NO. 94221-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN COX,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 48315-7-II
Clallam County Superior Court No. 15-1-00209-0

ANSWER TO PETITION FOR REVIEW

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SERVICE		
	Thomas E. Weaver The Law Office of Thomas E. Weaver P.O. Box 1056 Bremerton, WA 98337 Email: tweaver@tomweaverlaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 31, 2017, Port Angeles, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney JESSE ESPINOZA.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Kevin Cox*, No. 48315-7-II (Jan. 31, 2017), a copy of which is attached to the petition for review. *See also State v. Cox*, 2017 WL 417241, (Wn. App. Div. 2, 2017).

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles held that "Olson does not support Cox's claim that the trial court was required to dismiss the case before the State could benefit from the new commencement date under CrR 3.3(c)(2)" and that Cox failed to show a time-for-trial violation. *State v. Cox*, 2017 WL 417241, at *7 (Wn. App. Div. 2, 2017) (referring to *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)).

Additionally, the Court of Appeals held that, even without considering the statements which were excised from the affidavit after the

Franks[1] hearing, Officer Ponton's telephonic affidavit still established probable cause for a search warrant. Thus, the Court of Appeals reversed the trial court's order suppressing evidence.

The question presented is whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4 (b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and
2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and
3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

IV. STATEMENT OF THE CASE

Pre-trial Procedural History

On May 29, 2015, the State charged Kevin Cox, the Defendant, with Unlawful Possession of a Firearm in the Second Degree. CP 67. Mr. Cox challenged the search warrant which led to discovery of the firearm alleging that the telephonic affidavit for the warrant contained material misrepresentations made with reckless disregard for the truth. CP 28.

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[1] *Franks v. Delaware*, 438 U.S. 154, 156, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978).

On Oct. 28, 2015, a *Franks* suppression hearing was held (RP 1–56 (10/28/2015)) and the Clallam County Superior Court found that the warrant was based upon representations which were made in reckless disregard for the truth and that the remainder of the affidavit, absent the offending misrepresentation, did not establish probable cause for the search warrant. CP 5–6.

The trial court granted the defendant's motion to suppress evidence under *Franks*. CP 7.

Procedural History on Appeal

On Nov. 18, 2015, the State filed a motion for the court to clarify its order suppressing evidence. CP 6. On Nov. 25, 201, at the State's request, the trial court made a finding that the order suppressing evidence had the "practical effect of terminating the State's case." CP 4. The State filed notice of appeal on Nov. 30, 2015. CP 45.

Prior to addressing the merits of the State's appeal of the suppression order, Mr. Cox objected to the procedural posture of the case and moved for dismissal alleging a violation of Mr. Cox's right to speedy trial. *See* Br. of Respondent, COA no. 48315-7-II, filed Apr. 6, 2016, at 3, 5.

The Court of Appeals, Division II, held that Mr. Cox failed to show that there was a time-for-trial violation because time-for-trial is

tolled under CrR 3.3 (c)(2) when appeal is accepted for review. *State v. Cox*, slip opinion, No. 48315-7-II, Jan. 31, 2017, at 1, 11.

The Court of Appeals reversed the trial court's suppression order and remanded the case for further proceedings. *Id.* at 15. Mr. Cox's now seeks review arguing the Court of Appeals erred on the time-for-trial issue.

V. ARGUMENT

A. THE COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THE PETITIONER HAS NOT ESTABLISHED ANY OF THE REQUIREMENTS UNDER RAP 13.4 (B).

RAP 13.4 (b) sets forth the considerations governing this Court's acceptance of review: "A petition for review will be accepted by the Supreme Court only: . . . (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

Here, Mr. Cox asserts that his petition for review involves an issue of substantial public interest. This Court should decline to accept review because this consideration in this case does not support acceptance of review.

Mr. Cox claims that despite the fact that the Court of Appeals reviewed the State's appeal of the suppression ruling, the Court of Appeals never completed the "second step" by entering an order "accepting

review" or a stay of proceedings. Br. of Petitioner at 7. Mr. Cox's claim is not supported by any authority and ignores RAP 6.1 which states that "[t]he appellate court 'accepts review' of a trial court decision upon the timely filing in the trial court of a notice of appeal from a decision which is reviewable as a matter of right." Nevertheless, Mr. Cox claims that this "second step" is required in order for the time-for-trial to toll under CrR 3.3. Mr. Cox does not cite to such a rule in the RAP. Further, the cases cited by Mr. Cox do not hold that there is such a requirement in order for the proceedings to be tolled under CrR 3.3.

The opinion in *State v. LaTourette* simply includes the procedural history leading to the State's appeal prior to the analysis section and does not address any two-step rule as a requirement for tolling. 49 Wn. App. 119, 122, 741 P.2d 1033 (1987). *LaTourette*, therefore does not apply.

In *State v. Brown*, the State sought discretionary review and the Court of Appeals granted a motion to stay the proceedings which is permitted under RAP 8.3. 64 Wn. App. 606, 608, 825 P.2d 350 (1992). *Brown* does not apply in this case because, here, the State appealed under RAP 2.2 (b) as a matter of right in which review is accepted under RAP 6.1 "upon the timely filing in the trial court of a notice of appeal from a decision which is reviewable as a matter of right." Therefore, *Brown* does not apply.

Finally, *State v. Olsen*, cited by Mr. Cox, does not hold that there is such a two-step rule. *See* 126 Wn.2d 315, 893 P.2d 629 (1995). The issue decided by *Olsen* was whether the Court of Appeals abused its discretion by reviewing the case on the merits despite the State's failure to properly assign error to the dismissal order or failure to appeal from the suppression order. *Id.* at 323. *Olsen* therefore does not address such a two-step rule and does not apply in this case.

It is true that conditions of release remain in place while the time-for-trial is tolled pending appellate review. However, any conditions which Mr. Cox believes are unnecessary or overly restrictive may be brought before the Superior Court under RAP 7.2 (f): "In a criminal case, the trial court has authority, subject to RCW 9.95.062 and .064, to fix conditions of release of a defendant and to revoke a suspended or deferred sentence."

Should Mr. Cox bring a motion to modify conditions of release and the Superior Court denies the motion, then the remedy is to seek review of the court's order on conditions of release. *See State v. Rose*, 146 Wn. App. 439, 445, 191 P.3d 83 (2008) (citing *Butler v. Kato*, 137 Wn. App. 515, 521, 154 P.3d 259 (2007))(de novo review of the court's order requiring weekly urinalysis as part of Mason County's standard condition of pretrial release).

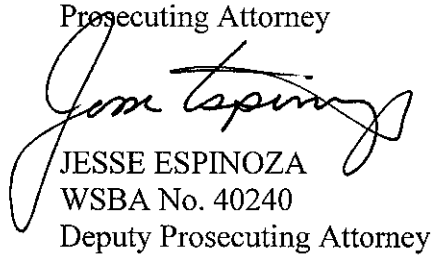
Therefore, the issue raised by Mr. Cox is not of substantial public interest because there is already an avenue for redress. Finally, a rule that requires a dismissal of proceedings and exoneration of conditions of release while a valid appeal is pending could lead to absurd consequences allowing for flight from justice.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny review of the Court of Appeals decision.

DATED March 31, 2017.

Respectfully submitted,
MARK B. NICHOLS
Prosecuting Attorney



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