No. 45823-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DONALD LEE,

Appellant.

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

APPELLANT'S REPLY BRIEF

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Washington Rules and Regulations

A. ARGUMENT IN REPLY

1. Mr. Lee's right to a speedy trial was violated when his trial was delayed for years because of the State's negligence.

Police arrested Donald Lee on allegations of third degree rape on October 9, 2009. CP 1. The trial court detained Mr. Lee upon a finding of probable cause and set bail at $50,000. RP 2; CP 1-2. Arraignment was set for several days later, but the State failed to file an information. RP 1; CP 4-5. Instead, the State authorized Mr. Lee's release on October 13, 2009. CP 5.

Although the City of Kelso initially investigated the charges against Mr. Lee. it transferred the case to the Cowlitz County Sherriff's Office after determining it was out of Kelso's jurisdiction. RP 187. The sheriff's office received a report from the Kelso police department in March 2009, but the case "fell through the cracks." RP 200-01. A deputy newly assigned to the detective unit eventually rediscovered the case and the State filed an information against Mr. Lee four years later, in March 2013. RP 199; CP 6. A jury convicted Mr. Lee of two counts of third degree rape of a child. CP 51, 53.

a. This Court should review Mr. Lee's claim pursuant to RAP 2.5.

The State argues Mr. Lee does not meet the requirements of RAP 2.5(a)(3) because he cannot show the violation of his Sixth Amendment speedy trial right had practical and identifiable consequences at trial. Resp. Br. at 11; see also State v. Gordon, 172 Wn.2d 671, 676, 250 P.3d 884 (2011). However, the record is clear the State's negligence resulted in a significant delay of Mr. Lee's trial. "[U]nreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including 'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." Doggett v. United States, 505 U.S. 647, 654, 112 S.Ct. 2686, 120 L.Ed.2d. 540 (1992) (quoting Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)).

The record shows the delay impaired Mr. Lee's defense. Doggett, 505 U.S. at 654. Mr. Lee disputed J.W.'s claim that she visited him in his mother's home, but because Mr. Lee's mother passed away before his trial, he was unable to present her testimony. RP 256.

The State asserts, paradoxically, that the death of Mr. Lee's mother does not demonstrate actual prejudice to Mr. Lee because (1) there was significant additional evidence suggesting J.W. was lying when she testified she visited the mother's apartment and (2) the evidence against Mr. Lee was overwhelming because of the letter linking J.W. to Mr. Lee.[1] Resp. Br. at 12.

This argument misapprehends the standard on appeal. As the Court explained in Doggett, it is necessary to "recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." 505 U.S. at 655. The potential impairment to Mr. Lee's defense as result of the speedy trial violation is a practical and identifiable consequence of the State's error, which satisfies RAP 2.5(a)(3).

b. The record is sufficient to fairly decide the issue on appeal.

The State claims that in order to fairly decide the issue on appeal, this Court should remand the matter for a reference hearing

[1] The State describes the letter as "describing the sex acts [Mr. Lee] performed on the victim and wanted to perform on her." Resp. Br. at 12. While this was the State's theory at trial, the letter did not identify J.W., or any specific individual, by name. RP 269, 340.

under RAP 9.11(a)(2) because additional evidence would probably change the decision being reviewed. Resp. Br. at 14. It claims the record is insufficient to "deduce the reason for the delay and the court to determine the delay was due to State negligence and prejudiced the Defendant." Resp. Br. at 12. This assertion is without merit.

The State's own witness, in his direct testimony, explained the Sherriff's office caused the delay and admitted Mr. Lee's case simply "fell through the cracks." RP 199-201. Additional details, assuming there are any to offer, will not alter the detective's admission. The record is clear the multiple-year delay was caused by the State's negligence and Mr. Lee was prejudiced as a result. This is sufficient to review Mr. Lee's claim pursuant to Barker.[2] 407 U.S. at 531.

c. The length of the delay was presumptively prejudicial.

The State argues this Court should not engage in a Barker analysis because the Sixth Amendment right to a speedy trial does not attach until the State files charges. Resp. Br. at 20. In making this

[2] The State's claim that Mr. Lee was not "candid with the appellate court by failing to acknowledge his own request and agreements to continue the trial date," and that a reference hearing could more fully address this issue, is misleading. Resp. Br. at 14. As the State later acknowledges, Mr. Lee explained in his opening brief that the constitutional violation occurred prior to Mr. Lee's arraignment and the subsequent requests for a continuance. App. Op. Br. at 11, 13; Resp. Br. at 21.

claim the State acknowledges, but disregards, this Court's finding in State v. Corrado that the "Sixth Amendment right to speedy trial attaches when a charge is filed or an arrest made, whichever occurs first." 94 Wn. App. 228, 232, 972 P.2d 515 (1999). Instead, the State relies on this Court's decision in State v. Higley, 78 Wn. App. 172, 902 P.2d 659 (1995) and the United States Supreme Court's decisions in United States v. Loud Hawk, 474 U.S. 302, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986) and United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982), to argue Mr. Lee's speedy trial rights did not attach until March 6, 2013, when the State filed charges against him. CP 6. These decisions do not support the State's assertion.

In Higley, the trial court granted the defendant a deferred prosecution for misdemeanor driving offenses, but the State later moved to dismiss the charges so that it could proceed against him in Superior Court for vehicular assault instead. 78 Wn. App. at 175-76. The court ultimately granted the State's motion, and the defendant was convicted of the felony charge. Id. at 177-78. On appeal, the defendant contended that his right to speedy trial had been violated. Id. at 184. Just as in Corrado, this Court held that "the constitutional right to speedy trial attaches when a charge is filed or an arrest is made,

whichever occurs earlier." Id. However, this Court was unpersuaded by the defendant's speedy trial claim because most of the delay had been caused by the fact that he had applied for, and been granted, a deferred prosecution. Id. at 185.

In Loud Hawk, the charges against the defendants were repeatedly dismissed, and then re-indicted, as the court ruled on the defendants' pre-trial motions and the parties appealed the rulings on those motions. 474 U.S. at 306-310. Relying on MacDonald, the Court held that the time during which the indictments were dismissed should be excluded from the calculation of the delay for speedy trial purposes because a citizen was no longer subject to a restraint on his liberty after the dismissal of charges. Id. at 311.

In MacDonald, the Court held that the time between the dismissal of military charges against the defendant, and subsequent indictment of civilian charges, should not be considered in the computation of delay under a Sixth Amendment speedy trial analysis. 456 U.S. at 11. The Court found "the Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused." Id. at 6 (citing United States v. Marion, 404 U.S. 307, 313, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)).

While the Court stated that a Sixth Amendment right to speedy trial does not arise until charges are pending, it also stated that "[i]n addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim." MacDonald, 456 U.S. at 7 (citing Dillingham v. United States, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975)).

In all of the cases upon which the State relies, the Courts examined a circumstance in which the State dismissed, and then refiled, charges against the defendant. The Courts did not contemplate what occurred here: Mr. Lee was arrested and initially held on $50.000 bail, only to face the charges against him years later because the State neglected to pursue its investigation for years. As the United States Supreme Court reiterated years after MacDonald and Loud Hawk, a speedy trial inquiry is "triggered by arrest, indictment, or other official accusation." Doggett, 505 U.S. at 655. Mr. Lee was arrested on October 9, 2009. CP 1-2, RP 2. He was not arraigned until almost three and a half years later, on March 25, 2013. RP 4. The length of the delay crossed the line from ordinary to presumptively prejudicial, triggering the Barker analysis. State v. Iniguez, 167 Wn.2d 273, 283, 217 P.3d 768 (2009).

d. A balancing of the *Barker* factors demonstrates the State violated Mr. Lee's constitutional right to a speedy trial.

i. *Reason for the Delay*

The State argues the delay between Mr. Lee's arrest and his arraignment may be justified because "[i]f there are valid reasons for the delay, then the valid reason may justify a reasonable delay." Resp. Br. at 23. It suggests it is unknown whether there was a valid reason for the delay because "there is little information about why the case was not actively investigated from April 2010 to May 2012 – 25 months." Resp. Br. at 23.

In fact, the testifying detective was clear that after the Cowlitz County Sherriff's Office received the report from the Kelso police department in March 2009, a few detectives performed minimal work on the case. RP 200-01. A deputy "did a little bit of work" to try and identify the subject of the accusations, a patrol deputy in the Detectives Unit "did a little bit of work" on the case while he was on a light duty assignment because of back surgery, and a detective performed "sporadic" work on the case while managing issues related to his parents' failing health, before retiring in April 2010. RP 201. After the detective retired, "the case fell through the cracks" until it was

rediscovered in May 2012. RP 201. For purposes of a Barker analysis, the detective's testimony provides all of the information needed: the delay occurred as consequence of the State's negligence. 407 U.S. at 531.

ii. *Mr. Lee's Assertion of his Right*

The State claims Mr. Lee's failure to assert his speedy trial right weighs against him in the Barker analysis, relying on State v. Ollivier, 178 Wn.2d 813, 312 P.3d 1 (2013). However, unlike other cases involving speedy trial claims, including Ollivier, the delay in this case was not caused by a party's repeated requests for a continuance. 178 Wn.2d at 831 (finding "[n]early all of the continuances were sought so that defense counsel could be prepared to defend"). By the time Mr. Lee had the opportunity to assert his right, the prejudice had occurred. As the Court recognized in Barker, while the defendant has some responsibility to assert a speedy trial claim, the primary burden remains "on the courts and the prosecutors to assure that cases are brought to trial." 407 U.S. at 529.

iii. *Prejudice to Mr. Lee*

The State also relies on Ollivier to argue that because prejudice is not presumed, Mr. Lee must make a showing of particularized

prejudice. Resp. Br. at 24. This has been established. See App. Op. Br. at 14-15. Because Mr. Lee's mother passed away prior to trial, Mr. Lee was unable to present her testimony to refute J.W.'s claim that she visited Mr. Lee at the mother's home. Given the inconsistencies in J.W.'s testimony, his mother's absence at trial was highly prejudicial.

The State also claims this Court should weigh any prejudice against the alleged benefits to Mr. Lee from the delay, again relying on Ollivier, 178 Wn.2d at 843. However, in Ollivier, "most of the continuances that resulted in the delay of which [the defendant] complains were requested by defense counsel in order to prepare an adequate defense." 178 Wn.2d at 845 (emphasis original). The court found that because the defendant had requested the continuances, any impairment of his interest must be weighed against any benefits he received. Id. Here, Mr. Lee did not contribute to the delay in his case from his arrest to his arraignment. It is therefore inappropriate to speculate, as the State has, about how the State's negligence may have inadvertently benefitted Mr. Lee.

The totality of the circumstances shows Mr. Lee's constitutional right to a speedy trial was violated. Iniguez, 167 Wn.2d at 295. His case should be dismissed with prejudice. Id. at 282.

2. When the State precluded Mr. Lee from cross-examining J.W. about her false claim of rape, the court violated Mr. Lee's Sixth Amendment right to confront witnesses.

Prior to trial, Mr. Lee sought to introduce evidence that J.W. had previously accused a boy of rape and then later admitted she had lied. CP 15-17; RP 20. This Court has found that under the rape shield statute, "[g]enerally evidence that a rape victim has accused others is not relevant and, therefore not admissible, unless the defendant can demonstrate that the accusation was false." State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (emphasis added). There was no question that J.W.'s accusation was false, as she admitted to police that she had made the story up. CP 17.

The trial court permitted Mr. Lee to cross-examine J.W. on the fact she made a false accusation to the police about another person, but denied Mr. Lee the opportunity to elicit that the false accusation was rape. RP 33. The State claims the trial court's decision was correct because J.W.'s mother, rather than J.W., made the initial report to the police. Resp. Br. at 29. The State's claim that "[t]here is no evidence the defendant could prove the victim made the initial false complaint, only that she didn't want someone to believe the victim made a false complaint" is incorrect. Resp. Br. at 29. The police report, attached to

Mr. Lee's motion, stated that J.W.'s mother contacted police because her daughter reported the rape to her. CP 17. J.W. contacted police the next day and admitted she had made the allegation, but that it was untrue. CP 17.

The fact that J.W., who was 15 years old at the time, made the report to her mother instead of directly to the police is not a basis for exclusion of the evidence at trial. See Harris, 97 Wn. App. at 871 (affirming trial court's exclusion of evidence when "the alleged statement was not an official complaint to police or parents" (emphasis added)). Here, J.W. did not dispute that she had reported this allegation to her mother, nor did she dispute the allegation was false.[3]

The State argues that even if there was evidence J.W.'s complaint was false, the trial court's ruling was correct because (1) exclusion of J.W.'s prior sexual history is inadmissible under RCW 9A.44.020 and (2) the evidence was irrelevant because consent was not at issue in Mr. Lee's case. Resp. Br. at 29. As addressed in the Appellant's Opening Brief and above, the first claim is meritless

[3] The State makes a similar argument when addressing the issue under an ER 608(b) analysis. It claims that in order to prove J.W. made a false complaint, testimony from her mother or the officer would be required. Resp. Br. at 30. This is not accurate. In fact, when J.W. was asked at trial if she had ever made a false accusation to police, she said that she had. RP 120-21.

because the rape shield statute does not preclude the admission of false statements. The second assertion, that the evidence was properly excluded because consent was not at issue, misapprehends the purpose for which Mr. Lee sought to admit the evidence. Given that the State was asking a jury to accept J.W.'s testimony that Mr. Lee had raped her, the evidence was relevant to show that such accusations from J.W. were not credible. See State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996).

The State bears the burden of proving a constitutional error was harmless beyond a reasonable doubt. Id; Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). When determining whether the limitations placed on the scope of the cross-examination was harmless, this Court must look to the "untainted" evidence to find whether that evidence was so overwhelming it necessarily leads to a finding of guilt. McDaniel, 83 Wn. App. at 187-88. In order to find Mr. Lee guilty, the jurors were required to accept J.W.'s testimony. The "untainted" evidence alone would not have allowed the jury to find Mr. Lee guilty. Because the error was therefore not harmless, Mr. Lee is entitled to a reversal of his convictions and a new trial. McDaniel, 83 Wn. App. at 188.

3. The legal costs imposed against Mr. Lee must be stricken and the case remanded because the court failed to consider Mr. Lee's resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3).

At sentencing, the trial court ordered Mr. Lee to pay $2,641.69 in legal financial obligations, which included discretionary costs of $773.69 for a court appointed attorney, a $200 crime lab fee, and $1,068 in court costs. CP 65. While formal findings supporting the trial court's decision to impose legal fees under RCW 10.01.160 are not required, the record must minimally establish that the sentencing judge actually considered the defendant's individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). Although boilerplate language was included in Mr. Lee's judgment and sentence, nothing in the record suggests the court actually considered Mr. Lee's financial circumstances before imposing the fees and costs. The trial court did not even mention it was imposing financial obligations at Mr. Lee's sentencing. RP 427-34.

Remand is the appropriate remedy when the trial court fails to comply with a sentencing statute unless the record clearly indicates the court would have imposed the same condition regardless. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v.

Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)). The State argues this standard has been met because Mr. Lee receives disability benefits, was 48 years old at the time of sentencing, and received a tenth grade education, leading to the "reasonable conclusion" Mr. Lee is able to find work. Resp. Br. at 34. In fact, the opposite is true. To be eligible for disability benefits, Mr. Lee must have been found unable to "engage in any substantial gainful activity." WAC 388-449-0001(1)(c). An individual who receives disability benefits is, by definition, unable to maintain employment.

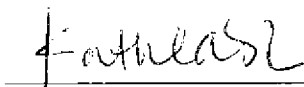
The trial court failed to consider Mr. Lee's financial resources before imposing the discretionary costs and fees, and the evidence suggests Mr. Lee will be unable to pay these obligations. The boilerplate finding should be stricken and the case should be remanded to allow the trial court to consider Mr. Lee's ability or likely future ability to pay the discretionary legal financial obligations.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Lee respectfully requests this Court reverse his convictions and dismiss the charges with prejudice because his right to a speedy trial was violated. In the alternative, Mr. Lee asks that this court reverse and remand for a new trial because the court violated his right to confront witnesses. At a minimum, his case should be remanded to correct Mr. Lee's sentence, strike the condition of community custody ordering Mr. Lee to submit to a plethysmograph as directed by a corrections officer, and require the trial court to consider whether Mr. Lee has the ability, or future ability, to pay the discretionary legal financial obligations.

DATED this 4th day of February, 2015.

Respectfully submitted,



KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 45823-3-II
v.	)	
	)	
DONALD LEE,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] THOMAS LADOUCEUR	( )	U.S. MAIL
[appeals@co.cowlitz.wa.us]	( )	HAND DELIVERY
COWLITZ COUNTY PROSECUTING ATTORNEY	(X)	E-SERVICE VIA
312 SW 1ST AVE		COA PORTAL
KELSO, WA 98626-1739		
[X] DONALD LEE	(X)	U.S. MAIL
751693	( )	HAND DELIVERY
AIRWAY HEIGHTS CORRECTIONS CENTER	( )	_____
PO BOX 2049		
AIRWAY HEIGHTS, WA 99001		

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF FEBRUARY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711

WASHINGTON APPELLATE PROJECT

February 04, 2015 - 3:57 PM

Transmittal Letter

Document Uploaded: 4-458233-Reply Brief.pdf

Case Name: STATE V. DONALD LEE

Court of Appeals Case Number: 45823-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

appeals@co.cowlitz.wa.us