No. 302229

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JOSE LEONEL MENDEZ MONCADA,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR.

1. Whether the court's findings that Mr. Moncada has the present or future ability to pay his legal financial obligations are supported in the record, or must instead be stricken from the judgment and sentence?

2. Whether the community custody condition prohibiting the purchase, possession or viewing of "any pornographic material in any form as defined by the treatment provider or the supervising community corrections officer" is unconstitutionally vague?

3. Whether the community custody provision requiring plethysmograph testing is unconstitutional?

B. ISSUES PRESENTED BY THE STATEMENT OF ADDITIONAL GROUNDS.

1. Whether the Appellant's right to a speedy trial was violated under either court rule or constitutional provision?

2. Whether appellate counsel was ineffective in not raising speedy trial violations on appeal?

C. ANSWERS TO ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

The State concedes the issues raised in the Appellant's opening brief. The judgment and sentence should be modified upon remand.

D. ANSWERS TO ISSUES PRESENTED BY THE STATEMENT OF ADDITIONAL GROUNDS.

1. There was no violation of the Appellant's speedy trial rights.

2. Appellate counsel was not ineffective for not raising speedy trial violations as issues on appeal, since they were without merit and frivolous.

II. STATEMENT OF THE CASE

The State does not dispute the Statement of the Case contained in the Appellant's opening brief, but supplements that narrative below. RAP 10.3(b).

An agreed order of continuance was entered on May 20, 2010. **(CP 5)**

Another agreed order of continuance was entered on July 15, 2010. **(CP 7)**

On October 14, 2010, Mr. Moncada executed a waiver of his speedy trial rights. **(CP 9)**

On December 17, 2010, defense counsel requested a continuance which was not joined in by Mr. Moncada. Counsel needed more time to go over interviews and prepare for trial. The court found that the continuance was in the interest of justice. **(CP 12; 12-17-10 RP 12-13)**

A contested order of continuance was entered on February 28, 2011, as the assigned deputy prosecutor was tied up in another trial. **(CP 26)**

On April 19, 2011, the court heard a defense motion to dismiss for violation of Mr. Moncada's speedy trial rights. Defense counsel outlined the history of continuances in this matter, including the one in question which was granted on February 15, 2011. **(4-19-11 RP 7-9)**

Counsel again reiterated his understanding that the expiration of speedy trial would have remained February 22, 2011 after that continuance:

> As I read the (f) section of Criminal Rule 3.3, it would appear, in fact, that unlike the (e) section of 3.3, the (f) section does not add the 30 days to any continuance that may be granted. I can only assume as to what was going through his mind at that time, that we were forcefully arguing against a continuance in the case. My guess is he considered all of that in coming to his conclusion that the expiration was, in fact, February 22nd.
>
> . . .
>
> I would have to say that implicit in his calculation here was that he was ruling that he was continuing this under the (f) section of Criminal Rule 3.3. The (f) section, unlike the (e) section does not add 30 days to any continuance. It's merely an excluded period of time.
>
> Because he continued a week, our belief is that speedy trial expired either on February 22nd or February 23rd. We weren't called to trial that day. Because we weren't called to trial that day, no objection, of course, would be

> necessary to demand that the case be set within the trial limits. One day is one day too many, and we believe the speedy trial has expired in this case. Therefore, the case should be dismissed with prejudice.
>
> **(4-19-11 RP 9-10)**

The State agreed that the February 15th continuance fell under CrR 3.3(f), but pointed out that the continuance on that date was at the request of the defense, and that further, any continuance granted under section (f) had the consequence of excluding time from the speedy trial period under section (e), then triggering the 30-day buffer period pursuant to CrR 3.3(b). The State reiterated its position, as stated on February 15, 2011, that the correct expiration date was March 24, 2011. **(4-19-11 RP 10-11)**

The deputy prosecutor further stated that she had discussed the February 18, 2011 amended trial status order with defense counsel before she entered it. Defense counsel had communicated to the prosecutor that he wished to start Mr. Moncada's trial on February 28th, due to a conflict with a trial in another county. The expiration date on that amended order was March 24, 2011. There was, further, no objection lodged to the amended trial date. **(Ex. A,B,C; CP 25; 4-19-11 RP 11-15)**

The court denied the motion to dismiss, finding that the continuance at issue on February 15th was an agreement to continue, and

that since CrR 3.3(e) references CrR 3.3(f), the 30-day buffer was indeed triggered. **(4-19-11 RP 16)**

III. ARGUMENT

1. The State concedes that the court's findings as to ability to pay legal financial obligations is not supported in the record.

The superior court ordered Mr. Moncada to pay the cost of his incarceration pursuant to RCW 9.94A.760. That statute requires the court to determine, at the time of sentencing, that the offender has the means to pay for the cost of incarceration. The judgment reflects a finding that he has the means to pay for the costs of incarceration. **(CP 97)** However, the record does not indicate that any evidence of Mr. Moncada's ability to pay was considered. While formal findings are not required under either RCW 9.94A.760(2) or RCW 10.01.160(3), the record must establish an offender's ability to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991).

Such a failure to consider evidence of the ability to pay is clearly erroneous. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). Relying on Baldwin, the court in Bertrand ordered that the court's finding as to ability to pay be struck, and the State was precluded from collecting the legal financial obligations.

Bertrand is dispositive of the issues raised by Mr. Moncada on appeal; the finding is not supported by any evidence in the record and should be struck. The State is precluded from collecting the costs of incarceration.

Bertrand would seem to allow the State to seek the costs of incarceration in the future, but only after a determination of his then-current ability to pay. This is so because the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation, and Mr. Moncada retains the right to seek remission of those costs at any time. Bertrand, 165 Wn. App. at 405, *citing* Baldwin, 165 Wn. App. at 310-11.

Indeed, Mr. Moncada is not challenging the imposition of the costs of medical care while in confinement, or the costs of incarceration, just the unsupported findings as to ability to pay those obligations. **(Appellant's Brief, p. 8)**

Remand is appropriate to strike the findings in paragraph 2.7, and that will have the effect of precluding collection of the costs in question unless and until there is a future determination of his ability to pay.

2. The pornography restriction is unconstitutionally vague.

As Moncada argues in his opening brief, the due process vagueness doctrine under the Fourteenth Amendment to the United States

Constitution and article I, section 3 of the Washington Constitution requires that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct must be avoided. Second, it protects from arbitrary, ad hoc, or discriminatory conduct. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

In Bahl, the court examined a community custody provision prohibiting the defendant from "possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer." Bahl, 164 Wn.2d at 754. The court concluded that the prohibition on possessing and accessing pornographic materials was unconstitutional and the fact that the condition allowed Mr. Bahl's community corrections officer to determine what falls within the prohibition demonstrated that the condition contained no ascertainable standards for enforcement. Id., at 761.

The State would concede that, in light of Bahl, the prohibition against the possession of pornography is unconstitutionally vague, as it is presently contained in the community custody order of August 30, 2011. **(CP 99)** For that reason, this matter should be remanded to strike the prohibition of possession of pornography.

3. Plethysmograph testing.

It is well-settled that polygraph and plethysmograph examinations may be ordered to monitor progress in sexual deviancy treatment. State v. Riles, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998). Indeed, a plethysmograph is regarded as an effective method for "diagnosing and treating sex offenders." Id., at 343-44, *quoted* in In re the Detention of Halgren, 156 Wn.2d 795, 806, 132 P.3d 714 (2006).

Moncada is correct, however, that while a plethysmograph device may be utilized as part of crime-related treatment or counseling, unlike a polygraph it "does not serve a monitoring purpose." Riles, 135 Wn.2d at 345.

In light of Riles, the State concedes that "plethysmograph" should be struck from that paragraph outlining the types of examinations which can be requested by the Community Corrections Officer. However, the State will request upon remand that the community custody order be modified to reflect that a sexual deviance therapist may employ a plethysmograph only as necessary to diagnose and treat sexual deviance.

4. There was no violation of Mr. Moncada's speedy trial rights under either the court rule or the constitution as there is no longer an "administrative" continuance.

At the heart of the issues raised in Mr. Moncada's statement of additional grounds is an implicit belief that the February 15, 2011

continuance was an administrative continuance, that would not have affected expiration of his speedy trial period under CrR 3.3. Both he, and Judge McCarthy, were incorrect.

Alleged violations of the speedy trial rule are reviewed *de novo*. State v. Carlyle, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996), *cited in* State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

The time-for-trial provisions were fundamentally overhauled in 2003. According to the task force charged with drafting the new rules:

> Task force members are concerned that appellate court interpretation of the time-for-trial rules has at times expanded the rules by reading in new provisions. The task force believes that the rule, with the proposed revisions, covers the necessary range of time-for-trial issues, so that additional provisions do not need to be read in. Criminal cases should be dismissed under the time-for-trial rules only if one of the rules' express provisions have been violated; other time-for-trial issues should be analyzed under the speedy trial provisions of the state and federal constitutions.
>
> . . .
>
> *Proposed Subsection (b)(5) (Allowable Time After Excluded Period) (new provision).* This subsection proposes a significant change from the current rule – a 30-day buffer period to follow any excluded period of time. The current rule does not provide adequate time for preparing and trying cases in which an excluded period of time runs out shortly before the expiration of a defendant's 60/90 time period.
>
> WASH. COURTS TIME-FOR-TRIAL TASK FORCE, FINAL REPORT II.B at 12-13 (October 2002)

Indeed, the Supreme Court has since observed that the "purpose of the 2003 reform was to clarify and simplify the time-for-trial rule, making it easier to apply, and thus avoiding the unpredictability that resulted from the due diligence standards imposed under the former rule." State v. George, 160 Wn.2d 727,738, 158 P.2d 1169 (2007).

Under *former* CrR 3.3(d)(8), there was a provision for administrative, five-day trial date extensions. Under that provision: "[w]hen a trial is not begun on the date set because of unavoidable or unforeseen circumstances beyond the control of the court or the parties, the court, even if the time for trial has expired, may extend the time within which trial must be held for no more than 5 days . . . unless the defendant will be substantially prejudiced in his or her defense."

As part of the overhaul of CrR 3.3, the administrative continuance went by the wayside. As the State argued below, it was by operation of the rule itself that the 30-day buffer was triggered. The February 15th continuance fell under CrR 3.3(f)(2), the period until February 22, 2011 was therefore excluded under CrR 3.3(e)(3), and pursuant to CrR 3.3(b)(5), expiration of speedy trial could be no sooner than 30 days later, or March 24, 2011. The court could not, in fact, order otherwise, and the court on February 15th was mistaken in believing that a one-week administrative continuance would not alter the expiration date calculation.

The latter denial of the motion to dismiss on April 19, 2011 was not error. The continuances were required in the administration of justice, Mr. Moncada was not prejudiced in the presentation of his defense, and there was no lapse in his rule-based speedy trial periods.

There was likewise no violation of Mr. Moncada's constitutional speedy trial rights.

A claim of denial of constitutional speedy trial rights is also reviewed *de novo*. The method of analysis for determining whether a defendant's constitutional right to a speedy trial has been violated is the same for both the Sixth Amendment and Art. I. s. 22. State v. Iniquez, 167 Wn.2d 273, 280, 290, 217 P.3d 768 (2009).

The Sixth Amendment analysis is in four parts: first, a defendant must demonstrate that a trial delay is presumptively prejudicial, then a reviewing court must engage the balance of the four-part inquiry set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), *cited by* Iniquez, 167 Wn.2d at 283.

After a showing of presumptive prejudice, the court next addresses the reason for the delay, the extent to which the defendant asserts his speedy trial right, and finally the prejudice to the defendant as a result of the delay. Id.

While it is true that the constitutional speedy trial right cannot be precisely quantified, a delay of more than 8 months has been held to be presumptively prejudicial after a fact-specific analysis. Iniguez, 167 Wn.2d at 293. However, it should be noted that the Supreme Court ultimately found that there was no violation of speedy trial in Iniguez, and very much unlike the facts in this case, the defendant there had objected to several continuances granted by the court. Id., at 277, 295-96.

Here, Mr. Moncada agreed to the continuances entered through October of 2010. He refused to sign the continuance entered on December 17, 2010, but the fact that counsel was preparing for trial, and needed more time to do so, is amply demonstrated in the record. Mr. Moncada agreed that a one week continuance from February 15, 2011 was appropriate, but indicated he was not in agreement with any further continuances.

Under the circumstances of the case, it is not surprising that defense counsel would need significant time to prepare for serious charges of first degree rape of a child and attempted first degree child molestation. The State would submit that Mr. Moncada has not shown that the length of delay of his trial was presumptively prejudicial.

Even if presumptively prejudicial, the reasons for delay were sound. Both counsel had trial conflicts during the pendency of the case,

and as indicated above, defense counsel was faced with voluminous discovery, including witness interviews, and it is apparent he was thoroughly preparing for trial. Mr. Moncada has not demonstrated that he was prejudiced by the delay.

5. Moncada has not met his burden of showing that his appellate counsel was ineffective.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *citing* State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In weighing the two prongs found in Strickland, a reviewing court begins with a strong presumption that defense counsel's representation was effective. In fact, the presumption "will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). A claim of ineffective assistance of counsel presents a mixed

question of law and fact, reviewed *de novo.* In re Personal Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Because the presumption runs in favor of effective representation, a defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Failure to raise all possible nonfrivolous issues on appeal by appellate counsel is not ineffective assistance. In re Personal Restraint of Lord, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). "Rather, the exercise of independent judgment in deciding which issues may be the basis of a successful appeal is at the heart of the attorney's role in our legal process." Smith v. Murray, 477 U.S. 527, 536, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986); *cited in* Lord, 123 Wn.2d at 314. Counsel may not ethically bring a claim upon a frivolous basis. RPC 3.1

Also, as Mr.Moncada acknowledges, in order to prevail on a claim of appellate ineffectiveness, he must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly, and then demonstrate actual prejudice. Id., *citing* Kimmelman v. Morrison, 477 U.S. 365, 375, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986).

Mr. Moncada has not demonstrated that his appellate counsel failed to raise a meritorious claim. Experienced and competent appellate

counsel would recognize that the speedy trial issue had no merit as demonstrated above; the application of the court rule and case law is clear. Even if the issue was not frivolous, there is no showing of actual prejudice, as the denial of the motion to dismiss ultimately was correct given the facts.

Further, there is no merit to Mr. Moncada's claim that the prosecutor committed misconduct by handing up the amended trial status order on February 18, 2011. As demonstrated in the record of the motion to dismiss, and the exhibits admitted at that time, that order was not presented to the court until the deputy prosecutor had consulted with defense counsel. There was nothing improper or unethical about the entry of the order.

IV. CONCLUSION

Based upon the foregoing argument, this Court should affirm the convictions, as the issues raised in the statement of additional grounds are without merit and frivolous. The matter should be remanded to the superior court, however, as the judgment should be modified in light of the State's concessions to the issues raised in the opening brief.

Respectfully submitted this 22 day of February, 2013.

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