No. 44958-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALLEN GENE ENGLUND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Christine Schaller, and Gary Tabor,
Judges
Cause Nos. 12-1-01749-6 and 12-1-01752-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court's denial of Englund's motion to represent himself in these cases violated his right of self-representation under either article I, § 22, of the Washington Constitution or the Sixth Amendment to the United States Constitution.

2. Whether the court violated Englund's right to a speedy trial under CrR 3.3 by granting a continuance of the trial past the 60th day from arraignment, where an intervening order for a competency evaluation tolled the speedy trial time.

3. Whether the court violated Englund's right to be present at all critical stages of the proceedings when it entered an order for a competency evaluation at a hearing where Englund was not present.

B. STATEMENT OF THE CASE.

1. Substantive facts.

The appellant's recitation of the facts in his opening brief, while correct, is incomplete. In addition to the incidents charged under Superior Court cause number 12-1-01749-4, which occurred on December 15 and 16, 2012, CP 17-18, Englund was also tried for one count of second degree unlawful possession of a firearm occurring on October 13, 2012. Supp. CP 184-194, first amended information and judgment and sentence. This cause number was consolidated with 12-1-01749-6. CP 79.

On October 13, 2012, Officer Chris Zuchlewski of the Department of Fish and Wildlife drove past Englund's property at

13151 Independence Road SW in Thurston County. RP 22-24, 105-107.[1] Zuchlewski observed two unattended fishing poles hanging over the bank above the Chehalis River. RP 25, 107, 111. He drove his vehicle into the driveway. On the property were two trailers and some vehicles. RP 25,108-09. Englund came out of one of the trailers and Zuchlewski explained about the fishing poles. Englund said he was not fishing and when Zuchlewski asked to look at the poles, Englund said he did not permit trespassing on his property. RP 26, 112-13. Zuchlewski informed Englund that he has the authority to enter the property without permission to investigate possible violations of the fishing laws, and Englund then gave permission to check the poles. RP 26-27, 113-14. Englund went back into the trailer and Zuchlewski walked 100 yards or so to the poles. He found that the lines were weighted but there were no hooks on the lines, so no fishing was taking place. RP 27, 114. Englund again came out of the trailer when Zuchlewski returned to his vehicle, and after a discussion about the necessity for a fishing license when fishing on one's own property,

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1 References to an undated Verbatim Report of Proceedings are to the two volume transcript dated February 20, May 28, May 29, and June 4, 2012, containing the hearing in which the court signed orders for competency evaluations, the CrR 3.5 hearing, the bench trial, and sentencing. The record of all other hearings will be referenced by their dates.

Zuchlewski departed. RP 28, 116. Zuchlewski had written down the license numbers of the vehicles on the property and ran a records check on them. One of them was registered to Allen Englund, and the information received included the fact that Englund was a convicted felon not allowed to possess firearms. RP 28, 116-17.

Later in the day, after patrolling other areas of Thurston County, Zuchlewski again drove past Englund's property. He observed Englund holding what appeared to be a rifle with a scope. RP 29, 117. Although Englund had been polite during their earlier conversation, he had been adamant about his rights as he perceived them, and Zuchlewski thought it would be prudent to have back up before contacting Englund again. RP 29-30, 118. He called for reinforcements, and waited a short distance from Englund's property until Deputy Klene of the Thurston County Sheriff's Office responded. RP 30, 118. The two men drove onto Englund's property because there was no place to park outside the property. RP 30, 277.

Englund was outside of the trailers but the gun was not visible. Zuchlewski explained that he had seen Englund with a rifle and asked to see the firearm. Englund said he did not have it with

him any longer, that he had put it away, and that it was no longer on his property. RP 32-33, 121. Zuchlewski explained to Englund that he could not legally possess a firearm, but Englund disagreed and ordered the officers to leave his property. Zuchlewski placed Englund under arrest and, after briefly resisting, he was handcuffed. RP 3334, 122-23, 280. In a search incident to the arrest, the officer found one .22-long cartridge in his right pants pocket and two .22-long cartridges in his left pants pocket. RP 34, 123. Zuchlewski advised Englund of his rights and he agreed to speak to the officers and to show them where the rifle was located in the trailer. Zuchlewski advised Englund of his rights regarding a search of his residence. Englund insisted on accompanying Zuchlewski into the trailer, where he pointed to a bed at the far end of the trailer. Zuchlewski recovered a .22 caliber rifle from under the mattress. The gun was equipped with a scope and was loaded, ready to fire. RP 37-38, 124-126. Englund said he had seen what he believed to be a coyote on his property and was carrying the gun so he could shoot it. RP 39. Zuchlewski seized the gun and the ammunition. RP 127-129.

2. Procedural facts.

The appellant's statement of the procedural facts is mostly correct. However, he apparently did not notice that the second degree unlawful possession of a firearm charge resulting from the October 13, 2012, incident with the Officer Zuchlewski was filed separately from the charges dealing with the assaults on Christensen and Parrish that occurred on December 15 and 16, 2012. Appellant's Opening Brief at 14. It is unclear when the arraignment occurred in cause number 12-1-01752-6, but Englund is not raising any speedy trial issues specific to that cause number.

It appears that duplicate orders were entered for the two causes each time the court made such orders. 01/03/13 RP 12-13 ("And I continued the status hearing in each of these matters to March 6, 2013. . . "); 01/03/13 RP 14 ("And so those are the orders signed by this court in each of the two cause numbers."). The court referenced the two cause numbers in the hearing of February 12, 2013, when conducting the colloquy with England regarding his request to represent himself. 02/12/13 RP 5-7. The court signed two orders for a competency evaluation. 02/20/13 RP 8 ("I'm signing those two orders at this time."); 02/28/13 RP 5 ("Your Honor, previously this court has entered orders in both of these

cases for competency evaluation by the defendant.") On February 28, the court signed two orders sending Englund to Western State Hospital for the evaluation. 02/28/13 RP 9 ("And I should have said 'orders,' because there are two identical orders, but they are in each of the two cases on the calendar today.") The court signed two agreed orders finding competency on May 2, 2013. 05/02/13 RP 1; CP 65, Supp. CP183. On May 16, 2103, the State moved to consolidate the two causes for trial, and the court so ordered. 05/16/13 RP 8-9. The order of consolidation carries both cause numbers. CP 79. At the sentencing hearing, two separate judgments and sentences were entered. CP 169-79, Supp. CP 185-194.

C. ARGUMENT.

1. It was not an abuse of discretion for the trial court to deny Englund's motion to represent himself. His behavior made it clear that he would cause serious disruptions to the orderly conduct of the trial.

Englund argues that the trial court's denial of his request to represent himself at nearly all the stages of the prosecution of his case violated his rights under both the Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington

Constitution to represent himself.[2] He identifies three points during the pretrial hearings in which the court considered and either denied or postponed ruling on his motion to represent himself: January 30, 2013, February 12, 2013, and May 16, 2013. Appellant's Opening Brief 20-26.

A defendant in a criminal case has a constitutional right to waive the assistance of counsel and represent himself. Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). The right is not absolute; the presumption is against waiver. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). The request must be made knowingly and intelligently. A defendant may not, by representing himself, disrupt a trial or other hearing and he must comply with procedural rules and substantive law. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). A court's decision to grant or deny a motion to proceed pro se is reviewed for abuse of discretion. The degree of discretion to be exercised in regard to timeliness varies with the time span between the motion and the trial. The more time there is between

2 Without explicitly saying so, the Washington Supreme Court seems to treat the Washington State and federal constitutional provisions as co-extensive. *See* State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010).

the motion to represent oneself and the trial, the less discretion the court has to deny it. Id. at 106-07. A court abuses its discretion when its decision is "manifestly unreasonable or 'rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" Madsen, 168 Wn.2d at 504 (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

A motion for self-representation may be denied if it is made for improper purposes or if granting it would "obstruct the orderly administration of justice." Breedlove, 79 Wn. App. at 108. A trial judge may terminate a defendant's self-representation if the defendant is engaging in "'serious and obstructionist misconduct.'" State v. Fritz, 21 Wn. App. 354, 363, 585 P.2d 173 (1978) (quoting Faretta, 422 U.S. at 834-35).

When the trial court is made aware that the defendant wishes to represent himself but delays ruling on the motion, the timeliness of the motion is measured as of the date of the first request. Madsen, 168 Wn.2d at 508. In Englund's case, the State does not dispute that the initial request to proceed pro se was timely.[3] A request to represent oneself must be unequivocal, a

3 The trial court ordered that Englund file a written motion to proceed pro se, which he did not do. 01/30/13 RP 6; CP 48; 02/12/13 RP 5. The State does not argue that a defendant must bring a written motion to represent himself.

knowing and intelligent relinquishment of the right to counsel. Faretta, 422 U.S. at 835. The defendant must be made aware of the dangers of representing himself, but there is no requirement that he have any legal knowledge or skills. Id. In this case, Englund was advised by the trial court of those dangers. 02/12/13 RP 4-12. The State does not dispute that Englund's request to represent himself was unequivocal.

At the hearing on February 12, 2013, the court found that Englund lacked the ability to represent himself. 02/12/13 RP 12. In its written order, the court said that he "would not have the capacity to understand and follow the procedural rules in this matter and would thereby be unable to provide for his defense." CP 52. While Englund maintains that this is an expression of the court's opinion that he lacked the legal skills to defend himself, it can more logically be read as an expression of the court's opinion that Englund would not conduct himself in a manner consistent with an orderly trial and seriously disrupt the administration of justice. The trial judge read the ruling as a finding that Englund would not follow the rules. RP 355. The record more than supports such a conclusion.

a. Englund's behavior pre-trial.

Englund's first appointed attorney was Les Ching. He filed a motion to withdraw on January 17, 2013, on the grounds that Englund insisted he defend on the basis that even though Englund was a convicted felon he had the right to possess firearms. Because the law is unarguably different, Ching felt he could not ethically raise such a defense and he was allowed to withdraw. CP 26-27, 29. Another attorney, Richard Woodrow, was appointed and almost immediately allowed to withdraw. 01/30/13 RP 7. Englund appeared before the court for an attorney status hearing on February 12, 2013. The court conducted a colloquy with him about his request to represent himself, and he demonstrated a single-minded focus on insisting that he had the right to possess firearms. When the court asked him if he understood the pending charges, he said, "Yeah, but you're talking around—I have gun rights." The court further asked about his understanding of the potential penalties if convicted, and he replied, "Yeah, I understand it, but it's not—the legal term is not there. I have gun rights, and I have the right to do what I'm doing." 02/12/13 RP 6-7. When the court advised him of the firearm enhancement, he said, "It's not legal what they're doing. You can't charge . . . " 02/12/13 RP 8. The

court later asked how Englund was familiar with the rules of evidence, and he replied, "The evidence ain't against me. It's the ones that made the assault, not me." 02/12/13 RP 9. When asked how he was familiar with the rules of criminal procedure he said, "Because I didn't do nothing wrong. I ain't the type to go to somebody else's place and step out of line." The court asked why he did not want legal representation he said, "Look what they've done all their lifetime, court appointed attorneys. Look at the record. It's not legal one bit. . . . The way they go about the legal procedure. For no reason . . . " 02/12/13 RP 10. When asked if he still wanted to represent himself, Englund said, "Yeah. The procedure is illegal all the way through." "It's all illegal all the way through. You're trying to prosecute the innocent. Innocent. You go too far with it." 02/12/13 RP 11-12.

On May 16, 2013, a hearing was held on Englund's motion to represent himself. At that hearing, besides objecting on speedy trial grounds, he told the court, "[A]nd the charges should go against the other ones, the way they went about it, and I do have gun rights, and I haven't violated any law." 05/16/13 RP 7.

On the morning of the first day of trial, Englund refused to be brought to the courtroom. RP 9. He did eventually appear in court,

RP 16, but before that the trial court advised his counsel that he would not be allowed to argue that a convicted felon may legally possess firearms. RP 15. When he did appear, Englund was arraigned on the first amended information. RP 18. The court then conducted this colloquy:

> THE COURT: But I'm also told that you do not want to be here during this trial. Can you tell me out loud if that is your desire?
>
> THE DEFENDANT: Just not legal.
>
> THE COURT: You believe that what we're doing is a violation of your constitutional rights, is that right?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Okay.
>
> THE DEFENDANT: I've had gun rights all my life and you guys picked me up and threw me in jail and saying I don't have them, and it's written in black and white that I do.
>
> THE COURT: You have a right to your opinion and you can interpret the law as you choose. I'm not trying to suggest to you what you should or should not do; however, it's my understanding that you may wish to present a defense as to the firing of the shots toward a vehicle, that you didn't intend to harm anybody, you were only wanting to damage the vehicle. You would have to be present to do that. Do you understand that?
>
> THE DEFENDANT: Yeah.

> THE COURT: Well, do you wish to be present and tell the jury that and let them consider that?
>
> THE DEFENDANT: I'm not the one that made that, went in and did the Class A felony on private property to begin with, not guilty of anything.

RP 18-19.

Through his counsel, Englund objected to the court's earlier ruling that he could not argue to the jury that a convicted felon may legally possess firearms. RP 21.

It is clear from reading the record, and would have been even more obvious to the judges who observed Englund's manner in court, that he had no intention of observing the rules of evidence or following instructions of the court. He was totally focused on his irrational belief that his right to possess firearms could not be, and was not, taken away from him. No matter the question, that was his answer. During the suppression hearing that immediately preceded the bench trial, his counsel argued that he did not waive his *Miranda*[4] rights knowingly, voluntarily, and intelligently because he so strongly held this erroneous belief. RP 65.

Englund's behavior during the suppression hearing confirmed the conclusion that Englund would not conduct himself in

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4 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

an appropriate manner in the courtroom and would not follow the judge's order that he not argue a position that was not the law. On direct examination, in response to his attorney's question about whether he had any idea his beliefs might be incorrect, he responded:

> No. I've always had gun rights ever since that felony happened. The judge split the decision, the felon under a survival act law, and he should have dismissed the charges on it. Instead, he let us keep our gun rights and then he made us do 30 days on jail time. And from thereafter, everything else was their fault, that felon in possession. I got gun rights. I won't go on that level where, you know, I'll be like the state kidnap people, throw them in jail, you know, and see that's kidnapping, you know, that's too high up there. They're the ones that charges were against not the innocent.

RP 56.

On cross examination during the suppression hearing, Englund simply would not answer the questions that were asked. He continually responded with *non sequiters*, repeating like a broken record his claim to have the right to possess firearms and to do whatever he wished on his own property. For example, when asked if he remembered a game officer coming onto his land in October and talking to him about fishing poles, he answered, "On my land I can have fishing poles anywhere I want. Nobody has to

say on my land, privately owned." RP 57. The prosecutor later asked him if, after he had been handcuffed, he talked to the officers about having a firearm, and his response was "I can have firearms." RP 60. When asked if he had been charged in 2009 with unlawfully possessing a firearm, he replied, "I have gun rights." RP 62. He said he had been convicted of that charge "[i]llegally. I have gun rights. And it still says it." RP 62. When the question was whether he had been told it was unlawful for him to possess firearms because he was a convicted felon, he answered, "I have gun rights, felon in possession with gun rights." . . . "No, I got gun rights. You didn't take them due to the circumstances." RP 63. Finally:

THE PROSECUTOR: No other questions.

THE DEFENDANT: I have gun rights.

RP 64. A reading of the entirety of Englund's testimony shows a similar inability to answer direct questions, and an unfounded but steadfast insistence on claiming his right to possess firearms. RP 55-64. Even after the evidentiary portion of the hearing, while the court was articulating its ruling that all of his statements were admissible, Englund interjected comments. *See* RP 67, 72.

Englund refused to sign the order setting the dates for the trial and other hearings, entered on May 2, 2013, and the consolidated omnibus order dated May 16, 2013. CP 64, 75-78.

b. England's behavior at the trial.

The conclusion that Englund would not be able to conduct an orderly trial was confirmed during the bench trial itself. During questioning of State witnesses, Englund continued to make comments. *See* RP 138-142, 178-79, 246, 272. Englund testified in his defense, and he continued his practice of giving answers that did not match the questions. For example, when his counsel asked him if he was a good enough shot that, had he intended to hurt the people in the truck, he would have been able to do so, he responded, "I did what they did to me because they did it first." RP 300. A short time later, this exchange took place on cross-examination:

Q: That's where you live?

A: Yeah. I'm the owner.

Q: Now, it was loaded at the time?

A: I keep them loaded, yes, keep them loaded.

Q: I'm asking if it was loaded.

A: Yes. I have them loaded. I live by myself. It's the law.

Q: So you keep it loaded normally; is that right?

A: I can if I want to.

Q: How did you obtain that .22 caliber that you had that . . .

A: I've had them for a long time.

Q: The—back in October when this officer took that gun, did you have at that time other guns on your property?

A: He just took that one.

Q: I know that's what he took. My question is, did you have other guns on your property at that time?

A: He didn't want any other ones.

Q: That's not my question, Mr. Englund. I'm asking if you had other guns on your property besides that one in October.

A: I think so. Yeah, pretty sure I did.

RP 305-06. Still later on cross-examination, in response to a question about whether he wanted to shoot at Christensen's vehicle, he responded:

No. I did what they did. You ought to see what the officers do when they screw up a little bit. They take their guns out and shoot you right and leave a mess with you if you assault them on your vehicles or anything.

RP 318.

At the conclusion of the evidentiary portion of the trial, the court explained its decision, but Englund tried to argue with the judge. RP 347-48, 350.

c. The efficient administration of justice.

A trial court has the discretionary authority to manage its own affairs so as to achieve an orderly and expeditious disposition of cases. Woodhead v. Discount Waterbeds, 78 Wn. App. 125, 129, 896 P.2d 66 (1995). As noted earlier in this argument, the right to represent oneself does not allow a defendant to "abuse the dignity of the courtroom," or fail to comply with procedural rules and substantive law. Faretta, 422 U.S. at 834. While a defendant cannot be prevented from representing himself on the grounds that he lacks legal knowledge or skills, he can be prevented from interfering with the efficient administration of justice. Id. at 836; Stenson, 132 Wn. App. at 738. Even the right to be present at trial can be denied because of a defendant's persistent disruptive conduct. *See* Illinois v. Allen, 397 U.S. 337, 339, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). Those cases in which the reviewing court has upheld the right of a defendant to represent himself involve records showing no disruption or disrespect on the part of the

defendant. State v. Hemenway, 122 Wn. App. 787, 795, 95 P.3d 408 (2004). While the State does not argue that Englund's behavior equaled the disruptive behavior of Hemenway, it certainly was sufficient to make a jury trial, which was the expectation at the time the ruling was made, an unmanageable procedure.

d. Mental capacity to conduct a defense.

Even if the trial court in this instance denied England's motion to proceed pro se because he would be unable to defend himself, that is not necessarily prohibited. While it is true that a court may not deny self-representation because of a lack of legal training or skills, it may take into account his mental capacity and whether or not that will have "serious and negative effects" on the ability to defend himself. In re Pers. Restraint of Rhome, 172 Wn.2d 654, 669, 260 P.3d 874 (2011). "A trial court may consider a defendant's mental health history and status when competency has been questioned, even where the defendant has been found competent to stand trial." Id. at 667. Judges are to be sensitive to mental health issues when ruling on a motion to waive counsel, but a separate evaluation of competency to represent oneself is not required. Id. at 666. As always, the trial court's decision is reviewed for abuse of discretion. Id. In Rhome, the court cited

with approval cases discussing the duty of the trial court to protect not only a defendant's right to represent himself but also other countervailing constitutional rights.

> [A] trial court's discretionary decision to accept a waiver of counsel in favor of pro se representation allows consideration of the impact such a waiver will have on countervailing rights. . . Although [the trial judge] could have expressly included a discussion of such concerns in his colloquy, the absence of such discussion does not make his decision to grant Rhome's waiver an abuse of discretion.

Rhome, 172 Wn.2d at 669.

In Rhome, the defendant had been granted the right to represent himself at trial, and complained on collateral attack that both the state and federal constitutions require the court to enter specific findings of fact that a defendant is competent to waive his right to counsel and represent himself. The court disagreed with him and affirmed his conviction, but, as noted above, discussed that a finding of competency to stand trial does not necessarily mean that the defendant must be allowed to represent himself. Citing to State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968) and State v. Hahn, 106 Wn.2d 885, 725 P.2d 25 (1986), the court concluded that those cases allow a trial court to consider a defendant's competency to represent himself at trial even where he

has been found competent to stand trial. A trial court may consider "the background, experience, and conduct of the accused," but not his judgment and skill. Rhome, 172 Wn.2d at 663.

It is true that the court in Englund's case did not make a particularly extensive record of its reasons for denying his motion to represent himself, but viewing the record as a whole and considering the exposure the court had to his behavior, it is a reasonable conclusion that the court believed that his mental issues would prevent him from conducting himself in an orderly manner during trial or following the orders of the court. It is also apparent from the record that Englund's mental difficulties impaired his ability to represent himself. A reviewing court will sustain a trial court's ruling on any appropriate ground supported by the record, even if not the ground identified by the court. Fritz, 21 Wn. App. at 364.

Because it was apparent to the court, and supported by the record, that Englund would not be able to represent himself at trial without significantly disrupting the order of the courtroom and that he would not follow the orders of the court that he could not argue a position contrary to the law, the court did not err by denying Englund's motion to proceed pro se.

2. There was no violation of Englund's CrR 3.3 right to a speedy trial.

Englund maintains that when the court continued his trial date past February 19, 2013, his right to a speedy trial as guaranteed by CrR 3.3 was violated. He does not claim a constitutional speedy trial right violation. He further argues that the sole reason the court granted the continuance was to permit time for a new attorney to be appointed and become familiar with the case. He claims that since the court abused its discretion in denying his motion for a new attorney, it therefore follows that it violated his right to a speedy trial by continuing the trial date to March 11, 2013. Appellant's Opening Brief 28-29. He maintains that the speedy trial time expired on February 24, 2013. Appellant's Opening Brief 28.

On January 30, 2013, the court addressed the motion of Richard Woodrow to withdraw as Englund's attorney. At that time, Englund apparently made his first request to represent himself. 01/30/13 RP 4. The court did not deny his motion for self representation at that time, but deferred a decision, requiring him to file his motion in writing. 01/30/RP 6. The State, however, was concerned about the fast-approaching trial dates of February 11

and 19, 2013, and moved the court to extend them. 01/30/13 RP 6-8. The court found good cause to continue because Englund had no representation and the decision had not been made whether he would represent himself or not. 01/30/13 RP 9-10. Implicit in that decision is the realization that whether there was a new attorney appointed or Englund represented himself, there was insufficient time to prepare for trial by February 11 or 19. The trials were both set for the week of March 11, 2013. 01/30/13 RP 11. Englund did not file a written objection to the new trial date or note a hearing on an objection to the trial date.

The court ordered that Englund submit to a competency evaluation. The original order was entered on February 20, an amended order was entered on February 28, and an order finding Englund competent was entered on May 2, 2013. CP 2, 59-61, 65. Englund does not assign error to the court's order of a competency evaluation, nor does he claim error because speedy time was tolled while the competency evaluation was pending.

a. The court's continuance of the trial dates from February 11 and 19 to March 11 had no effect on his right to speedy trial under CrR 3.3.

Englund asserts that his speedy trial period pursuant to CrR 3.3 expired on February 24, 2013. Appellant's Opening Brief at 28.

Even though the court, on January 30, entered an order extending the trial date to March 11, an order for a competency evaluation was entered on February 20, four days before the speedy trial time, as calculated by Englund, would have expired. The time between the entry of an order for a competency evaluation and an order finding competency is excluded from the computation of elapsed speedy trial time. CrR 3.3(e)(1). The order of finding competency was entered on May 2, restarting the speedy trial time. There were four days remaining of the speedy trial time when the order for a competency evaluation was signed. When a period of time is excluded pursuant to CrR 3.3(e), the time for trial extends another 30 days beyond the excluded period. CrR 3.3(b)(5). Therefore, once an order finding competency was entered on May 2, the speedy trial time extended until June 5, 2013. The trial began on May 28 and concluded on May 29, 2013. CP 117-121. Even if Englund were correct that the continuance of his trial date until March 11 would have violated his court rule right to a speedy trial, that did not in fact happen. The intervening competency inquiry rendered the continuance moot. There was no violation of his CrR 3.3 right to a speedy trial.

b. Englund did not move to reset the trial date within ten days of January 30, 2013, nor did he move to dismiss the prosecution.

A defendant cannot rely on CrR 3.3 on appeal if he never sought dismissal in the trial court based upon a violation of the rule.

CrR 3.3(d)(3) provides that a party who objects to a trial date on speedy trial grounds must, within 10 days of notice of the trial date, move the court to set trial within the time limits of the rule. A party who fails to make such a motion "for any reason" loses the right to object to the trial date on the grounds it is outside the time limits of the rule. Id. Further, the party must seek dismissal in the trial court on the grounds of a court rule speedy trial violation before he can raise the issue on appeal. State v. Barton, 28 Wn. App. 690, 693, 626 P.2d 509, *review denied*, 95 Wn.2d 1027 (1981).

> With the exception of jurisdictional and constitutional issues, appellate courts will review only issues which the record shows have been argued and decided at the trial court. . . . CrR 3.3 does not create a constitutional right, . . . nor is it jurisdictional. Although the rule is to be strictly enforced, it is nonetheless a procedural rule. The right to a dismissal for a violation of CrR 3.3 may be waived if not timely presented. . . .
>
> The court's obligation to dismiss a prosecution for violation of CrR 3.3 is triggered by a motion by the defendant.

Id. (internal citations omitted).

A motion to the trial court gives that court the opportunity to consider any excluded periods, determine if the time period has indeed elapsed, and make a record of its rulings for appellate review. When that does not happen, there is no error before the appellate court to review. Id. at 694.

c. Good cause supported the court's continuance.

Even if Englund could raise a challenge to the court's order continuing the trial date past February 24, and even if it were not rendered moot by the stay for the competency evaluation, the continuance was proper.

When a defendant is in custody for the charged offense, trial must generally begin within 60 days of arraignment. CrR 3.3(b)(1). However, absent prejudice to the defendant, CrR 3.3(e)(8) allows a trial court to continue a trial beyond the speedy trial time limit to accommodate unavoidable or unforeseen circumstances. When the court exercises its discretion and grants a continuance under this rule, the continued days are excluded from the 60-day period when computing the time for trial under CrR 3.3(b)(1).

The decision to grant a continuance rests within the sound discretion of the trial court and will not be disturbed on appeal unless there is a clear showing that it is manifestly unreasonable,

exercised on untenable grounds, or for untenable reasons. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). In Englund's case, the continuance from February 24, which he calculates as the 60th day, to March 11 was 15 days. It was necessary because he had no attorney, his motion to represent himself had not yet been ruled upon, and under either option, he could not have reasonably been expected to be prepared for trial by February 24. The record does not show any prejudice by the delay, nor has he claimed any, and in fact the delay turned out to be a little more than three months after February 24. As noted, he does not assign error to the exclusion of the time period during which the competency evaluation was pending.

Under these circumstances it cannot be said that the court abused its discretion.

3. A hearing to consider a motion for a competency evaluation for the defendant is not a critical stage of the trial and there is no constitutional requirement that the defendant be present at such a hearing.

Englund argues that because he was not present at the hearing on February 20, 2013, at which his attorney sought and was granted an order that Englund be evaluated to determine his competency to stand trial, he was denied his right under both the

Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution to be present at critical stages of his prosecution. Such a hearing is not a critical stage.

A defendant has the right under the Confrontation Clause of the Sixth Amendment to be present at all critical stages of a criminal proceeding against him. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). The defendant has the right to be present at any proceeding "'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" State v. Irby, 170 Wn.2d 874, 881, 246 P.3d 796 (2011) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). The right to be present is not absolute. A defendant has the right to be present only to the extent that his presence ensures a fair and just hearing. Irby, 170 Wn.2d at 881, again quoting Snyder.

On direct appeal, a question as to a violation of the right to be present is reviewed de novo. Irby, 170 Wn.2d at 880.

> A critical stage is one "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected."

State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (citing to State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)).

Englund argues that because the court was making a factual determination regarding whether to order a competency evaluation the hearing on February 20 was a critical stage. Appellant's Opening Brief at 31. But he was not required at that hearing to defend against the charge, and that is the definition of a critical stage. The court may, had he been there, have listened to his input about being evaluated for competency, but that does not go to the facts of the charge. The outcome of the case was not substantially affected at that hearing, and thus it was not a critical stage.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Englund's convictions.

Respectfully submitted this 14th day of January, 2014.

Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

January 14, 2014 - 10:22 AM

Transmittal Letter

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