No. 93263-8

COURT OF APPEALS No. 33158-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

SCOTT M. WILLIAMS, Petitioner

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Scott Williams asks this Court to review the decision by the Court of Appeals, Division III, referred to in Section II.

II. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals decision filed May 10, 2016. A copy of the Court's published opinion is attached as Appendix A. This petition for review is timely made.

III. ISSUES PRESENTED FOR REVIEW

A. CrR 8.3(b) authorizes a court to dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of an accused which materially affects his right to a fair trial. The rule encompasses governmental arbitrary action, intentional misconduct and simple mismanagement. Case law is replete with examples of the courts defining government misconduct and mismanagement. However, "arbitrary" action is not defined in the rule or by case law. Where the State decides to switch venues based on convenience or preference is the action arbitrary? If the action is arbitrary and forces the defendant to choose between his right to a speedy trial and effective assistance of counsel, did the trial court properly exercise its discretion to dismiss the prosecution?

IV. STATEMENT OF THE CASE

On September 17, 2014, Scott Williams was arrested in Adams County on suspicion of DUI and attempt to elude a police vehicle. (CP 3-4). The alleged incident began in Spokane County, passed through Lincoln County and ended in Adams County. (11/20/15 RP 4; CP 45). After arrest Mr. Williams was transported to the East Adams Rural Hospital in Ritzville. The arresting trooper applied for, and Judge Hille of Adams County granted, a search warrant for a blood draw. The blood evidence was placed into evidence in Adams County. (CP 3).

The following day, the court found probable cause for the charges and set bond at $80,000. (CP 28-29). Unable to post bond, Mr. Williams remained in jail. (CP 6). Five days later, September 22, the Adams County prosecutor filed a charging information alleging attempt to elude a pursuing police vehicle and felony driving under the influence. (CP 30-31).

Counsel was assigned to Mr. Williams at an October 6 arraignment. (CP 27; 11/20/14 RP 3). The omnibus hearing was set for October 27, a trial date of November 18, and a 60 days speedy trial expiration date of December 5. (11/20/14 RP 3; CP 33).

Seventeen days later, October 23, the Spokane County Superior Court issued a warrant for Mr. Williams, acknowledging that he was in

custody in Adams County. (CP 6). On October 27, the Adams County prosecutor requested a continuance of the omnibus hearing, to confirm charges had been filed in Spokane County. Adams County dismissed the case against Mr. Williams on October 28. He remained in custody and was transported to the Spokane jail on October 30. (11/20/14 RP 6; CP 36). Charges were filed in Spokane County October 31, with an added third charge, driving with license suspended first degree. (CP 7-8; 10-11). At the time of the filing, Mr. Williams had been jailed for 44 days. (CP 9).

At his first appearance in Spokane Superior Court, October 31, the court set November 4 as the date for arraignment. (CP 9;13). On November 4, defense counsel noted Mr. Williams had been arrested on September 17, and asked the court to set a constructive arraignment date of October 1, and to maintain the court dates set previously by Adams County. (11/4/2014 RP 4;6; CP 14). Defense counsel specifically pointed out that although jurisdiction had changed, Mr. Williams should not be forced to waive his right to a speedy trial. The court granted an expedited trial setting, based on the time for trial that had elapsed while Mr. Williams remained in the Adams County jail. (11/4/14 RP 3).

The State agreed to the setting of the constructive arraignment date, stating, "That's exactly what we need, I believe." (11/4/14 RP 4-5).

The court set the last date to hear suppression or dismissal motions to November 13, with a pretrial conference for November 14, the last day to hear motions to change trial date on November 20, and trial to commence on December 1. (CP 14).

The following day, David Loebach, was appointed as defense counsel for Mr. Williams. Counsel immediately requested discovery. I11/14/14 RP 6-7; CP 15). Counsel did not receive discovery until November 18, almost two weeks later. (11/20/14 RP 9).

At the November 14 pretrial conference, Mr. Loebach told the court he wanted to maintain the same dates set earlier, but to extend the pretrial date to the following week. The trial date remained the same. (11/14/14 RP 6-7). He wanted to review why jurisdiction had been changed, needed time to research the case, and placed on the record that he did not believe Mr. Williams should be forced to waive his speedy trial right simply because the State had decided to change jurisdiction. (11/14/14 RP 6-7).

The court questioned the state's attorney regarding the timeline. The prosecutor replied, "Well, Judge, I think Ms. Olsen [prosecutor] recognizes the strange posture of this case. I think at this point we'll just – we're certainly not objecting to the pretrial date. We'll have to look and

see what's gong to happen with the trial date at the next hearing." (11/14/14 RP 7-8).

MOTION FOR DISMISSAL

On November 20, defense counsel asked Judge Tompkins for a dismissal under *Michielli.* (11/20/14 RP 3). Counsel outlined all the pertinent dates, specifically noting the agreed upon arraignment date of October 6, the receipt of discovery on November 18, and because of the set dates, the opportunity to file a motion to suppress had passed prior to receipt of discovery. 11/20/14 RP 9). In order to declare trial readiness, Mr. Williams would have had to waive making a suppression motion. (11/20/14 RP 9).

Counsel further argued that the nature of the case required investigation of the search warrant information, interviews of numerous police witnesses, as well as expert witnesses. Counsel also showed the penalty for Mr. Williams was potentially lengthy. (11/14/14 RP 10-11). Counsel noted that Mr. Williams had already made it to an omnibus hearing in Adams County before there was any discussion to transfer the matter to Spokane County. Once Spokane County filed charges and Adams County dismissed, Mr. Williams was forced to acquire new representation. He was placed in the position of choosing between his

right to a speedy trial and effective assistance of by a prepared counsel. (11/20/14 RP 11-14).

Recognizing CrR 8.3(b) required only arbitrary conduct, counsel argued the decision to change jurisdiction could have been malicious or innocuous, but it certainly adversely impacted the ability of the defendant to be prepared and ready for trial within 60 days. (11/20/14 RP 14).

In contrast, the State's oral argument rested on whether the date of arrangement was October 6th or November 4th. (11/20/14 RP 17-18). The state wrongly assumed defense counsel had not made an objection at the November 4 hearing. (11/20/14 RP 18;22). It further argued the case could be investigated and tried within two weeks. (11/20/14 RP 24). In its briefing on the issue, despite the arrest, search warrant and blood draw having been conducted in Adams County, as well as the majority of the alleged erratic driving occurring outside Spokane County, the State offered the justification:

> "Because all of the events underlying the charges began and occurred in Spokane County before continuing on and into the other two counties, the respective prosecutors decided that Spokane would be the more appropriate place to charge and try the defendant."

(CP 41).

The court denied the motion to dismiss, but held that if defense counsel could show the constructive arraignment date, it would revisit the

motion. (11/20/14 RP 31). With that ruling, counsel requested a continuance over Mr. Williams objection. (11/20/14 RP 32). Counsel requested a second continuance on January 15 setting trial to February 17. Mr. Williams also objected to the second continuance. (1/15/15 RP 9-11).

On January 22, 2015, the court reconsidered the earlier dismissal motion. (1/22/15 RP 34). The November 4 transcript showed the original arraignment date was October 6 in Adams County. (1/22/15 RP 38). And, the Spokane court had agreed to keep that date, with agreement by the state. The record showed there was no new commencement date nor was there an order for a change of venue. (1/22/15 RP 45-47).

The court granted the motion to dismiss. (1/22/15 RP 52). It specifically stated that regardless of why Adams County dismissed and Spokane County filed the charges, "that particular determination relates to the defendant's ability to prepare for a trial and know the charges, and know what's confronting him result in an unfair circumstance that is arbitrary." (1/22/15 RP 52). The court specifically found the issue was preserved at the November 4 hearing without objection by the state. (1/22/15 RP 53). The court concluded: "...the choice of dismissal and refiling caused too much of an ambiguity in the charges, the type of evidence, the discovery, and rendered it impossible to prepare for trial" within the speedy trial rules. (1/22/15 RP 53; CP 86). An order for

dismissal was entered with the requisite written findings of fact and conclusions of law. (CP 79-80). The State appealed. (CP 83).

In its published opinion, the Court of Appeals noted: "The term 'arbitrary' is not defined in the rule. Nor do our cases provide much guidance on what is meant by arbitrary action, as opposed to misconduct, under CrR 8.3(b). Thus we are faced with discerning the intended meaning of 'arbitrary action' in the current context." *Slip Op.* at 4.

Using the context of a denial of substantive due process, the Court relied on *State v. Worthey,* 19 Wn.App. 283, 576 P.2d 896 (1978). It concluded the State did not need to show its actions were legally required to overcome a charge of arbitrariness. Rather, it reasoned the State had considerable leeway under the rule, and so long as the state could articulate a plausible non-discriminatory reason for its action, it would not be considered "arbitrary". *Slip Op. at 5.* Holding the State's explanation was not discriminatory and pursuing charges in Spokane was a reasoned choice, the decision to switch venues did not qualify as arbitrary. *Slip Op.* at 6. The Court reversed the trial court decision and remanded. *Slip Op.* at 7.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A speedy trial in a criminal prosecution is a personal right guaranteed by the U.S. Constitution and the Constitution of Washington.

"It is also an objective in which the public has an important interest." as defendants who are not released on bail "must spend 'dead' time in local jails exposed to conditions destructive of human character." *State v. Striker,* 87 Wn.2d 870, 876, 557 P.2d 847 (1976). Petitioner believes this Court should accept review because the decision by the Court of Appeals is of substantial public interest. RAP 13.4(b)(4).

Findings of fact must be supported by substantial evidence. *Govett v. First Pac. Inv. Co.,* 68 Wn.2d 973, 412 P.2d972 (1966). Substantial evidence is that quantum of evidence sufficient to persuade a fair-minded, rational person of the truth of the findings. *Brown v. Superior Underwriters,* 30 Wn.App. 303, 306, 632 P.2d 887 (1980). And a reviewing court need only consider evidence favorable to the prevailing party, assuming the trial court's findings are correct. *Bland v. Mentor,* 53 Wn.2d 150, 155, 385 P.2d 727 (1963); *Nguyen v. City of Seattle*, 170 Wn.App. 155, 163, 317 P.3d 518 (2014). Even when substantial but disputed evidence supports the findings of fact, the reviewing court will not disturb the trial court's ruling. *State v. Smith,* 84 Wn.2d 498, 505, 527 P.2d 674 (1974). Unchallenged findings of fact are treated as verities on appeal. *State v. O'Neill,* 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

The State has not challenged Finding of Fact 6, which provides the only basis the prosecutor moved the case to Spokane: "Because the State

preferred to prosecute the charges in Spokane rather than Adams County." (CP 85). Based on unchallenged finding of fact 6, the decision to dismiss and refile the charges against Mr. Williams was simply a *preference* by the prosecutor. When referring to a judicial decision, 'arbitrary' means founded on prejudice or *preference* rather than reason or fact. BLACK'S LAW DICTIONARY 100 (7th ed. 1999).

In discussing arbitrary actions, in *State v. Pettit,* the Court held that while a prosecutor has wide discretion to charge or not charge an individual, there is a necessary assumption that the prosecutor will exercise it after an analysis of all available relevant information. *State v. Pettit,* 83 Wn.2d 288, 296, 609 P.2d 1364 (1980). The only analysis offered by the State, which the trial court found to be a preference was:

> "Because all of the events underlying the charges began and occurred in Spokane County before continuing on and into the other two counties, the respective prosecutors decided that Spokane would be the more appropriate place to charge and try the defendant." (CP 41).

The trial court rightly considered it a preference as the record shows that actually the majority of alleged conduct occurred outside of Spokane County, in Lincoln and Adams Counties. Additionally, Mr. Williams was arrested in Adams County, the Adams County Superior Court reviewed the probable cause affidavit and issued the search warrant

for the blood draw, and the blood was drawn at an Adams County Hospital. Mr. Williams was assigned counsel in Adams County, jailed for six weeks in Adams County, arraigned in Adams County, and continued through the legal process in Adams County up to the omnibus hearing. The decision to change the jurisdiction after six weeks rested simply on the individual preference of the prosecutors. The State did not present any reasoned analysis, and the facts demonstrate the decision to move the prosecution was arbitrary. The trial court rightly concluded the "State's choice of dismissal and filing refilling created too much of an ambiguity in the change of evidence, and the discovery and rendered it impossible to be able to prepare for trial within the confines of the defendant's speedy trial rights." (CP 86-87).

An appellate court reviews the trial court's decision on a motion to dismiss for manifest abuse of discretion, which occurs if the trial court's decision is manifestly unreasonable or is based on untenable grounds. *State v. Martinez,* 121 Wn.App. 21, 30, 86 P.3d 1210 (2004). A decision is based on untenable grounds if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The trial court did not abuse its discretion in finding the action was arbitrary.

The Court of Appeals noted that "arbitrary" sets a fairly low bar. *Slip Op.* at 6. The Court went on to reason that CrR 8.3(b) requires "some sort of wrong-doing." *Slip Op.* at 3. However, Mr. Williams contends that 'arbitrary' does not require a wrong-doing, but rather, preference or prejudice.

The purpose of CrR 8.3 is to see that one charged with a crime is fairly treated. *State v. Satterlee,* 58 Wn.2d 92, 361 P.2d 168 (1961). The rule allows the court, in the furtherance of justice, to dismiss a criminal prosecution due to either governmental misconduct (malicious or simple mismanagement) or arbitrary action, where there has been prejudice to the rights of the accused, which materially affects his right to a fair trial. *Rohrich,* 149 Wn.2d at 654. In other words, some action taken by the State, whether mismanagement or even simply a preference, which materially affects the rights of the accused, is sufficient for a dismissal.

In *Brooks* the Court noted that because a criminal defendant has separate constitutional rights to a speedy trial and to effective assistance of counsel, the State cannot force a defendant to choose between the two. *State v. Brooks,* 149 Wn.App. 373, 387, 203 P.3d 397 (2009). A defendant being forced to waive his speedy trial right is not a trivial event. "This court, 'as a matter of public policy[,] has chosen to establish speedy trial time limits by court rule and to provide that failure to comply

therewith requires dismissal of the charge with prejudice.'" *State v. Michielli,* 132 Wn.2d 229, 245, 937 P.2d 587 (1997). Similarly, one cannot have a fair trial with counsel who is not adequately prepared. *Id.*

The State had options to prevent prejudicing Mr. Williams rights: it could have left the prosecution in Adams County or returned the prosecution to Adams County. Similarly, it could have asked the court to release Mr. Williams from custody to extend the speedy trial time from 60 to 90 days. *State v. Wilson,* 149 Wn.2d 1, 12, 65 P.3d 657 (2003). It did not request any of those remedies.

The trial court rightly concluded that the arbitrary action of the state resulted in a violation of CrR 8.3(b) that prejudiced the rights of Mr. Williams and materially affected his right to a fair trial. The trial court did not abuse its discretion in dismissing the prosecution.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Williams respectfully asks this Court accept review of his petition.

Dated this 9th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on June 9, 2016, I served by USPS, first class, postage prepaid a true and correct copy of the Brief of Appellant to:
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CASE # 331580
State of Washington v. Scott Michael Williams
SPOKANE COUNTY SUPERIOR COURT No. 141038080

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment
c: (**E-Mail**) Honorable Linda G. Tompkins
c: Scott Michael Williams
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FILED
May 10, 2016
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, Appellant, v. SCOTT M. WILLIAMS, Respondent.	)	No. 33158-0-III PUBLISHED OPINION

PENNELL, J. — CrR 8.3(b) authorizes dismissal of criminal charges based on arbitrary state action when there has been prejudice to the accused. Criminal charges against Scott Williams were dismissed under this rule after the superior court determined the State's decision to switch venues prejudiced Mr. Williams by forcing him to choose between effective assistance of counsel and the right to a speedy trial. Because we disagree with the superior court's conclusion that the State's venue decision was arbitrary, we reverse.

FACTS

Mr. Williams was arrested in Adams County after allegedly leading police on an erratic high-speed chase that began in Spokane County. Mr. Williams originally faced felony charges in Adams County, but that case was dismissed in favor of similar charges in Spokane County. The State's change in selected venue disrupted the continuity of Mr. Williams's appointed legal counsel. As a result, his Spokane counsel did not have sufficient time to prepare for trial under the 60-day speedy trial clock.

Mr. Williams filed a motion to dismiss under CrR 8.3(b). The Spokane County Superior Court granted the motion. Although the court found no misconduct, it dismissed the charges against Mr. Williams because "[t]he decision of the State to move the proceedings from Adams County to Spokane County was an arbitrary action that resulted in unfair circumstances forcing Mr. Williams to make an impossible choice between exercising his speedy trial right and being competently prepared for trial." Clerk's Papers (CP) at 81. The State appeals.

ANALYSIS

We are confronted with whether, under the facts of this case, dismissal was warranted under CrR 8.3(b). The rule provides:

> 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.

To prevail on a motion to dismiss under this provision, "the defendant must show by a preponderance of the evidence both (1) arbitrary action or governmental misconduct, and (2) actual prejudice affecting the defendant's right to a fair trial." *State v. Martinez*, 121 Wn. App. 21, 29, 86 P.3d 1210 (2004). No amount of prejudice can sustain a dismissal order if the defendant is unable to establish arbitrary action or misconduct. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

This court reviews a trial court's dismissal under CrR 8.3(b) for manifest abuse of discretion. *Martinez*, 121 Wn. App. at 30. "Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds." *Id.* "A decision is based on untenable grounds 'if it rests on facts unsupported in the record . . . .'" *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

During the superior court proceedings, the focus was on prejudice. Although the State did not concede arbitrary action or misconduct, scant attention was paid to those components of CrR 8.3(b). While it is true that "simple mismanagement," rather than "evil or dishonest" conduct can justify dismissal, *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868 (2000), the rule still requires some sort of wrong-doing. Dismissal "is an

extraordinary remedy." *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). CrR 8.3(b) was not designed to grant courts "the authority to substitute their judgment for that of the prosecutor." *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975).

In its factual findings, the superior court determined the State had engaged in arbitrary action, but not misconduct. CP at 81. The term "arbitrary" is not defined in the rule. Nor do our cases provide much guidance on what is meant by arbitrary action, as opposed to misconduct, under CrR 8.3(b). Thus, we are faced with discerning the intended meaning of "arbitrary action" in the current context.

In due process jurisprudence, the concept of arbitrary governmental action is fairly common. *See, e.g.*, *State v. Watson*, 120 Wn. App. 521, 533, 86 P.3d 158 (2004), *aff'd in part, rev'd in part on other grounds*, 155 Wn.2d 574, 122 P.3d 903 (2005) (litigant can state a claim for denial of substantive due process by showing that "the State's action was arbitrary and unreasonable"). Accordingly, we may look to this context for guidance. *See In re Brazier Forest Prods., Inc.*, 106 Wn.2d 588, 595, 724 P.2d 970 (1986). When it comes to a substantive due process claim of arbitrary governmental action, we will uphold the State's actions so long as they are grounded in a rational basis, unless the claimant alleges a violation of fundamental rights. *Watson*, 120 Wn. App. at 533. This determination accords with the only other Washington case to discuss arbitrary action

under CrR 8.3(b), *State v. Worthey*, 19 Wn. App. 283, 576 P.2d 896 (1978). In *Worthey*, Division Two of this court recognized that when it comes to CrR 8.3(b), an arbitrary action is one that is discriminatory or done "without reasonable justification." *Worthey*, 19 Wn. App. at 288.

Interpreting "arbitrary action" in this light, it is apparent CrR 8.3(b) allows the State considerable leeway. To overcome a charge of arbitrariness, the State need not show its actions were legally required. In addition, given the prohibition on judicial second-guessing, the State's choice need not represent the best possible means of furthering its objectives. Unless the accused's fundamental rights are implicated, a claim of arbitrary action must fail so long as the prosecutor can articulate a plausible, nondiscriminatory reason for the government's action.

With this in mind, we turn to Mr. Williams's case. In its response to his motion to dismiss, the State explained its charging decision as follows:

> Because all of the events underlying the charges began and occurred in Spokane County before continuing on and into the other two counties, the respective prosecutors decided that Spokane would be the more appropriate place to charge and try the defendant.

CP at 41. The superior court did not reject this explanation as disingenuous. Verbatim Report of Proceedings (Jan. 22, 2015) at 52. Thus, the only question we face is whether the State's explanation meets the rule's terms. We hold it does. The State's decision to

pursue charges in the county where the commencement and bulk of the defendant's alleged conduct took place is a reasoned one. It is not discriminatory and did not infringe on any fundamental rights.[1] Consequently, the State's decision to switch venues does not qualify as arbitrary and cannot justify dismissal under CrR 8.3(b), regardless of prejudice.

We recognize that arbitrariness sets a fairly low bar. It is perhaps for this reason that most cases under CrR 8.3(b) involve misconduct allegations. Indeed, Mr. Williams's case might have been quite different had there been a finding of misconduct. For example, had the State unreasonably delayed its venue decision or sought a strategic advantage by causing discontinuity of counsel, dismissal under CrR 8.3(b) might have been warranted. *See Michielli*, 132 Wn.2d at 244; *State v. Sulgrove*, 19 Wn. App. 860, 863, 578 P.2d 74 (1978). But those are not our facts. While it was unfortunate Mr. Williams's case was delayed due to the State's decision to switch venues, this circumstance does not justify dismissal under CrR 8.3(b).

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[1] Venue choices do not implicate fundamental rights, triggering heightened scrutiny. *See Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651, 112 S. Ct. 2184, 119 L. Ed. 2d 432 (1992). The same is true for decisions implicating rule-based (as opposed to constitutional) speedy trial rights. *State v. Smith*, 117 Wn.2d 263, 278-79, 814 P.2d 652 (1991); *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980). Although Mr. Williams had the constitutional right to effective assistance of counsel, the State's action did not directly impinge on this right since counsel was able to ask for a continuance beyond the normal speedy trial period. *State v. Hoffman*, 116 Wn.2d 51, 76-77, 804 P.2d 577 (1991).

The superior court's order of dismissal is reversed and this matter is remanded for further proceedings consistent with this opinion.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Siddoway, J.