96763-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 35272-2-III

STATE OF WASHINGTON, Respondent,

v.

JOHN MARTIN MALING, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

John Martin Maling requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the published decision of the Court of Appeals filed on December 18, 2018, holding that the State is not required to provide the defendant prior notice of a motion to release the defendant solely for the purpose of preventing the time for trial expiring. A copy of the Court of Appeals' published opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

The State forgot it had jailed Mr. Maling before trial. Late in the afternoon on the last day of the CrR 3.3 speedy trial period, the State took *ex parte* action to place Maling's case on the docket at 3:30 p.m. As it happened, Maling's attorney was in the courthouse on another matter and was orally advised of the hearing about one hour before it began. Acknowledging that the case was "a mess" and with no indication in the record that a jury could be summoned and trial commenced at that point in the day, the State moved for Maling's release for the sole purpose of extending the time for trial. Maling's counsel objected to the lack of

notice and the Court of Appeals affirmed Maling's subsequent conviction, holding that the State needed not comply with the "technical requirements" to provide advance notice of the hearing to Maling and his attorney. One judge dissented, concluding that the trial court abused its discretion by failing to enforce CrR 8.2 and CR 7(b)(1)'s notice requirements before entertaining the State's motion for release. Maling now seeks review of the following issues:

1. Whether, when CrR 8.2 requires parties in criminal cases to bring motions in accordance with the notice requirements of CR 7(b)(1), an unwritten exception exists that allows motions from the State to release a defendant to prevent the time for trial expiring to be brought without any prior notice;
2. Whether, when CrR 3.3 does not define a "day" for purposes of determining when the final day for trial has expired, Maling's time for trial had already expired by the time of the hearing in the late afternoon on the final day when it was uncontested that the case could not then have proceeded to trial; and
3. Whether *State v. Chavez-Romero*, 170 Wn. App. 568, 285 P.3d 195 (2012) and *State v. Kelly*, 60 Wn. App. 921, 808 P.2d 1150 (1991), holding that a trial court may release a defendant for the sole purpose of preventing the speedy trial from expiring despite

the lack of any change in circumstances required to amend a pre-trial detention order under CrR 3.2, are wrongly decided and should be overruled.

IV. STATEMENT OF THE CASE

John Maling faced three counts of possessing a controlled substance with intent to deliver it. CP 4. After he failed to appear at a pretrial hearing and a warrant was issued, he was arrested and brought back before the court, at which time the parties acknowledged that the time for trial was reset and would expire in sixty days. RP (Arraignment, Hearing, Trial Confirmation) at 4.

The State then forgot that it had jailed him. After being alerted to this fact by an unidentified third-party, the State "added Mr. Maling's case to the court's afternoon docket for a hearing." *Opinion*, at 3. The record does not reflect how the State caused this to occur. By happenstance, Maling's attorney was nearby on another matter and the State "caught [him] in the hallway across the street and mentioned it – that this [hearing] was happening." RP (Arraignment, Hearing, Trial Confirmation) at 8-9. His attorney objected to proceeding with the hearing based upon the lack of notice. CP 18.

Despite Maling's objection and the State's concession that the case was "a mess," at approximately 3:30 p.m. on the last day of the speedy trial period, the trial court entertained motions from the State to either continue the trial date or release Maling from custody to extend the time for trial an additional 30 days. RP (Arraignment, Hearing, Trial Confirmation) at 9-10; *Opinion*, at 3. Observing that omnibus requirements had not been satisfied and that trial could not realistically commence within the next two weeks, Maling opposed the continuance request and asked for the case to be dismissed. RP (Arraignment, Hearing, Trial Confirmation) at 11. Maling also contended that the speedy trial clock had already expired, and the State argued it would not expire for another hour and 47 minutes, presumably referring to the time the court closed for business. RP (Arraignment, Hearing, Trial Confirmation) at 12.

When it appeared that the court would not grant its request to continue the trial date, the State requested Maling's release, stating,

> I'm not asking to impose the cure period. If you're not going to grant a continuance so we can get this moved, then the state would be asking to release him, which would change his speedy trial period from 60 to 90 days.

RP (Arraignment, Hearing, Trial Confirmation) at 12. The State did not acknowledge or address any of the release factors set forth in CrR 3.2(a),

and did not make any argument that Maling's circumstances were changed such that pretrial incarceration was no longer necessary under CrR 3.2(j) or (k). The trial court ordered Maling released, and subsequently denied his motion to dismiss for violation of the speedy trial rule. RP (Arraignment, Hearing, Trial Confirmation) at 12; *Opinion*, at 4.

On appeal, Maling contended that the trial court erred in entertaining the State's motions when they were brought without providing adequate notice to Maling or his attorney. *Appellant's Brief*, at 6. Observing that multiple provisions of the criminal rules require motions to be made in writing and served no less than five days before the scheduled hearing, and that nothing in CrR 3.2 established an exception to these requirements, Maling contended the motion was not properly before the court and because it could not have been properly brought before the time for trial expired, his motion to dismiss for violation of the speedy trial rule should have been granted. *Appellant's Brief*, at 6-7.

The Court of Appeals disagreed, dismissing the notice requirements of CrR 8.2 as a mere "technical objection." *Opinion*, at 5. Reasoning that because the trial court holds the ultimate responsibility for enforcing Maling's speedy trial deadline, the State's actions in bringing Maling before the court with no prior notice to him or his attorney were

appropriate. *Opinion*, at 6. One judge dissented, agreeing with Maling that the State's failure to comply with the notice and motion requirements of CrR 8.1 and 8.2 deprived the court of jurisdiction to enter the order releasing Maling. *Dissenting Opinion*, at 8. Observing that "improper notice implicates fundamental principles of justice and due process," the dissenting judge castigated the majority's dismissal of the notice requirements as merely technical, stating,

> A party and his or her attorney should not be burdened with responding to an important motion by notification to the attorney one hour in advance when the attorney walks the halls of the courthouse in order to attend to other clients and other cases.

Dissenting Opinion, at 9-10.

Both the majority and the dissenting judge assumed that the State could properly request Maling's release for the sole purpose of preventing the time for trial expiring and without any consideration of the CrR 3.2 release factors, relying upon *State v. Chavez-Romero*, 170 Wn. App. 568, 285 P.3d 195 (2012), *review denied*, 176 Wn.2d 1023 (2013) and *State v. Kelly*, 60 Wn. App. 921, 808 P.2d 1150 (1991). *Opinion*, at 6; *Dissenting Opinion*, at 4. Neither the majority nor the dissenting judge (who agreed with Maling on other grounds) addressed Maling's argument that the final "day" for trial expired when Maling's case could no longer have been

called for trial and a jury venire empaneled for that day, not when the courthouse closed. *Appellant's Brief*, at 9-11; *Dissenting Opinion*, at 12.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(4), review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. This case, which establishes as precedent that notice to the defense is a mere technicality that can be disregarded when the State's negligence brings a case to the brink of the speedy trial deadline, presents such issues.

Court rules must be construed "to foster the purposes for which they were enacted." *State v. Greenwood*, 120 Wn.2d 585, 593, 845 P.2d 971 (1993). The purpose of the speedy trial rule is to give the defendant a prompt trial once prosecution is initiated. *State v. Carson*, 128 Wn.2d 805, 815, 912 P.2d 1016 (1996). By establishing different time-for-trial periods for defendants who are detained pretrial and those who are released, the rule acknowledges that the loss of liberty occasioned by delay in bringing a case to trial is significant. *See* CrR 3.3(b). Accordingly, the rule requires greater diligence by the State to try the case promptly when the defendant has been incarcerated without being convicted of a crime.

That the penalty for failing to comply with the speedy trial rule is harsh – dismissal with prejudice of the charge – underscores the importance of proceeding diligently. *See* CrR 3.3(h). However, the rule acknowledges the realities of case and court administration, providing multiple exceptions to and exclusions from the applicable time limits. CrR 3.3(e) (excluding various proceedings as well as unforeseen circumstances from the time calculation); (f) (permitting continuance of the trial date "when such continuance is required in the administration of justice" and the defense will not be prejudiced); (b)(5) (extending the allowable time for trial 30 days beyond the end of any excluded period); (c)(2) (restarting the time for trial calculation due to certain significant actions in the case or when the defendant's failure to appear at a required hearing occasions the ensuing delay). Indeed, the rule even contemplates that overlooking the trial deadline can be cured, so long as the oversight is promptly addressed and corrected by initiating the trial shortly afterward. CrR 3.3(g). Thus, while the remedy for a violation is harsh, the rule fully contemplates necessary delays and offers the State ample opportunities to extend the time for trial to accommodate the demands of the case, the schedules of parties and witnesses, and emergent circumstances.

However, the rule provides no exception to the State's obligation to give due notice of proceedings in the case merely because the time for

trial is close to expiring. Those obligations, established in CrR 8.1 and 8.2, as well as the civil rules they incorporate, require motions to be made in writing with no less than five days' notice to the opposing party. *Dissenting Opinion*, at 5-7. There is no dispute that the procedure employed in this case, in which the State unilaterally placed the matter on the docket the same day and fortuitously located defense counsel nearby to verbally give him approximately one hour's notice of the hearing, did not comply with these rules.

Nevertheless, the Court of Appeals' published opinion dismisses CrR 8.1 and 8.2 as mere procedural technicalities, which the court's duty to enforce the speedy trial rule implicitly allows it to disregard. *Opinion*, at 2, 5. This position, and its precedential effect, are deeply troubling. As observed by the dissenting judge, the requirement that a defendant receive advance notice of the State's proposal for action in a case is inherent in the obligation to afford him due process of law. *Dissenting Opinion*, at 8-10. Moreover, the interpretation adopted by the majority is not limited in language or in logic to motions relating to the speedy trial rule, but effectively allows the State[1] to bypass written motion and notice

[1] Additionally, because it is unclear what process the State employed to unilaterally place the matter on the court's docket on short notice, it cannot be ascertained whether the same opportunity would be afforded the defense.

requirements entirely by unilaterally calendaring the defendant's case for an unspecified hearing, and then presenting its motions orally. *See Opinion*, at 6; *Dissenting Opinion*, at 5-6. This reading renders CrR 8.1 and 8.2 nullities, contrary to well-established principles of interpretation that rulemaking bodies do not engage in unnecessary or meaningless acts. *See John H. Sellen Const. Co. v. Dept. of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976) ("By interpretation we should not nullify any portion of the statute.").

Because of the broad implications of the Court of Appeals' ruling to criminal motions practice generally, its precedential holding that rule-based notice and motion requirements are mere technicalities that may be disregarded is of substantial public interest, warranting review by this Court. Furthermore, because the case also presents the need to interpret the limits of the speedy trial deadline and to consider the court's authority with respect to pretrial detention, issues of significant public interest concerning criminal case administration are raised.

Concerning the first point, the speedy trial rule establishes that defendants must be brought to trial within a certain number of "days," but provides no definition of a "day" to establish the point at which the time for trial has expired. *See* CrR 3.3(b). The rule could mean a calendar day,

in which case the day ends at 11:59:59 p.m. The rule could mean a court day, in which case the day ends when the court closes for business, whenever that may be. Or, read pragmatically, the rule could mean that the day has ended when the court is no longer capable of acting. Because commencing a trial requires that a jury venire be present and available for selection, a day for trial should be interpreted as ending when the case is not called for trial and any jurors summoned to appear that day are released and unavailable to serve. *See* CrR 6.3. Interpreting the outside limits of the speedy trial deadline will be helpful in resolving future cases and therefore satisfied RAP 13.4(b)(4).

Concerning the second point, previous appellate decisions allowing the trial court to release a defendant from custody for the sole purpose of extending the time for trial disregards the standards established in CrR 3.2 for release decisions and interprets CrR 3.3 in a manner that excuses, rather than discourages, intransigence by the State. Under *State v. Chavez-Romero*, 170 Wn. App. 568, 578, 285 P.3d 195 (2012), *review denied*, 176 Wn.2d 1023 (2013) and *State v. Kelly*, 60 Wn. App. 921, 928, 808 P.2d 1150 (1991), upon which *Chavez-Romero* relied, a trial court does not abuse its discretion when it orders a defendant released without a change in the circumstances that justified pretrial incarceration in the first instance, solely to extend the time for trial under CrR 3.3. Because this

interpretation conflicts with the language of CrR 3.2, minimizes the significance of ordering pretrial incarceration in the first instance, and interprets the speedy trial rule in a manner that sanctions State negligence, this Court should take the opportunity to evaluate these precedents.

In *Kelly*, on the final day for trial after its motion to continue the trial was denied, the State moved to release the defendant. 60 Wn. App. at 923. On appeal, the defendant argued that the trial court abused its discretion by ordering release for the sole purpose of extending the time for trial, without a showing of a change in circumstances under CrR 3.2. *Id.* at 926. Division I of the Court of Appeals rejected this argument, interpreting CrR 3.2 as permitting a court to consider courtroom congestion and the availability of witnesses in determining whether to grant pretrial release. *Id.* at 928. In *Chavez-Romero*, Division III of the Court of Appeals adopted the *Kelly* court's interpretation. 170 Wn. App. at 578.

This interpretation cannot be sustained by the language or purpose of CrR 3.2. It is presumed that criminal defendants are entitled to release on their own recognizance, and this presumption is only overcome when there is evidence that the defendant will not appear, will commit a violent crime, or will subvert the administration of his case by intimidating

witnesses or engaging in other unlawful acts. CrR 3.2(a). The *Kelly* court referred to language in the rule permitting the court to consider "the relevant facts including but not limited to ..." as permitting the court to consider non-enumerated factors including congestion and other impediments to trial. 60 Wn. App. at 926. But whether courtrooms are congested or witnesses may be unavailable have no bearing on whether a defendant will appear when he is ordered or commit crimes if he is released.

Furthermore, *Kelly*'s rationale discounts the reasons why pretrial incarceration was ordered in the first place by allowing those reasons to be ignored to facilitate prosecution. Because defendants are presumed entitled to release without conditions, and because their fundamental liberty interests are at stake when they are incarcerated without being convicted of a crime, specific factors implicating public safety or refusal to comply with court orders must be shown to justify the initial detention order. These factors do not dissipate simply because, for reasons not otherwise justifying recalculation of the speedy trial deadline, the State has failed to proceed diligently to try the case.

Moreover, the *Kelly* court's reasoning discourages the State from carefully considering in each individual case whether pretrial incarceration

should be recommended, in exchange for the obligation the State undertakes to try the case more quickly than when the defendant is released. Instead, the State is incentivized to simply pursue pretrial incarceration across the board and only seek release when the 60-day limit becomes too onerous *and* cannot otherwise be excused or extended under CrR 3.3's many exceptions. Conviction rates for individuals who are detained pretrial on a felony charge are nearly 1.5 times greater than for defendants who are released, likely in part because of the pressure pretrial incarceration places on a defendant to reach a plea bargain and secure his release rather than remain in jail to establish his innocence. *See* Cohen, Thomas H. and Reaves, Bryan A., *Pretrial Release of Felony Defendants in State Courts*, U.S. Dept. of Justice Bureau of Justice Statistics, Special Report (Nov. 2007) at 7, *available online at* https://www.bjs.gov/content/pub/pdf/prfdsc.pdf (last visited January 17, 2019); *see also* Holland, Brooks, *The Two-Sided Speedy Trial Problem*, 90 Wash. L. Rev. Online 31 (2015), *available online at* https://www.law.uw.edu/wlr/online-edition/the-two-sided-speedy-trial-problem (last visited January 17, 2019).

Finally, the language of CrR 3.2 does not permit a court to amend an order establishing conditions for release except in the event of a "change of circumstances, new information or showing of good cause."

CrR 3.2(k). Logically, this is because a defendant who has been determined to be a flight risk or a potential danger to society continues to be a flight risk or a potential danger to society in the absence of new information or a change in circumstances. And, while the exception for "good cause" is broader, it is an extraordinary reading of "good cause" that would include amendment because the State's lack of diligence allowed the case to languish until mere hours before the time for trial expired.

Pretrial incarceration practices are under increasing scrutiny in Washington. In 2016, the Washington State Minority and Justice Commission hosted its annual symposium on the topic of pretrial incarceration. In 2017, Washington organizations, in partnership with the Minority and Justice Commission and the national Pretrial Justice Institute, organized a Pretrial Reform Task Force to study and evaluate reforms to policies and practices concerning pretrial incarceration. In this context of increased attention to the social costs of pretrial imprisonment, consideration by this Court of *Kelly*'s interpretation of CrR 3.2 is likely to be of significant public interest.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(4) and this Court should enter a ruling that the trial court lacked authority to consider the State's motion to continue the trial or release Maling to extend the time for trial when the State failed to comply with CrR 8.1 and 8.2, that Maling's time for trial had already expired at the time of the State's motion, and that CrR 3.2 does not permit a trial court to release a defendant from custody for the sole purpose of extending the time for trial, overruling *Kelly* and *Chavez* and reversing and dismissing Maling's convictions.

RESPECTFULLY SUBMITTED this 17 day of January, 2019.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

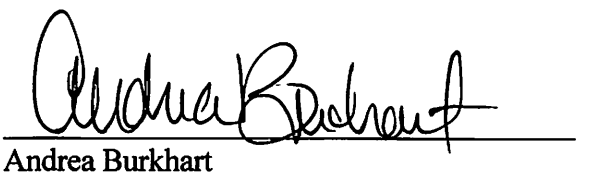
I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Joseph Anthony Brusic
Michael James Austen Ellis
Yakima County Prosecutor's Office
128 N 2nd St Rm 233
Yakima, WA 98901-2639

John Martin Maling
508 N. 21st Ave.
Yakima, WA 98902

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 17 day of January, 2019 in Kennewick, Washington.



Andrea Burkhart

APPENDIX

FILED
DECEMBER 18, 2018
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. 35272-2-III
	)	
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
JOHN MARTIN MALING,	)	
	)	
Appellant.	)	

PENNELL, A.C.J. — Under Washington's speedy trial rules, an individual incarcerated on criminal charges generally must be brought to trial within 60 days of arraignment. The time for trial period can be extended to 90 days if, prior to the expiration of the 60-day limit, the defendant is released from custody.

John Maling's case was placed on the superior court docket after the prosecutor noticed Mr. Maling's 60-day in-custody trial deadline was within hours of expiring.

Upon appearing before the court, the prosecutor made an oral motion for release. The trial court granted the motion and Mr. Maling's speedy trial deadline was extended by an additional 30 days.

On appeal to this court, Mr. Maling argues the trial court's release order was invalid because it was not preceded by a written motion filed at least five days before the court hearing. We are unpersuaded. Trial courts hold the responsibility for ensuring compliance with speedy trial rules. The ability to meet this obligation is not hindered by the technical requirements for motion practice applicable to litigants. The judgment of conviction is therefore affirmed.

BACKGROUND

On December 3, 2015, the State of Washington charged John Maling with three counts of possession of a controlled substance with intent to deliver. Mr. Maling failed to appear for an August 29, 2016, pretrial hearing, and the court issued a bench warrant for Mr. Maling's arrest.

On September 1, 2016, Mr. Maling appeared in court for arraignment. The trial court imposed $100,000 bail and scheduled the next hearing for October 10. Consistent with CrR 3.3(c)(2)(ii), the trial court noted that, because of Mr. Maling's failure to appear

on August 29, the 60-day speedy trial period recommenced on September 1. As a result, Mr. Maling's 60-day statutory speedy trial period would expire on October 31.

Mr. Maling never posted bail. The October 10 hearing did not occur due to an apparent oversight.

On October 31, 2016, an unidentified third party alerted the prosecution that Mr. Maling remained in custody. The prosecution then added Mr. Maling's case to the court's afternoon docket for a hearing. Mr. Maling's counsel happened to be present at the courthouse on the afternoon of October 31 on another matter and appeared in court with Mr. Maling for the hearing, which commenced at approximately 3:30 p.m. During the hearing, the State advised the court the case "[was] a mess." Report of Proceedings (Oct. 31, 2016) at 9. The State requested the court either continue the trial schedule or alternatively, release Mr. Maling.

Defense counsel objected to the court granting a continuance and argued the speedy trial period had expired.[1] The defense also made an oral motion for dismissal.

[1] In subsequent written motions, defense counsel claims he objected to the court conducting the hearing on the basis of proper notice. The record before us does not bear this out. While defense counsel noted at the beginning of the hearing that he had not received advance notice, counsel did not object to the court holding a hearing. Instead, the defense objected to the relief given by the court by arguing that the speedy trial period had already run. The defense also asked for its own substantive relief in the form of dismissal.

The State asserted the 60-day deadline for trial would not expire for another hour and 47 minutes.

After hearing from the parties, the trial court ordered Mr. Maling's release from custody on his own recognizance. The court preserved Mr. Maling's right to later argue infringement of his speedy trial rights since Mr. Maling received only one hour's verbal notice of the October 31 hearing. The trial court recalculated his time for trial as being 90 days, rather than 60, from the September 1 arraignment. Jail authorities later released Mr. Maling on October 31.

Mr. Maling and the State later agreed to continue the trial beyond 90 days in part to allow for settlement negotiations, with Mr. Maling presumably reserving the right to object to violation of the 60-day incarceration speedy trial rule. On March 20, 2017, Mr. Maling filed a motion to dismiss for violation of his right to a speedy trial. The court denied the motion. Mr. Maling waived his right to a jury trial, and the court convicted Mr. Maling as charged.

LAW AND ANALYSIS

Washington's speedy trial rule generally requires that a defendant held in custody be brought to trial within 60 days of arraignment. CrR 3.3(b)(1); *State v. Chavez-Romero*, 170 Wn. App. 568, 578, 285 P.3d 195 (2012). If the defendant is released

from jail prior to expiration of the 60-day limit, the time for trial is extended to 90 days. CrR 3.3(b)(3). The State can move for a defendant's release from custody in order to extend the speedy trial deadline and avoid dismissal. *Chavez-Romero*, 170 Wn. App. at 578-79. Should such motion be submitted, the defendant cannot request continued incarceration in order to force expiration of the speedy trial period. *State v. Kelley*, 60 Wn. App. 921, 926-27, 808 P.2d 1150 (1991).

Mr. Maling contends the trial court abused its discretion in ordering his release on October 31 because the State moved for release without first complying with the notice and motion requirements set by court rule. The rules referenced by Mr. Maling provide that requests for court orders must be made by written motion, unless presented during a hearing or trial. CrR 8.2; CR 7(b)(1). In addition, written motions must be served at least five days before the hearing at which they are to be decided. CrR 8.1; CR 6(d).

We disagree with Mr. Maling's technical objection to the trial court's disposition. The ultimate responsibility for enforcing Mr. Maling's speedy trial time fell on the court, not the prosecution. CrR 3.3(a)(1). Once the State's prosecutor learned Mr. Maling had not posted bail, he had a duty as a judicial officer to alert the court of the potential for a speedy trial violation so the court could take timely corrective action. *See State v. White*,

94 Wn.2d 498, 502-03, 617 P.2d 998 (1980);[2] *State v. Jenkins*, 76 Wn. App. 378, 382-83, 884 P.2d 1356 (1994). Given the prosecutor only discovered Mr. Maling's continued incarceration on the 60th day of the in-custody speedy trial period, it was appropriate for the State to alert the trial court of a potential speedy trial problem by immediately placing Mr. Maling's case on the docket.

Once Mr. Maling was in court, the judge had discretion to consider oral motions, including a request for release so as to avoid a speedy trial violation. CR 7(b)(1); *Chavez-Romero*, 170 Wn. App. at 578-79; *Kelley*, 60 Wn. App. at 926-28. As soon as the court ordered release, Mr. Maling's time for trial period was extended by 30 days. CrR 3.3(b)(3); *Kelly*, 60 Wn. App. at 926 ("[W]hen a judge releases a defendant from custody, the 90 day limit becomes effective irrespective of whether he is released from custody on the 6th day or the 60th day."). Thus, although the 60-day speedy trial period was near its expiration, the period did not lapse. Mr. Maling did not suffer a speedy trial violation and his motion for dismissal was properly denied.

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[2] A similar duty sometimes extends to defense counsel. *White*, 94 Wn.2d at 502-03; *State v. Carson*, 128 Wn.2d 805, 815, 912 P.2d 1016 (1996) ("[C]ounsel for a defendant bears some responsibility for asserting CrR 3.3 rights of a client and assuring compliance with the rule before the speedy trial period expires.").

MOTION TO STRIKE FEES ASSESSED BY TRIAL COURT

Citing *State v. Ramirez*, __ Wn.2d __, 426 P.3d 714 (2018), Mr. Maling has filed a motion to strike the $200 criminal filing fee and $100 deoxyribonucleic acid (DNA) collection fee imposed by the trial court at sentencing. *Ramirez* was decided after the close of briefing in this case. The decision held that the 2018 amendments[3] to Washington's legal financial obligation scheme apply prospectively to cases on direct review at the time of enactment. Of interest to Mr. Maling, the 2018 amendments prohibit imposition of a $200 criminal filing fee on defendants who are indigent at the time of sentencing as defined by RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h). Also prohibited is the assessment of a DNA database fee if the State has previously collected the defendant's DNA as a result of a prior conviction. RCW 43.43.7541.

The record before the court indicates Mr. Maling's request for relief is controlled by *Ramirez*.[4] Specifically, Mr. Maling was indigent at the time of sentencing and Mr. Maling's lengthy felony record indicates a DNA fee has previously been collected. Accordingly, we grant Mr. Maling his requested relief and direct the trial court to strike the $200 filing fee and $100 DNA fee from Mr. Maling's judgment and sentence.

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[3] LAWS OF 2018, ch. 269

[4] The State has not responded to Mr. Maling's motion.

CONCLUSION

The judgment of conviction is affirmed. This matter is remanded to the trial court with instructions to strike the $200 filing fee and $100 DNA fee from Mr. Maling's judgment and sentence.

Pennell, A.C.J.

I CONCUR:

Siddoway, J.

No. 35272-2-III

FEARING, J. (dissenting) — John Maling challenges his convictions for delivery of a controlled substance by arguing directly that the State provided insufficient notice of a motion to release him from incarceration and arguing indirectly that the State violated his rule based speedy trial rights. I agree and dissent from the majority's ruling.

On December 3, 2015, the State of Washington charged John Maling with three counts of possession of a controlled substance with intent to deliver. Maling failed to appear for an August 29, 2016, pretrial hearing, and the court issued a bench warrant for Maling's arrest.

On September 1, 2016, John Maling appeared in court for arraignment. The trial court required Maling to post $100,000 bail to ensure his appearance and scheduled the next hearing for October 10. The trial court noted that, because of Maling's failure to appear on August 29, the sixty-day speedy trial period recommenced on September 1. A failure to appear for a mandatory court hearing results in a resetting of the commencement date to the date of the defendant's next appearance. CrR 3.3(c)(2)(ii); *State v. Chavez-Romero*, 170 Wn. App. 568, 579, 285 P.3d 195 (2012). The sixty-day period would expire on October 31.

John Maling never posted bail. Through an oversight the October 10 hearing did not occur because of a mistaken belief that the prison had released Maling.

John Maling did not appear in court again until October 31, 2016. On October 31, some unidentified third party warned the prosecution that Maling remained in custody. The prosecution added Maling's case to the afternoon trial docket for a 3:30 p.m. hearing. Maling's counsel by happenstance was present at the courthouse on the afternoon of October 31 and received notice, at 2:30 p.m., from the prosecution that his client would appear for a hearing an hour later. The record does not reflect the filing of any written notice for hearing or a written motion. During the 3:30 Halloween hearing, the State advised the court that the case "[was] a mess" and requested a continuance of the trial schedule or, in the alternative, to release Maling. Report of Proceedings (Oct. 31, 2016) at 9.

The majority writes that the record does not corroborate that John Maling's defense counsel objected to the October 31 hearing proceeding based on a lack of sufficient notice. To the contrary, when entering an order denying Maling's motion to dismiss, the trial court entered a finding of fact that reads:

> 9. Mr. Everett [defense counsel] objected to the hearing being held due to lack of notice to defense.

Clerk's Papers at 18. The State assigns no error to this finding of fact and does not contend the finding to be erroneous. An unchallenged finding of fact will be accepted as

a verity on appeal. *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000). This Court will review only findings of fact to which error has been assigned. *In re Contested Election of Schoessler*, 140 Wn.2d at 385. We usurp our role as reviewing courts when rejecting an unchallenged finding of fact.

During the October 31 hearing, John Maling further objected to any trial continuance and argued that the speedy trial rules precluded any further processing of the case. Maling asked for dismissal of the prosecution. The State responded that the sixty-day deadline for trial did not expire until another hour and forty-seven minutes.

On October 31, the trial court ordered John Maling released from custody on his own recognizance. The court reserved Maling's right to later argue infringement of his speedy trial rights and to contend that he received improper notice of the October 31 hearing. The trial court recalculated his time for trial under ninety days rather than sixty days from the September 1 arraignment. Jail authorities later released Maling on October 31.

John Maling and the State later agreed to continue the trial beyond the ninety days in part to allow for settlement negotiations, with Maling presumably reserving the right to object to violation of the sixty-day incarceration speedy trial rule. On March 20, 2017, Maling filed a motion to dismiss for violation of his right to a speedy trial. The court denied the motion. Maling waived his right to a jury trial, and the court convicted Maling on all three counts.

John Maling raises only one assignment of error on appeal. He contends the trial court erred when denying his motion to dismiss because the statutory time for trial expired.

Under a Washington court rule, a defendant generally must be brought to trial within sixty days of arraignment if held in custody on the charge for which he or she was arraigned or within ninety days of such arraignment if released on that charge. CrR 3.3(b)(1)-(2); *State v. Chavez-Romero*, 170 Wn. App. at 578 (2012). If the State releases the defendant from jail before the expiration of the sixty-day time limit, the time limit shall extend to ninety days. CrR 3.3(b)(3); *State v. Chavez-Romero*, 170 Wn. App. at 578.

The trial court released John Maling from jail on his own recognizance on October 31 solely because the sixty-day trial deadline expired later that day and the State had failed to bring Maling to trial. Case law allows the trial court, on motion by the State, to release a prisoner from incarceration in order to avoid the sixty-day deadline even if the deadline's expiration looms because of mistakes by the prosecution. A judge holds the discretion to release a defendant specifically for the purpose of extending the time for trial period. *State v. Chavez-Romero*, 170 Wn. App. at 578-79; *State v. Kelley*, 60 Wn. App. 921, 928, 808 P.2d 1150 (1991). A defendant possesses no right to resist release in order to cause the speedy trial rule to expire and compel dismissal of the prosecution. *State v. Kelley*, 60 Wn. App. at 926.

John Maling may agree that the trial court held authority to release him on the sixtieth day after his arraignment. He focuses his argument instead on the State's purported failure to properly schedule the sudden October 31 hearing. He contends that the State failed to comply with the requirements of CrR 8.2 and CR 7(b) when abruptly scheduling the October 31 hearing. I agree.

CrR 8.2 addresses notice for motions in criminal prosecutions. The rule tersely reads:

> Rules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases.

CrR 3.5 concerns a State motion to admit an incriminating statement uttered by the defendant and CrR 3.6 concerns a defense motion to suppress evidence, so neither rule bears relevance to this appeal. CR 7(b)(1), a civil rule, declares:

> *An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing,* shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(Emphasis added.)

John Maling argues the State violated CR 7(b)(1) by failing to afford him written notice of the October 31 application for an order releasing him from custody. In response, the State argues it did not need to provide written notice because it made the application during a hearing that it scheduled for October 31. The State emphasizes the

portion of CR 7(b)(1) that allows an unwritten motion if made during a hearing.

A literal reading of CR 7(b)(1) supports the State's position. The State orally asked the trial court for release during an October 31 hearing. Nevertheless, the State's argument leads to extreme and prejudicial results. The State could withhold a written motion on any number of and all varieties of applications to the court, other than a CrR 3.5 motion to introduce a confession at trial, give oral notice to the defense attorney minutes before a hearing, and then ask for such relief. Such an application could include critical pretrial motions such as a motion for a trial continuance, motion to remove a judge, motion to exclude a witness, or a motion in limine. The defense would be prejudiced by such a tactic since it would not have time to prepare a response. The reading of CR 7(b)(1) by the State would negate the rule's requirement of a written motion since the State could simply orally schedule and argue all motions at a time convenient for the State.

The State's argument fails to observe that it had no hearing scheduled for the prosecution against John Maling for the afternoon of October 31 until it scheduled the emergency hearing to release John Maling. For CR 7(b)(1) to be fair to both parties and not lead to extreme results, the court must read the rule to limit the presentation of oral motions at hearings when a party already properly scheduled a hearing on another written application or during trial. This court interprets court rules in the same manner as statutes. *State v. Davis*, 3 Wn. App. 2d 763, 788, 418 P.3d 199 (2018). This court strives

to avoid unlikely or absurd results in its interpretation of statutes. *State v. Davis*, 3 Wn. App. 2d at 788.

I note that written applications to the court or motions must usually afford the opposing party one week's notice. CrR 8.1 curtly declares:

> Time shall be computed and enlarged in accordance with CR 6.

In turn, the first sentence of CR 6 reads:

> **(d) For Motions—Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court.

I observe, however, that the State need not always give the defendant five days' notice to release a defendant, but could seek on occasion for good cause an order shortening time for a written motion. A trial court has discretion when ruling on a motion to shorten time. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 236, 88 P.3d 375 (2004). A deviation from the normal time limits is permitted as long as there is ample notice and time to prepare. *Loveless v. Yantis*, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973). In the case on appeal, the State never sought an order shortening time.

The State posits that motions to release or reduce bail are routinely made during a hearing without notice to the opposing party. For support, the State leans on *State v. Chavez-Romero*, 170 Wn. App. 568 (2012). But in *Chavez-Romero*, the State brought its motion to release the defendant at a previously scheduled pretrial hearing and one week

before the expiration of the sixty-days from arraignment.

One might argue that the State need not give the defense any notice when releasing the defendant from incarceration. After all, the defendant wishes release from imprisonment. Release benefits the defendant. An Illinois decision militates against this position, however. An Illinois Court of Appeals wrote:

> The release of any defendant must be accomplished in an orderly and legitimate manner. It is an absurd argument that a defendant can be incarcerated for a period of time only to be released upon the caprice of the sheriff or the State's attorney in order to avoid the [speedy trial] rule.

People v. Gooding, 21 Ill. App. 3d 1064, 1067, 316 N.E.2d 549 (1974), *rev'd*, Ill. 2d 298, 335 N.E.2d 769 (1975). Washington's CrR 3.2, in keeping with the teachings of *Goodman*, requires a court order for release of an incarcerated defendant along with the rule outlining an orderly procedure for the release.

When a trial court denies a motion to dismiss for speedy trial purposes, the appellate court reviews that decision for an abuse of discretion. *State v. Chavez-Romero*, 170 Wn. App. at 577. Failure to enforce the requirements of rules can constitute an abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). I would hold that the trial court abused its discretion by not enforcing CrR 8.2 and CR 7(b)(1). I would further hold that the order releasing John Maling from incarceration to be void because of lack of proper notice and the absence of a written motion. A court lacks jurisdiction to rule on a motion that has not been properly noticed for hearing on the date in question

because improper notice implicates fundamental principles of justice and due process. *Diaz v. Professional Community Management, Inc.*, 16 Cal. App. 5th 1190, 1204-05, 225 Cal. Rptr. 3d 39 (2017); *Puckrein v. Jenkins*, 884 A.2d 46, 52 (D.C. 2005); *First Western Bank of Minot v. Wickman*, 464 N.W.2d 195, 196 (N.D. 1990).

The majority writes that trial courts have the ultimate responsibility for ensuring compliance with speedy trial rules. Majority at 5. Of course, this proposition rings true. But enforcement of the speedy trial rules entails dismissing a case if the State violates the rules, not breaching other procedural rules in order to skirt the speedy trial rules. In a case cited by the majority, *State v. White*, 94 Wn.2d 498, 617 P.2d 998 (1980), the Supreme Court observed the importance of the right to a speedy trial and the need for the court to enforce the right. Nevertheless, the Supreme Court upheld CrR 3.3 by dismissing the prosecution, not by violating another procedural rule.

The majority also writes that the "technical requirements for motion practice" should not hinder a trial court's ability to ensure compliance with the speedy trial rules. Majority at 2. In turn, the majority refers to John Maling's attempt to enforce the notice rules as a "technical objection." Majority at 5. Presumably the majority depreciates Maling's appeal by branding his arguments as "technical objections" and belittles the requirements for motion practice by labeling those requirements as "technical." Nevertheless, the majority does not expressly identify those technical requirements or explain its reason for downplaying the requirements as "technical." To repeat, a court

lacks jurisdiction to rule on a motion that has not been properly noticed for hearing on the date in question because improper notice implicates fundamental principles of justice and due process. *Diaz v. Professional Community Management, Inc.*, 16 Cal. App. 5th at 1204-05 (2017); *Puckrein v. Jenkins*, 884 A.2d at 52 (D.C. 2005); *First Western Bank of Minot v. Wickman*, 464 N.W.2d at 196 (N.D. 1990). Notice requirements are not "technical requirements." Due process is not a technicality. A party and his or her attorney should not be burdened with responding to an important motion by notification to the attorney one hour in advance when the attorney walks the halls of the courthouse in order to attend to other clients and other cases.

The majority cites *State v. White*, 94 Wn.2d 498 (1980), *State v. Jenkins*, 76 Wn. App. 378, 884 P.2d 1356 (1994), and *State v. Carson*, 128 Wn.2d 805, 912 P.2d 1016 (1996) for the proposition that defense counsel sometimes holds the duty to alert the court of the potential for a speedy trial violation. The majority does not enlighten the reader as to how the duty implicates the outcome of this appeal or how John Maling's counsel violated any duty.

In *State v. White*, the Supreme Court limited any such duty to warn of speedy trial complications to the time when the superior court schedules the trial date. In *State v. Jenkins*, this court affirmed dismissal of a criminal charge because of violation of the speedy trial rule. The ruling implied that defense counsel had no duty under the circumstances to warn of an impending expiration of the trial deadline. The *Jenkins* court

noted that the State, not the defense, held the duty to timely bring the prosecution to trial.

In *State v. Carson*, the prosecutor and the trial court mistakenly calculated the expiration of the speedy trial timeline, while defense counsel knew of the correct date. The court ruled that defense counsel, during discussions with the court and counsel, should have disclosed the correct date.

In John Maling's appeal, the State does not accuse defense counsel of failing to correct, at the time of a scheduling hearing, any mistaken belief as to the expiration of the speedy trial rule. We have no information that Maling's defense counsel knew that Maling remained incarcerated or that the sixty-day period was about to expire. No case stands for the proposition that defense counsel must alert the court to the expiration of the period outside of the context of a trial setting hearing or appear at a hearing without proper notice and waive proper notice. In other decisions, Washington courts have rejected an obligation on defense counsel to warn of speedy trial right violation. *State v. Raper*, 47 Wn. App. 530, 736 P.2d 680 (1987); *State v. Lemley*, 64 Wn. App. 724, 828 P.2d 587 (1992).

The State argues that, assuming a written motion was required, it could have provided John Maling with written notice of its motion on October 31, noted the motion for hearing on November 7, and thereby complied with the writing and notice requirement of CR 6(d). CrR 3.3(g) provides for a cure period, during which the court may continue a case beyond the limits of CrR 3.3(b) on a motion of a party made within

five days after the time for trial has expired. The State may be correct that it might have later cured the rule violation, but the trial court could have exercised discretion and rejected the cure. Nevertheless, the State never followed the rule and sought the cure. Courts do not base decisions on what could have been done, but what was not done.

John Maling also contends that the sixty-day period expired on October 31 because the case was not called for trial on October 31. In other words, according to Maling, the period elapsed before the afternoon hearing and his release from jail. I need not address this argument since I would hold in favor of Maling on other grounds. The majority leaves this contention unaddressed.

Since Maling's trial did not occur within sixty days and since his release from jail was not pursuant to an orderly process, I would dismiss the charge with prejudice. CrR 3.3(h); *State v. Chavez-Romero*, 170 Wn. App. at 584-85 (2012).

Fearing, J.

Fearing, J.

BURKHART & BURKHART, PLLC

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