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30226-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS M. KLINDWORTH,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Was there a violation of the time for trial court rule or the constitutional speedy trial rule?
2. Did the court prevent the Defendant from presenting a defense regarding the lost vial of blood by concluding the CrR 3.6 hearing on the day that the Defendant requested and after considerable time and opportunity for the Defendant to prepare for hearing,?
3. Did testimony that the Defendant did not cooperate with a DUI interview prejudice the trial outcome?
4. Where the Defendant informed the court that he would be going forward with appointed counsel, did the court deprive him of his right to self representation?

5. Where the Defendant presented no evidence in support of his CrR 8.3(b) motion regarding improper notice of hearing dates, was the court's denial of the motion an abuse of discretion?

6. Did the court impose an ignition interlock device requirement?

IV. STATEMENT OF THE CASE

On January 21, 2007 at 1:50 AM, Franklin County sheriff's deputy Jim Dickenson was driving an unmarked car on I-182 eastbound from Road 68 in Pasco when he observed the Defendant Thomas Klindworth driving 60 mph in a 70 mph zone. Munoz RP 909. The Defendant suddenly swerved extremely hard into the deputy's lane of travel and slammed on the brakes in front of the deputy so as to almost cause an accident. Munoz RP 910. The deputy braked and activated his dash cam. *Id.* As the speed zone changed to 60 mph, the Defendant slowed hard again to 30 mph. *Id.* When the Defendant crossed the fog line, the deputy initiated a traffic stop. *Id.* The deputy testified at trial that driving under the speed limit in and of itself can pose a safety risk, and the

Defendant's driving was erratic and abnormal. Munoz RP 911-12.

When the deputy approached the Defendant's window, he detected the odor of methamphetamine. Munoz RP 913-14. From the deputy's experience, he knows that a person under the influence of methamphetamine can be very fidgety, talkative, irritable, and twitchy, sometimes confused, sweaty, or dry of mouth. Munoz RP 914-15. The Defendant had extremely red eyes, dilated pupils, slurred and rapid speech; he was confused, argumentative, irritable, and nervous; he was very talkative, repetitive in speech, extremely fidgety, and was moving very quickly. Munoz RP 916, 932. He was reaching all over the inside of the vehicle. Munoz RP 916. There were no indications of alcohol use. Munoz RP 932. The deputy arrested him for driving under the influence of drugs. Munoz RP 917.

The Defendant spoke continuously and very rapidly, however, he refused to cooperate with the DUI interview. Munoz RP 926, 929-30. In the deputy's car, the Defendant continued to be very fidgety. Munoz RP 926.

Eventually the Defendant was transported for a blood draw. RP 939. He refused to listen to the deputy's instructions. RP 939.

He was uncooperative with the DRE (drug recognition expert) evaluation. RP 941.

After reading the implied consent warning numerous times and asking if he could write on the form, the Defendant eventually consented to a blood draw. RP 938-39. Deputies took the Defendant to Our Lady of Lourdes Hospital for the blood draw. RP 939. The deputies supplied two vials for the technician to fill and retrieved the vials for evidence. RP 942-43. The Defendant requested that a third vial be drawn; the vial was left with hospital staff for the Defendant to arrange to retrieve. RP 942-44.

WSP toxicologist Asa Louis tested the blood in the two vials provided by the State and found methamphetamine in the blood. Pelletier RP 92, 104-05. The level of drug would have caused a person to fidget, to speak and move rapidly, and to have dilated pupils – and potentially could have impaired the user's driving. Pelletier RP 106-08.

The Defendant had been charged with unlawful possession of suboxone, use of drug paraphernalia, DUI, reckless driving, and negligent driving in the first degree. CP 342. The drug charges were dismissed after the evidence in the car was suppressed. CP

226; King RP 234. The charges which remained were: DUI, reckless and negligent driving. Munoz RP 711. On July 22, 2011, the Defendant Thomas Klindworth was convicted by jury of DUI. Pelletier RP 220.

TIME FOR TRIAL - The Defendant challenges three changes to his commencement date resulting from the issuances of bench warrants after his failures to appear.

On July 17, 2007, the Defendant failed to appear and a bench warrant issued. King RP 3. The Defendant was arrested and in custody before the court the next day. *Id.* At that hearing, the Defendant explained that he had arrived late to court, after the warrant had issued. When he arrived, he went to the wrong courtroom and approached the bailiff who then summoned the sheriff who arrested the Defendant on the warrant. King RP 4.

The Defendant failed to appear at a pretrial hearing scheduled for Tuesday, October 2, 2007 and for his trial on October 3, 2007. Adams RP 42. A bench warrant issued on October 2. Adams RP 42, 48. The Defendant appeared in court of October 16 on his motion to quash the warrant. Adams RP 42. The deputy prosecutor advised the court that the Defendant was "playing

games with the Court" and that "[t]he only way we're ever going to get his case disposed of is for him to be in custody." *Id.*

The Defendant said he first learned about the missed hearings when he called the prosecutor on Friday, October 5. *Id.* He told the court that he had not received written notice of the October 2 pretrial hearing until after the hearing. Adams RP 44. He did not explain why he missed his trial date.

The prosecutor explained that pretrial was continued from September 25 to 26, however, Judge Yule was not in Washington state on that day. Adams RP 47. When the Defendant called the court administrator on September 26, he refused to give her his mailing address, so she gave him the October 2 court date over the telephone and told him that she would also mail him notice (per court rule) after she got his address from the prosecutor. Adams RP 47-48. On April 5, 2011, the Defendant appeared before the court on a bench warrant that was many months old. Adams RP 109. The court advised the Defendant that he needed to be back in court on April 12. Adams RP 111. On the 12th, the Defendant and his standby counsel appeared. McLaughlin RP 24. The court could not hear the case, because the Defendant had submitted an

affidavit of prejudice against the judge, and the hearing had to be reset. *Id.* On May 23, 2011, the Defendant appeared in court on a warrant. McLaughlin RP 25. He explained that his attorney Karla Kane had left a message regarding a court date for April 20, but he understood that the date was April 30. McLaughlin RP 26. The Defendant also said that he had been late to court on April 20. McLaughlin RP 27, line 1.

SPEEDY TRIAL – The Defendant has prepared an appendix admitting numerous failures to appear and continuances of the trial date due to defense actions. According to this appendix, a single continuance of the trial date was due to State action. On March 16, 2010, the State requested a continuance due to witness (officer) unavailability. Appellant's Brief, Appendix A.

The State's frustration with the Defendant's delays boiled over as trial neared, as the deputy prosecutor proposed adding four bail jumping charges "stemming from 2010 forward since the statute of limitations would only be one year on those bail jumping charges." Munoz RP 712.

DEFENSE MOTION ON THIRD BLOOD VIAL – The Defendant's motion regarding the testing of an additional blood vial

was filed on 12/1/09 and, after the Defendant's long absence on a bench warrant, finally set for argument on 7/8/11. CP 185-214. At the beginning of the hearing on July 8, 2011, the court asked the Defendant if he wanted to proceed or if he wanted to continue the hearing for a few days to allow his standby counsel (who was in trial on another matter) to be present. Munoz RP 709. The Defendant insisted on going forward. *Id.* The court allowed the hearing to go forward in the afternoon when the jail staff was available to attend the incarcerated Defendant in the courtroom. Munoz RP 710.

When the parties returned that afternoon, the Defendant refused to go forward after the court had especially accommodated him with this special set hearing. Munoz RP 712-17. The court explained that the CrR 3.6 hearing, on the Defendant's motion, had been interrupted by equipment failure, and continued to September 9, 2010, but the Defendant failed to appear and remained on warrant status for many months. Munoz RP 723. Now on the eve of trial, the matter was scheduled to be completed and the State's witness was present for the Defendant's cross-examination. *Id.* At that point, the Defendant refused to cross-examine the witness. "I

can't proceed." *Id.* His claim of lack of preparation on a motion filed in 2009 rang false where over a year before, when asking to represent himself and specifically in reference to his blood draw motion, the Defendant was reminded that he "has stated he's attempted to get these motions he's spoken of heard for months, if not years now." Lang RP 129.

The court then excused the witness, and the parties proceeded to argument. The court reminded the Defendant that he was challenging probable cause to arrest and "what you'd characterize as our denial of your right to your second blood draw." Munoz RP 728-29. The Defendant again refused to proceed. Munoz RP 729. Although that morning he had asked to proceed without standby counsel, now he was insisting on waiting for standby counsel. *Id.*

The court was exasperated: "Mr. Klindworth, I advised you a year ago that you were being foolish by representing yourself and you ignored that advice." *Id.* The court instructed the prosecutor to present argument. After a lengthy interruption by the Defendant. (Munoz RP 731-35), the court explained:

> I'm denying your request for attorney because you've been going back and forth. At one time you wanted an attorney [ ] AND then you wanted to represent yourself. And then you wanted an attorney. And then you wanted to represent yourself. [ ] So I see this as yet another ploy on your part to undermine your case, to cause delay, and I'm just declining. [ ] You chose a long time ago to represent yourself, and I'm going to make you stand by it.

Munoz RP 735. The court found probable cause for the arrest and ruled against the Defendant's argument regarding a second blood draw. Munoz RP 741.

> ... as it relates to the second blood draw, he was given ample opportunity to have -- to make arrangements for his own blood draw, and as a matter of fact, an extra vial was taken at his request at Lourdes Hospital and apparently -- I don't know what happened to that thereafter, but Mr. Klindworth apparently did not take whatever steps necessary to have it tested or preserved or whatever was necessary there. So I'm going to deny your 3.6 motion.

Munoz RP 741-42. The Defendant then denied that he had made the motion on the blood draw. Munoz RP 742. The Defendant made no motion for reconsideration after meeting with his standby counsel who would be appointed to represent him.

MOTION TO DISMISS – On July 12, 2011, the Defendant made a motion to dismiss, complaining that he had not received

notice of hearing dates which had resulted in his failing to appear and a subsequent delay in the trial date. Munoz RP 770-85, 791. Specifically, the Defendant expected all notice to be sent to his hotmail account. Munoz RP 796. Incomprehensibly, the Defendant argued that he expected to receive notice via email even while he was in custody. Munoz RP 792-93.

However, this expectation stands in contradiction to the record that on March 23, 2010, the Defendant had been advised upon seeking self-representation that all notices would be sent to a Kennewick address ***and not to any email*** and that the court would consider him served whether he picked up his mail or not. Lang RP 124-25. At that hearing, Karla Kane was clear that her responsibility as standby counsel was not to be the Defendant's secretary. Lang RP 114. The prosecutor noted that a standard court order regarding conditions of release requires a defendant (and this Defendant) to contact his attorney, not the other way around. Munoz RP 787.

The trial court noted that the critical failure to appear for this motion was on September 9, 2010, when the Defendant was not in custody and represented himself with Ms. Kane as his standby

counsel. Munoz RP 799-800. The court also recalled that the Defendant had an obligation to contact his standby counsel to find out when his hearings were scheduled. *Id.* The court observed that the movant had the burden of proof, and the Defendant had not presented any evidence and failed to provide a transcript. Munoz RP 800-01.

REPRESENTATION – The Defendant was represented by four different attorneys In this case and also represented himself for a portion of each year. Appellant's Brief at 41. His last request to represent himself was granted on March 23, 2010. Lang RP 102-13. Then the court put the Defendant on notice that, if this was a ploy to switch to different counsel at public expense, a substitution would not happen. Lang RP 106. The court clarified with the Defendant that all his motions needed to be filed together and heard on one date and that a delay would not be permitted to accommodate late motions. Lang RP 108. The court reminded the Defendant that when he had tried to represent himself in this matter in the past, he had proven himself incapable. Lang RP 110. The court also explained the limitations of standby counsel. Lang RP 114-15.

On the eve of trial, the Defendant repeatedly requested counsel. However, if counsel were appointed on the eve of trial, it would have resulted in a new trial date, which the Defendant equally clearly did not want. Munoz RP 734. The Defendant refused to choose, stating, "I want an attorney, and I don't want to give up speedy trial." Munoz RP 735. The court found this to be "yet another ploy on your part to undermine your case, to cause delay." *Id.* "You chose a long time ago to represent yourself, and I'm going to make you stand by it." *Id.*

However, on July 12, 2011, after the Defendant's repeated protestations over two days that he needed an attorney, the court appointed Karla Kane. Munoz RP 803. Ms. Kane was understandably concerned at this appointment so close to the trial date. Munoz RP 805. And the Defendant was not mollified. Munoz RP 806. The judge advised the Defendant that he had until the day of trial, July 20, to decide whether to proceed with Ms. Kane's assistance or to represent himself. Munoz RP 807. In the meantime, Ms. Kane would assist the Defendant in identifying and subpoenaing witnesses. Munoz RP 808.

On July 19th, the court inquired whether the Defendant wanted to represent himself at trial. Munoz RP 820. The Defendant petulantly instructed the court to address his attorney, and Ms. Kane advised that the Defendant felt bound to proceed with her as his attorney. *Id.* The court noted that it was apparent that the Defendant never intended on proceeding pro se, but only hoped to finagle the attorney of his own choosing. Munoz RP 821.

Ms. Kane advised the court that the defense was ready to proceed. Munoz RP 822.

V. ARGUMENT

A. THE TIME FOR TRIAL RULES WERE NOT VIOLATED.

The Defendant claims three violations of the time for trial rules under CrR 3.3.

The **first claim** regards the issuance of a bench warrant on July 17, 2007, which resulted in a new commencement date of July 18, 2007. King RP 16-17. At the July 18th hearing, bail was set at $5000, and the next hearing was scheduled for July 24 in order reset dates. King RP 6, 16-1.

The Defendant rejects the commencement date of July 18 (and October trial date), which resulted from the July 17 failure to appear, but insists that the proper end date would have been August 20, i.e. 90 days after a May 22nd commencement date. Appellant's Brief at 25. It appears that his reasoning is that he does not think he was to blame for failing to appear. Appellant's Brief at 24 (claiming that state knew he was in the wrong courtroom "because the bailiff directed him to stay.") But, first, the rule only requires a failure to appear, which there was – as is apparent, because there was no hearing. And second, the bailiff only became aware of the Defendant's presence ***after*** the bench warrant had issued, which is why the bailiff required the Defendant to stay put in order that a sheriff could be summoned to arrest him on the warrant. There was no error in resetting dates after the failure to appear.

The **second claim** regards an alleged conflict between the local rule and CR 6(e). On September 26, 2007, the court administrator gave the Defendant oral notice of his October 2 court date. Adams RP 47. His failure to appear resulted in a bench warrant. The Defendant challenges the notice he received

regarding the pretrial hearing.

However, the Defendant also failed to appear at his trial on October 3, rendering his notice claim both not credible and irrelevant. Even if the bench warrant issued improperly on October 2, his dates would reset after his failure to appear on his trial date October 3, per CrR 3.3(c)(2)(ii) (resetting commencement date upon defendant's failure to appear at a proceeding where his presence was required).

The local criminal rule permits 72-hour notice of required hearings in cases where the defendant is on bail or recognizance. LCrR 3.2(a). The civil rule states that if a party has a right to respond to something served upon him, he shall have three days (excluding weekends and holidays) to respond after he is served with that matter to which he needs to respond. CR 6(e). The Defendant complains that the two rules conflict. They do not. The Defendant is arguing that he had three days (excluding weekends and holidays) from September 28 (when the court administrator mailed written notice of the pretrial date) to respond. But the communication of a court date is not a motion so as to be something to which a party has a right to respond. A party does not

need to prepare a response to the administrative scheduling of a hearing. The purpose of the hearing was not to debate the merits of the scheduling clerk, but to resolve pretrial issues. There was no error in resetting dates after the Defendant's failure to appear for pretrial and trial.

The **third claim** is that the Defendant did not have notice of the April 20, 2011 hearing, which resulted in a bench warrant. Appellant's Brief at 29. The Defendant told the trial court that his counsel left him a message through a friend communicating the hearing date, but he understood the date to be the 30th. McLaughlin RP 26. Whatever miscommunication there may or may not have been, the Defendant failed to appear after the correct date had been communicated to his counsel. This satisfies CrR 3.3. Note that the Defendant admitted on the record that he had been late on the 20th, which undercuts his claim that he did not know he had a hearing on that date. However, he also claimed that he appeared on the 20th only to be arrested (Munoz RP 776), a claim that is inconsistent with the record and suggests that the Defendant's poor memory of events is the true culprit behind his failing to appear.

There was no violation of the time for trial rule. The dates were properly reset after the Defendant's various failures to appear.

B. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.

A criminal defendant may seek relief outside the time for trial court rule and under the constitutional speedy trial provision. *State v. Schmidt*, 30 Wn. App. 887, 897, 639 P.2d 754 (1982). Unlike the rule under CrR 3.3, the constitutional right attaches on the date of arrest or the date of filing of the information, whichever comes first. *State v. Higley*, 78 Wn. App. 172, 184, 902 P.2d 659, *review denied* 128 Wn.2d 1003, 907 P.2d 296 (1995). Such a claim must show not the expiration of a fixed time, but the expiration of a reasonable time. *State v. Higley*, 78 Wn. App. at 185. A reasonable time is determined by a review of all the factors in the particular case -- particularly four factors: the length of delay, the reason for the delay, whether or not the defendant asserted his right to speedy trial, and the existence of any resulting prejudice. *Id.; See also Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

There was a long delay between arrest (1/21/07) and trial (7/20/11), and it is not disputed that the Defendant repeatedly asserted his right to speedy trial. However, it is the State's position that the most important *Barker v. Wingo* factors in the instant case are *the reason for the delay* and *the lack of prejudice*. The Defendant was the significant reason for the delays.[1] He went back and forth between different lawyers and self-representation, which caused delays. He failed to appear at so many hearings that DPA Jenny advised the court that for the purposes of getting this case to disposition, the Defendant should remain in custody. Adams RP 42. However, the judges continued to release him, balancing his freedom and defense interests with his speedy trial interest.

The Defendant eventually spent more time in custody than the State ever would have requested for a first time DUI. Pelletier RP 239-40. This being the case, any judge would have been inclined to release a defendant on his personal recognizance pending trial. On top of that, the Defendant represented himself, off

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[1] While the trial court noted at one hearing (Lang RP 127) that a recent continuance had been due to the unavailability of State's witnesses, the Defendant caused "the bulk of the continuances" (Lang RP 127) and a missing witness justifies an appropriate delay for speedy trial purposes. *Barker*, 407 U.S. at 531, 92 S.Ct. 2182 ().)

and on, and repeatedly asked for release in order to prepare his defense. The superior court judges did not abuse their discretion in weighing the Defendant's freedom interest and his interest in making a proper defense against his speedy trial interest. This is especially true where the delays were of the Defendant's own making and where the state's case was less likely than some other cases to be prejudiced by delay (because the state's witnesses were professional witnesses who could rely on their written reports to refresh their memories).

In discussing the length of the delay, the Defendant states that *State v. Iniguez*, 167 Wn.2d 273, 292, 217 P.3d 768 (2009) determined that an eight-month delay is presumptively prejudicial. Appellant's Brief at 31. This is inaccurate. The court of appeals decision had this holding. *State v. Iniguez*, 143 Wn. App. 845, 859, 180 P.3d 855 (2008) ("We agree with these courts and hold than an eight-month delay is presumptively prejudicial.") (overturning conviction on speedy trial grounds), *reversed by State v. Iniguez*, 167 Wn.2d 273, 292, 217 P.3d 768 (2009). The Washington Supreme Court reversed on this very issue, rejecting a formulaic presumption of prejudice upon the passing of a certain period of

time. *State v. Iniguez*, 167 Wn.2d at 292. "[W]hether a delay is presumptively prejudicial is necessarily a fact-specific inquiry dependent on the circumstances of each case." *State v. Iniguez*, 167 Wn.2d at 291. In the end, the court did find the delay in Iniguez's case to be prejudicial, but only after reviewing relevant factors separate from the mere length of delay. And in the final holding, the court did **not** find a violation of the speedy trial right. *State v. Iniguez*, 167 Wn.2d at 295-96.

The *Iniguez* court also considered the defendant's time in custody, the complexity of the case, and the number of witnesses whose memory could be compromised by delay. The court noted that Iniguez had spent all of the time in custody. *Id.* This was not the case for Mr. Klindworth. In four and a half years, he was in custody for approximately 80 days on this case. Munoz VRP 720. In fact, it was precisely because he was repeatedly released after each arrest on a bench warrant that the Defendant had the ability to constantly miss court dates and create delays in the trial process.

The *Iniguez* court found that the robbery case was not complicated. *State v. Iniguez*, 167 Wn.2d at 292. Rather, the delay had been caused by a co-defendant case to which the trial was

joined. *State v. Iniguez*, 167 Wn.2d at 290. Mr. Klindworth's case had no co-defendants, so that, unlike in *Iniguez*, the court's interest in joinder for judicial efficiency was not a factor here. Nor was his case significantly delayed by the unavailability of witnesses. *But see Barker*, 407 U.S. at 531, 92 S.Ct. 2182 (a missing witness justifies appropriate delay). It is fair to say that the complexity of the case influenced delays. The Defendant eventually faced only misdemeanors. However, a DUI, while less serious in terms of penalty, can still be quite complicated in that it involves various agencies, lab results, and expert witnesses. The Defendant's many, many motions suggest that this was indeed a complicated case. And the time was extremely productive for the Defendant. In the pretrial period, the Defendant managed to persuade the court to suppress all the evidence seized from his car and to dismiss the felony count.

The *Iniguez* court noted that there were many eyewitnesses, and that a delay could result in witnesses becoming unavailable or their memories fading. *Id.* While a delay is more prejudicial to the state in this regard, because the state has the burden of proof, the prejudice was lessened by the fact that the state's witnesses were

professional witnesses of the note-taking variety. In this way, the passage of time was less likely to prejudice memory. While the Defendant claimed that one of his witnesses had died during the pendency of trial, he did not prove McElroy's death and the statement he did provide indicated the witness' testimony would have been inculpatory, not exculpatory. CP 156-57 ("It is obviously only the State that is prejudiced by the loss of Mr. McElroy's testimony.")

The *Iniguez* court noted that the prejudice of delay to a defendant may be pretrial incarceration. *State v. Iniguez*, 167 Wn.2d at 295. The Defendant here did not suffer that prejudice, because he was repeatedly released despite the fact that his absences were the most significant cause of delay. In four and a half years, he had spent only eighty days in custody on this matter, spread out over various arrests on bench warrants. Munoz RP 720. Nor can it be said that delay impaired his defense where the delay resulted from his release which was granted specifically in order to allow him to prepare a defense out of custody.

This Court should find no violation of the speedy trial right where the delay was the Defendant's own doing and for the

Defendant's goals of preparing a defense and avoiding unnecessary lengthy pretrial incarceration.

C. THE COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE BY FOLLOWING THROUGH WITH A PRETRIAL SCHEDULE FOR HEARING MOTIONS.

The Defendant complains that the trial court denied him the right to challenge the blood evidence by forcing him to proceed with the CrR 3.6 hearing. Appellant's Brief at 35. However, it is clear from the record that the decision to proceed on that day was not the court's, but the Defendant's.

The Defendant had asked to represent himself on March 23, 2010, specifically expecting to argue this motion, and been warned that no continuances would be allowed. The Defendant had delayed the completion of the hearing by absconding for many months. It was then the eve of trial. He was finally present on the date of the scheduled hearing. He was insisting on having the hearing without the assistance of standby counsel. But then at the moment of the hearing, when all parties and the witness were gathered, he demanded a delay (even while insisting that a delay violated his speedy trial right.)

The Defendant's game playing is apparent throughout this long record. The court completed the hearing, which the Defendant had himself insisted on holding that very day. That the Defendant refused to either make a cogent CrR 3.6 argument or to permit a short continuance of the hearing to allow his standby counsel to be present does not give rise to judicial error.

The Defendant relies on *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). There the issue was whether the court had prevented the Defendant from making a defense by refusing to admit evidence of the circumstances surrounding the rape. That is unlike the case here. Mr. Klindworth was not prevented from admitting evidence at trial. In fact, the State presented to the jury the very evidence relevant to the Defendant's complaint, explaining exactly how an extra blood sample had been taken at the Defendant's request, but never picked up by the defense. Munoz RP 896-905, 942-44.

The Defendant's motion was to suppress the State's evidence (or dismiss the State's case) under the theory that the State was under some obligation to look after the Defendant's extra vial. The Defendant was permitted to make the motion. It was

argued in his 2009 brief. He, however, refused to make the oral argument in 2011. The court did not prevent the Defendant from making his motion or arguing his claim before the jury.

The Defendant argues that RCW 46.20.308(2) and RCW 46.61.506(6) impose an obligation on the State to pick up the Defendant's extra sample and store it for him until such time as is convenient for him to receive it. Appellant's Brief at 38-39. The statutes cited simply say no such thing.

The court properly ruled that the cause of the loss of the evidence was the Defendant's neglect, not the State's. Munoz RP 741-42. As the State argued in its own responsive briefing, arresting officers are under no obligation to assist a defendant in making an independent test, but are only obliged not to hinder or obstruct the defendant's efforts. *State v. McNichols*, 128 Wn.2d 424, 906 P.2d 329 (1995).

D. TESTIMONY THAT THE DEFENDANT DID NOT COOPERATE WITH A DUI INTERVIEW DID NOT PREJUDICE THE DEFENDANT.

The Defendant claims that it was improper for the State to elicit evidence of his refusal in a DUI investigation. Appellant's Brief at 40. It is the State's position that in the context of all the

evidence at trial, this single comment could not have prejudiced the result of trial.

The Fifth Amendment prevents the state from commenting on either pre-arrest or post-arrest silence of the defendant so as to infer guilt from a refusal to answer questions. *State v. Clark*, 143 Wn.2d 731, 764, 24 P.3d 1006 (2001). Where a suspect asserts his right to remain silent under Miranda, the State may not use the ensuing silence as substantive evidence of guilt. 12 Wash. Prac. sec. 3325.

The State has the burden of proving beyond reasonable doubt that a comment did not affect the outcome of the trial. *State v. Silva*, 119 Wn. App. 422, 430-31, 80 P.3d 8889 (2003).

The evidence at trial was that the Defendant drove dangerously, twice stopping short on the highway in front of a patrol deputy and then veering over the fog line. The car smelled strongly of methamphetamine; and there was methamphetamine in his blood. The Defendant's behavior was bizarre, consistent with methamphetamine use to a degree that would have affected his driving.

The prosecutor took care to show that the deputy followed proper procedures in the face of this bizarre behavior. Munoz RP 926-48. There were advisements, protocol, solicitousness in the face of the Defendant's voluble speech and questioning. There were forms to complete and signatures to acquire. Everything went by the book.

Throughout, the Defendant was very irritable and very talkative. Munoz RP 939. He refused to listen to any instructions. *Id.* The Defendant made unusual demands. He asked for a third vial of his blood to be taken. Munoz RP 902-04, 942. He needed the implied warnings read to him more than once. Munoz RP 938. Then he needed to read the form to himself over and over, which the deputy readily permitted. Munoz RP 938. The deputy allowed the Defendant to add language to the form as he pleased. RP Munoz 938-39. The Defendant was difficult with correctional staff and the drug recognition expert. Munoz RP 939, 941. His behavior was apparently the result of methamphetamine use. Munoz RP 941. And the whole process took "way above the normal process of a DUI investigation." *Id.*

The testimony that the Defendant did not agree to the DUI interview (Munoz RP 929-30) is part of this greater context that the police were professional and thorough, and the Defendant was difficult, irritable, and exhibiting the effects of methamphetamine.

The Defendant did not call any witnesses and did not take the stand. This being the evidence, any reasonable juror would have reached the same result with or without the error. It is not prejudicial.

E. WHERE THE DEFENDANT DID NOT REQUEST TO PROCEED PRO SE, BUT INSTEAD INFORMED THE COURT THAT HE WOULD PROCEED WITH APPOINTED COUNSEL, THERE WAS NO VIOLATION OF HIS RIGHT TO SELF REPRESENTATION.

The Defendant claims that the court should have allowed him to represent himself. Appellant's Brief at 44. The record is that the court inquired whether the Defendant wished to represent himself, and ***he did not***. Munoz RP 820. While there is a right to self-representation under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), there is also a right to counsel under the constitution. In this case, the Defendant ***requested counsel*** and informed the court that he would proceed with counsel.

The Defendant was represented by four different attorneys in this case and expressed a clear preference for one of these attorneys. Appellant's Brief at 41. However, he may not demand reassignment of an attorney based on his mere refusal to cooperate with the appointed attorney. *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). And in the end, while petulant in his manner, ***he did not request to represent himself***.

The Defendant argues that Ms. Kane was not willing to represent him. Appellant's Brief at 44. This is inaccurate. While she may have had her misgivings, she agreed to represent him and was prepared for trial on time.

F. THE COURT'S DENIAL OF THE MOTION TO DISMISS WAS NOT A MANIFEST ABUSE OF DISCRETION.

The Defendant argues that his CrR 8.3(b) motion should have been granted, because the procedures notifying him of his hearings constituted mismanagement and his subsequent failures to appear resulted in delays in his trial. Appellant's Brief at 45.

A trial court may dismiss under CrR 8.3(b) for governmental misconduct which has materially prejudiced the accused's right to a fair trial. The Defendant must prove prejudice by a preponderance

of the evidence. *State v. Hoffman*, 115 Wn. App. 91, 60 P.3d 1261 (2003). Dismissal is an extraordinary remedy which may only be resorted to in truly egregious cases of mismanagement or misconduct. *Id.* The trial court's decision is reviewed for manifest abuse of discretion, i.e. when the decision is manifestly unreasonable or exercised on manifestly untenable grounds or for untenable reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

The court's decision was that the Defendant had not met the burden of proof, because he failed to provide any evidence of his claim that he did not receive proper notice of the September 9, 2010 hearing. This is a tenable ground for the ruling.

G. THERE IS NO IGNITION INTERLOCK REQUIREMENT.

The Defendant challenges the imposition of the ignition interlock device where the device tests for alcohol consumption and there was no allegation of alcohol consumption in his case. Appellant's Brief at 46-47.

RCW 46.20.720(2) requires a judge to order "any person convicted of a violation of RCW 46.61.502 [ ] to comply with the rules of the department regarding the installation and use of a

functioning ignition interlock device on all motor vehicles operated by the person." The Defendant is convicted under RCW 46.61.502. Therefore, the imposition of an IID is required.

However, the court did not impose an IID requirement. CP 14. And the State did not cross appeal on this issue to request the imposition of the requirement. The Defendant has no complaint.

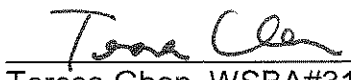
VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

Dated this 26th day of February, 2013.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 26th day of February, 2013, a copy of the foregoing was delivered to Thomas M. Klindworth, Appellant, c/o Roy Graham, 1156 Englewood, Richland WA 99352 and to Dennis W. Morgan, opposing counsel, P.O. Box 1019, Republic WA 99166 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Abigail Iracheta

Signed and sworn to before me this 26th day of February, 2013.

Deborah L. Ford

Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2014