appellant at 34. The crux of his argument seems to be that he was not appointed an attorney until nine days before trial, which impaired his ability to prepare a defense.

Mr. Klindworth ignores the fact that he was not appointed counsel until just before trial because he had been asserting his right to proceed pro se. In fact, one of the issues on appeal is that the court appointed defense counsel over his objection. He also fails to identify how late appointment of counsel prejudiced his defense. There is no indication his ability to present a defense was hindered by the passage of time. This factor weighs in favor of the State.

On balance, the *Barker* factors favor the State. While the lengthy delay favors Mr. Klindworth, his significant contribution to the delay and the absence of prejudice all weigh against his position. Mr. Klindworth's constitutional speedy trial right was not violated.

Right to Present a Defense. Mr. Klindworth next contends that the trial court denied him his right to present a defense by preventing him from challenging the blood test results and fully cross-examining Sergeant Dickenson. He contends, "[t]he critical aspect of [his] defense was the attack of the blood test results and the denial of his ability to have independent tests conducted." Br. of Appellant at 35. He contends the trial court should have suppressed the blood test results because he was denied the opportunity to have the third blood vial tested. Specifically, he claims the arresting officer was under a duty pursuant to RCW 46.20.308(2) and RCW 46.61.506(6) to inform him that the hospital would only keep the vial for one week and that the arresting officer should have taken the third sample and preserved it. He also maintains that "a full cross-examination of [Sergeant] Dickenson could have impacted the trial court's decision in denying the CrR 3.6 motion as to the blood tests." Br. of Appellant at 36. His arguments fail.

First, the State was under no obligation to cover the expenses or otherwise assist in the procurement of additional blood tests for Mr. Klindworth. *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 899, 774 P.2d 1187 (1989). "While the State must afford a [DUI] suspect a reasonable opportunity, under the circumstances, to obtain additional tests, this does not require the State to administer additional tests." *State v. McNichols*, 128 Wn.2d 242, 249, 906 P.2d 329 (1995) (citations omitted) (citing *State v. Stannard*,

109 Wn.2d 29, 36, 742 P.2d 1244 (1987)). Furthermore, the State is under no duty to assist the accused in obtaining exculpatory evidence. *McNichols*, 128 Wn.2d at 249.

RCW 46.20.308(2) instructs the officer administering an alcohol or drug test to inform the DUI suspect of his or her rights under the statute. The implied consent statute also gives the driver the right to undergo additional tests of his or her own choosing after he or she has either taken or refused the police administered test. RCW 46.20.308(2). RCW 46.20.308(2) states in relevant part, "The officer shall inform the person 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." RCW 46.61.506(6) states:

> The person tested may have a physician, or a qualified technician, 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. The test will be admissible if the person establishes the general acceptability of the testing technique or method. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

The court denied Mr. Klindworth's motion to suppress the blood test results, finding that Mr. Klindworth was given ample opportunity to make arrangements for his own blood draw and that he failed to take the steps necessary to have it preserved. The court did not err. The record establishes that Sergeant Dickenson read Mr. Klindworth his implied consent warning numerous times. The sergeant explained that he eventually

transported Mr. Klindworth to a hospital for a blood draw where a third vial was drawn, at Mr. Klindworth's request. Sergeant Dickenson took two vials and left the third vial with hospital staff. Under well-established law, Sergeant Dickenson had no affirmative duty to assist Mr. Klindworth in obtaining an independent test of the third blood vial.

In a related assignment of error, Mr. Klindworth asserts that the trial court prevented him from presenting a defense regarding the flaws in the blood evidence because it forced him to proceed to the CrR 3.6 hearing unprepared. The Sixth Amendment guarantees criminal defendants the right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719-20, 230 P.3d 576 (2010). We may review de novo an alleged denial of the Sixth Amendment right to present a defense, but only if the defendant's need to present the evidence outweighs the State's interest in precluding the evidence. *Id.* at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

Relying on *Jones*, Mr. Klindworth complains that the court's refusal to continue the CrR 3.6 hearing so that Mr. Klindworth could obtain his notes and legal materials, resulted in compromising his ability to fully examine Sergeant Dickenson and adequately challenge the State's blood evidence. However, *Jones* does not help him. In that case, the issue was whether the trial court violated the defendant's right to present a defense by refusing to let him testify or introduce evidence regarding the circumstances of the

charged rape. *Jones*, 168 Wn.2d at 719-20. Here, unlike the defendant in *Jones*, Mr. Klindworth was not prevented from admitting any evidence or examining witnesses. In fact, he was given multiple opportunities to question Sergeant Dickenson.

For example, on March 23, 2010, Mr. Klindworth asked to represent himself and argue several motions, including a challenge to the admissibility of the blood draw evidence. He stated that he needed until the middle of June to prepare his motions. The court accommodated him and scheduled a pretrial hearing for June 23, 2010. Mr. Klindworth did not appear for the scheduled hearing. At the next scheduled hearing on August 17, 2010, Mr. Klindworth started questioning Sergeant Dickenson, but the hearing had to be continued to September 9, 2010, due to a mechanical failure of the stenographic machine. Mr. Klindworth indicated that he was aware of the new court date, but did not appear on September 9, 2010. Mr. Klindworth disappeared until April 5, 2011. A new court date was scheduled for May 20, 2011. Mr. Klindworth failed to appear again on May 20, 2011.

On July 8, 2011, the date finally set for Mr. Klindworth's suppression motion, Mr. Klindworth initially indicated that he wanted to proceed with the hearing. Sergeant Dickenson was present. However, shortly into the hearing, Mr. Klindworth reversed his position and informed the court that he was not prepared to continue his questioning of

Sergeant Dickenson due to his inability to access his notes while he was incarcerated. The court noted that Sergeant Dickenson was present and pointed out that this was Mr. Klindworth's chance to finally complete his cross-examination of the sergeant. Mr. Klindworth refused and the court excused Sergeant Dickenson.

Mr. Klindworth had multiple opportunities to cross-examine Sergeant Dickenson. Ultimately, his inability to do so was based on his failure to appear for scheduled court hearings and his refusal to proceed with the CrR 3.6 hearing and finish his questioning of Sergeant Dickenson. The trial court did not deny Mr. Klindworth the opportunity to challenge the blood evidence or present a defense.

Right to Remain Silent. Next, Mr. Klindworth contends that the prosecutor violated his right to remain silent by eliciting testimony from Sergeant Dickenson that Mr. Klindworth refused to cooperate with a DUI investigation.

The Fifth Amendment to the United States Constitution states that "[no] person . . . shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington Constitution states that "[no] person shall be compelled in any criminal case to give evidence against himself." Both provisions guarantee a defendant the right to be free from self-incrimination, including the right to silence. *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009). The State violates this right

when it uses the defendant's constitutionally permitted silence as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). This means the State cannot elicit comments from witnesses or make closing arguments that infer guilt from the defendant's silence. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Eliciting testimony about and commenting on a suspect's postarrest silence or partial silence is constitutional error and subject to our stringent constitutional error standard. *Id.* at 236-37. Under this standard, we presume constitutional errors are harmful and reverse and remand for a new trial unless the State meets the heavy burden of establishing that the constitutional error was harmless beyond a reasonable doubt. *Id.* at 242. A constitutional error is harmless beyond a reasonable doubt only if the evidence is so overwhelming that any rational trier of fact would necessarily have found the defendant guilty. *Id.*

A "comment" involves use of silence either as substantive evidence of guilt or to suggest that the defendant's silence was an admission of guilt. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Here, the prosecutor questioned Sergeant Dickenson as follows:

> Q. Okay, Sergeant Dickenson, I'm handing you State's Identification 8 (indicating). Do you recognize it?
> A. Yes. This is the portion of the constitutional rights in the DUI packet.

Q. Was this form filled out during the course of your investigation for this case?
A. Yes, it was.
Q. Are those the same or substantially the same rights that you just read from your Miranda card?
A. Yes.
Q. Did the defendant sign indicating that he understood those rights?
A. He did.
. . . .
Q. Is this portion of your investigation voluntary?
A. Yes.
Q. Did the defendant agree to do the DUI interview with you?
A. I believe he didn't. I'd have to look at my form.

RP (Vol. VI of VI) at 929. After a few more questions, Sergeant Dickenson confirmed that Mr. Klindworth refused the interview. Defense counsel did not object to the questioning and the matter was not mentioned again.

In the context of the trial, the single reference to Mr. Klindworth's failure to cooperate with the DUI interview was elicited to show that after his arrest, he was irritable, uncooperative, and exhibiting the effects of methamphetamine use. The prosecutor did not at any point during trial invite the jury to use Mr. Klindworth's failure to cooperate with the DUI interview as substantive evidence of guilt or suggest that guilt could be inferred from silence. A statement will not be considered a comment on the right to remain silent, if "'standing alone, [it] was so subtle and so brief that [it] did not naturally and necessarily emphasize defendant's testimonial silence.'" *Burke*, 163 Wn.2d

at 216 (internal quotation marks omitted) (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). A mere reference to silence is not reversible error absent a showing of prejudice. *Burke*, 163 Wn.2d at 216.

However, even if we assume that Sergeant Dickenson's testimony constituted an impermissible comment on Mr. Klindworth's right to remain silent, the error was harmless under the constitutional error standard. The untainted evidence of guilt is overwhelming. Specifically, as detailed above, Sergeant Dickenson testified that Mr. Klindworth was driving dangerously, speeding and then slowing down, stopping in front of the patrol car and then veering over the fog line. The car smelled of methamphetamine, and Mr. Klindworth's behavior was consistent with methamphetamine use. A blood draw revealed the presence of methamphetamine in Mr. Klindworth's system.

In light of this overwhelming evidence demonstrating Mr. Klindworth's guilt, any rational trier of fact would necessarily have found Mr. Klindworth guilty of driving while under the influence of drugs. Accordingly, any error related to an improper comment on Mr. Klindworth's postarrest silence was harmless beyond a reasonable doubt.

Right to Self-Representation. Mr. Klindworth next contends that the trial court erred by denying his request to proceed pro se. He contends the trial court forced him to

be represented by appointed defense counsel, Karla Kane, over his objection. He further maintains that the breakdown in communication between him and Ms. Kane violated his effective right to counsel.

We review the trial court's denial of a request for self-representation for an abuse of discretion. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

Criminal defendants have a constitutional right to waive the assistance of counsel and represent themselves at trial. *Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Barker*, 75 Wn. App. 236, 238, 881 P.2d 1051 (1994). An unjustified denial of this right requires a new trial. *Madsen*, 168 Wn.2d at 503 (quoting *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)); *State v. Breedlove*, 79 Wn. App. 101, 111, 900 P.2d 586 (1995). The court must indulge in every reasonable presumption against the defendant's waiver of right to counsel. *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)).

The right to self-representation, however, is not absolute. *State v. DeWeese*, 117

Wn.2d 369, 375-76, 816 P.2d 1 (1991). As a threshold matter, the defendant's request to proceed pro se must be both timely and unequivocal. *Stenson*, 132 Wn.2d at 737. Where a defendant's request for self-representation is untimely, "the right is relinquished and the matter of the defendant's representation is left to the discretion of the trial judge." *DeWeese*, 117 Wn.2d at 377.

Mr. Klindworth's request to proceed pro se was neither timely nor unequivocal. On July 8, 2011, Mr. Klindworth asked to proceed with the CrR 3.6 hearing without the benefit of standby counsel. Later in the hearing, he indicated he wanted standby counsel and refused to argue the motion without legal counsel present. The court reminded Mr. Klindworth that it had advised him one year ago that he was being foolish by representing himself. Mr. Klindworth repeated his desire to have legal counsel. The court denied the request, noting "you've asked for lawyers on multiple occasions, and then you've asked they be discharged on multiple occasions, and I see this as simply another ploy on your part." RP (Vol. IV of VI) at 741.

On July 12, 2011, Mr. Klindworth asked for an attorney to represent him at trial scheduled for July 20, 2011. The court appointed Karla Kane. Mr. Klindworth responded, "I will not work with Karla. . . . Our differences are irretrievable, and if forced to, I need to continue on to trial on my own because we've had differences that I

don't want to discuss in open court that would . . . undermine my entire defense." RP (Vol. V of VI) at 806. The court responded, "Ms. Kane is your attorney right now. If you wish to renew your request to represent yourself at time of trial, on July 20th you can bring that up to the court." RP (Vol. V of VI) at 807.

On July 19, 2011, Ms. Kane advised the court:

> Your Honor, at this point Mr. Klindworth does feel he is bound to proceed with me as his attorney. His tactic of defending the case would have been—is severely different than mine in terms of part of the differences as to why I had asked the court to not appoint me last week.
>
> But at this point he feels like in order to get his trial underway, he has to proceed with me because he obviously didn't—since he felt like your Honor was appointing me and that the issue was closed, that he is not prepared and hasn't subpoenaed witnesses that he would have wanted, etc., for trial tomorrow.
>
> So, at this point I am proceeding forward as his attorney.

RP (Vol. V of VI) at 820-21.

When the State voiced concerns that Mr. Klindworth had a right to represent himself, the court responded:

> From my perspective, he didn't—he never wanted to proceed pro se. He just didn't want Karla Kane as his attorney, and he doesn't have a choice to choose his attorney. That's why the court ruled the way it did. Then he brings it up eight days before trial, which under those circumstances could only be characterized as efforts to undermine the process.

RP (Vol. V of VI) at 821-22.

The right to represent oneself does not encompass a right to choose a particular advocate. *State v. Schaller*, 143 Wn. App. 258, 267, 177 P.3d 1139 (2007). Moreover, a pro se request made in the context of expressing displeasure with one's counsel often indicates that the request is equivocal. *State v. Woods*, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001). In *Woods*, the defendant stated that:

> "I will be prepared to proceed with—with this matter here without counsel come October.
>
> . . . .
>
> I've already consented to one continuance, Your Honor. And they—they have done nothing but grossly misuse that time."

Id. The court found that this was not an unequivocal request, but an expression of the defendant's displeasure with his counsel's motion to continue his trial. *Id.*

Mr. Klindworth's request was likewise equivocal. The overall purpose of his exchanges with the court was to express displeasure with appointed defense counsel and to obtain new counsel. Moreover, on the day of trial, he did not renew his request to be pro se. Considering Mr. Klindworth's statements in context and applying the presumption against waiver of right to counsel, his request was equivocal.

Additionally, a trial court may terminate pro se status if a defendant "deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46; *see also Madsen*, 168 Wn.2d at 509 n.4 ("if a defendant is sufficiently disruptive or if delay

becomes the chief motive"). Here, the trial court based its decision on its finding that Mr. Klindworth was undermining and delaying proceedings. As just detailed, the record amply supports the court's finding, establishing repeated disruptions by Mr. Klindworth and repeated admonitions by the court. The trial court did not abuse its discretion in denying Mr. Klindworth's request to proceed without counsel.

Denial of Motion to Dismiss. Mr. Klindworth contends that the trial court abused its discretion in denying his motion to dismiss under CrR 8.3(b) for mismanagement. He argues that the "notification procedures utilized by the State in this case constitute mismanagement," which resulted in substantial prejudice to Mr. Klindworth, including incarceration on several occasions. Br. of Appellant at 45.

CrR 8.3(b) states:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Before a trial court may dismiss charges under CrR 8.3(b), the defendant must show by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *Rohrich*, 149 Wn.2d at 654. The governmental misconduct need not be evil or dishonest; simple mismanagement

is sufficient. *Blackwell*, 120 Wn.2d at 831. And, the defendant must show actual prejudice, not merely speculative prejudice affecting his right to a fair trial. *Rohrich*, 149 Wn.2d at 657. Dismissing charges under CrR 8.3(b) is an extraordinary remedy and is limited to truly egregious cases of mismanagement. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)). We review a trial court's decision denying a motion to dismiss under CrR 8.3 for an abuse of discretion. *Blackwell*, 120 Wn.2d at 830.

In December 2009, Mr. Klindworth filed a CrR 8.3 motion to dismiss, alleging his case had been mismanaged by the prosecutor, court administration, and the clerk's office. He claimed that he was not given notice of court dates and that when he showed up for court, the date would be reset. He claimed that the resulting delays prejudiced his trial because a witness had died during this time and his speedy trial rights were violated.

The court denied Mr. Klindworth's motion, finding that Mr. Klindworth had been advised of court dates and that his failures to appear were unexcused. The court also noted that most of the delays were attributable to Mr. Klindworth, pointing out that Mr. Klindworth filed approximately 10 motions in July 2010, but failed to note any of them for the motion docket. The court also found that Mr. Klindworth was not credible and that he failed to support his contentions with supporting documents.

Mr. Klindworth fails to explain how the court abused its discretion. Mr. Klindworth does not specify which "notification procedures" prejudiced him or point to any evidence in the record to support his claim. In view of Mr. Klindworth's multiple unexcused failures to appear for court, failure to support his arguments with supporting documentation, and failure to establish actual prejudice, the trial court did not abuse its discretion in denying his motion.

Imposition of Interlock Requirement. Finally, Mr. Klindworth contends that the trial court erred in imposing an ignition interlock device requirement at sentencing. This contention is without merit. The court did not impose an ignition interlock requirement.

SAG Issues. Mr. Klindworth raises a number of additional grounds in his SAG. He contends his speedy trial rights were violated, the prosecutor failed to release exculpatory evidence, the prosecutor released slanderous information to the Tri-City Herald to create negative pretrial publicity, the procedure for gathering an independent blood test was flawed, willful court misconduct and wrongful incarceration hampered his ability to present a defense, the removal of defense counsel added one year to the pretrial process, denial of public funds for his defense, and the court's instruction that the jury was not to be told that Mr. Klindworth spent months in jail before trial denied him a fair trial.

None of these claims are properly before us. Several of his alleged errors have been addressed by counsel and are, therefore, not matters for his SAG. These include issues related to speedy trial violations, the blood test, and violation of his right to present a defense. RAP 10.10(a) permits an appellant to file a pro se statement of additional grounds "to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel."

The remaining claims either involve matters outside the record, *State v. McFarland*, 127 Wn.2d 322, 335, 338 n.5, 899 P.2d 1251 (1995) (matters outside record must be raised in personal restraint petition), were not raised at trial, or are insufficiently argued. Although RAP 10.10(c) states that reference to the record and citation to authorities are not required in statements of additional grounds for review, the rule also states that the appellate court will not consider the SAG for review if it does not inform the court of the nature and occurrence of the alleged errors. Here, Mr. Klindworth fails to cite to record or adequately describe the nature and occurrence of any alleged errors as required by RAP 10.10(c). We are not obligated to search the record in support of SAG claims. Additionally, several claims would require us to consider affidavits and other evidence outside the record below and on appeal. If Mr. Klindworth wishes to raise

issues of facts and evidence outside the record, he must raise them in a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

We affirm the trial court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Price, J.P.T.

WE CONCUR:

Korsmo, J.

Siddoway, C.J.

FILED

APR 30 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

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 30TH day of April, 2014, I caused a true and correct copy of the *RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW* to be served on:

RENEE S. TOWNSLEY, CLERK
Court of Appeals Division III
500 North Cedar Street
Spokane, Washington 99201

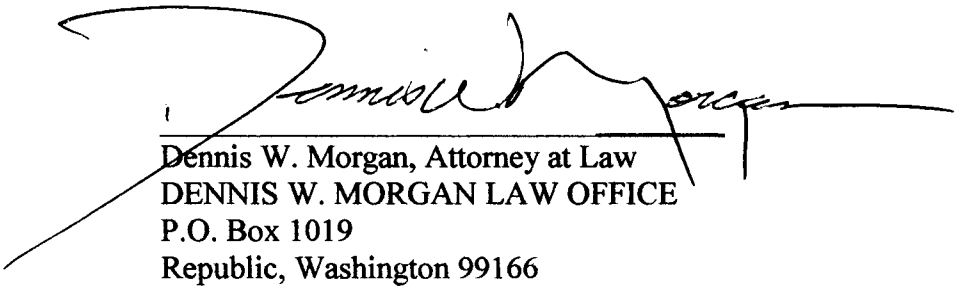
U.S. MAIL

TERESA CHEN
Attorney at Law
PO Box 5889
Pasco, Washington 99302-5801

U.S.MAIL

FRANKLIN COUNTY PROS OFFICE — U.S. MAIL
Attn: Shawn P. Sant
1016 North 4th Avenue
Pasco, Washington 99301-3706

THOMAS M. KLINDWORTH — U.S.MAIL
c/o Roy Graham
1156 Englewood
Richland, Washington 99352



Dennis W. Morgan, Attorney at Law
DENNIS W. MORGAN LAW OFFICE
P.O. Box 1019
Republic, Washington 99166
Telephone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com