NO. 96763-6
(Court of Appeals NO. 35272-2-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN MARTIN MALING, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

II. COURT OF APPEALS DECISION

At issue is the published court of appeals decision filed on December 18, 2018, in Division Three of the Court of Appeals. *See State v. Maling*, __ Wn. App. __, 431 P.3d 499, 2018 Wn. App. LEXIS 2839 (Dec. 18, 2018).

III. ISSUES PRESENTED FOR REVIEW

1. Pursuant to CrR 8.2, the State moved to release Maling from custody on the sixtieth day of Maling's time for trial period. Should this Court accept review of Maling's court rule based claim where the State adhered to the applicable CrR 8.2 procedure and the trial court appropriately exercised its discretion to fulfill its obligation that a defendant receive a speedy trial under CrR 3.3?
2. Long-standing decisions from the Court of Appeals allow a trial court the discretion to release a defendant from custody to extend time for trial. Should this Court accept review of these decisions which permit a trial court to exercise its discretion to both ensure timely trials and protect the public from individuals deemed to merit pretrial incarceration under CrR 3.2?

3. Although released on the sixtieth day of time for trial, Maling asserts that his speedy trial period expired earlier, at an unknown, indefinite point when it may have been impractical to summon a jury. Should this Court accept review and cast doubt on every defendant's time for trial expiration date?

IV. STATEMENT OF THE CASE

On December 1, 2015, Maling was charged with three counts of possessing a controlled substance with intent to deliver under RCWs 69.50.401(1) and (2)(b). Clerk's Papers (CP) at 4.

Maling subsequently failed to appear for a pre-trial hearing on August 29, 2016, and the trial court issued a bench warrant for Maling's arrest. VRP 9/1/16 at 4. Maling re-appeared in court on September 1, 2016, at which time the trial court noted that Maling's time for trial re-commenced, giving the State sixty days of speedy trial under CrR 3.3. *Id.*

On October 31, 2016, Maling's case was added to the afternoon trial court docket. CP at 18. Maling, still in custody, and defense counsel were present. *See* VRP 10/31/16 at 8. The record reflects neither the procedure used to note the hearing for October 31, 2016, nor whether any specific request was made by the State at the time the hearing was scheduled. The parties calculated that, based on Maling's prior

appearance, the sixty day time for trial period would expire that same day, October 31, 2016. *See id.* at 10.

Given the limited remaining time for trial, the State requested a continuance or, alternatively, Maling's release from custody, thereby allowing an additional thirty days under CrR 3.3(b)(3). *Id.* at 10, 12. Defense counsel objected and asked that the case be dismissed. *Id.* at 11. The State noted that the sixtieth day had yet to expire. *Id.* at 12.

The trial court released Maling, *id.*, and allowed defense counsel to make a record concerning Maling's objection to release. *Id.* at 13. Following Maling's release, the trial court recalculated Maling's time for trial expiration date pursuant to CrR 3.3(b)(3) as November 30, 2016. *See* CP at 19. Maling was given a new hearing date on November 10, 2016. VRP 10/31/16 at 16.

Maling's case was subsequently continued by agreement of the parties to allow for settlement negotiations. *See* CP at 13. On March 20, 2017, Maling filed a motion regarding the speedy trial issue addressed on October 31, 2016. CP at 8–11. On March 29, 2017, the matter proceeded to trial. *See* VRP 3/29/17 at 4. Following argument regarding the time for trial issue, the trial court denied Maling's motion. *See id.* at 26.

Ultimately, Maling waived his right to a jury trial and opted for a stipulated facts bench trial. *See id.* at 53–56; *see also* CP at 16. Following

a review of the police reports, the trial court found Maling guilty on all three counts. VRP 3/29/17 at 72–73. Written findings of fact and conclusions of law followed for both the time for trial motion and bench trial. *See* CP at 17–24.

On May 8, 2017, Maling was sentenced to twenty months confinement concurrent across the three counts, twelve months of community custody, and legal financial obligations. CP at 25–33.

Maling appealed, arguing that (1) the State failed to adhere to applicable court rules when moving to release Maling and (2) that time for trial had in fact already expired under CrR 3.3 sometime during the final day of speedy trial. *See* Appellant's Brief at 2. The Court of Appeals disagreed, holding that the trial court was within its discretion to consider oral motions during the hearing. The court did not address Maling's proposed modification to the commonsense definition of a "day" under CrR 3.3.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) states that:

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

A. Maling's CrR 8.2 claim is inappropriate for review as (1) the trial court did not abuse its discretion when entertaining the State's oral motion to release and (2) a technical, court rule focused argument does not satisfy RAP 13.4(b)

1. As the State's motion was made orally during a hearing, CrR 8.2 does not mandate that the State first make its motion in writing

Maling argues that the State violated the CR 7(b) written motion requirement as incorporated by CrR 8.2. *See* Petition for Review at 9. Maling further contends that, due to the alleged CR 7(b) violation, the State acted contrary to CR 5(a) and CR 6(d). *See id.*

CrR 8.2 states that "[r]ules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases." CrR 8.2. Under CR 7(b)(1),

> [a]n 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.

CR 7(b)(1). Further, CrR 8.4 states that "CR 5 shall govern service and filing of written motions . . . in criminal causes." CrR 8.4. CR 5(a) requires that "every written motion . . . shall be served upon each of the parties." CR 5(a). Finally, CrR 8.1 mandates that "[t]ime shall be computed and enlarged in accordance with CR 6." CrR 8.1. Under CR 6(d), "[a] written motion . . . and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing." CR 6(d).

CR 7(b)(1) does not apply as the State's motion was "made during a hearing." *See* CR 7(b)(1); *see also Trust Fund Services v. Glasscar, Inc.*, 19 Wn. App. 736, 745, 577 P.2d 980 (1978) (noting that "CR 7(b) provides that motions which are not made during a hearing or trial are to be made in writing"). Accordingly, CR 7(b)(1) does not mandate that the State's motion first be made in writing. As the State was not required to

have brought the motion in writing, neither CR 5(a) nor CR 6(d) are applicable. *See* CR 5(a) (requiring "written motion[s]" to be served upon each party); CR 6(d) (mandating that "written motion[s] . . . shall be served not later than 5 days before the time specified for the hearing").

As the State's motion was made orally during a hearing, the State did not violate the Superior Court Criminal Rules. The State was not required to first make a written motion given the procedural posture and setting of the State's request. The trial court therefore did not abuse its discretion when entertaining the State's oral motion.

2. Maling's technical argument concerning the Criminal Rules notice requirement is not appropriate for review under RAP 13.4(b)

Maling argues that "the broad implications of the Court of Appeals' ruling to criminal motions practice generally" warrant review by this Court. Petition for Review at 10. Asserting that the Court of Appeals' decision "effectively allows the State to bypass written motion and notice requirements entirely by unilaterally calendaring the defendant's case for an unspecified hearing, and then presenting its motions orally," Maling claims that the decision below neuters any practical effect of the Criminal Rules. *See id.* at 9–10.

The Court of Appeals' decision does not constitute an "issue of substantial public interest" that warrants review by this Court. *See*

RAP 13.4(b). The Court of Appeals specifically raised the trial court's independent obligation under CrR 3.3(a)(1), noting that "[i]t shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime." *See Maling*, 431 P.3d at 500; CrR 3.3(a)(1). Contrary to Maling's assertion, CrR 3.3 uniquely places a burden on the trial court to ensure compliance. In keeping with CrR 3.3, the Court of Appeals concluded that technical violations of the Criminal Rules do not surmount the higher obligation of the trial court to administer justice in a timely manner.

Maling's interpretation of the Court of Appeals' decision leads to an unresolvable conflict with the trial court's obligation under CrR 3.3(a)(1). Under Maling's proposal, a trial court would be forced to decline its duty to monitor compliance with the time for trial rule if the State did not comply with the technical requirements of other Criminal Rules. The Criminal Rules cannot be subjected to an interpretation that risks mandating that trial courts abandon their obligation under CrR 3.3(a)(1).

As such, Maling's overbroad reading of the Court of Appeals' decision is not supported by the record. The Court of Appeals limited their analysis to situations regarding CrR 3.3, which uniquely among the Criminal Rules places a specific burden upon the trial court to monitor

compliance with time for trial limits. It is not within the public interest to compel a trial court to abdicate its obligations if other technical provisions are not strictly complied with. Maling has therefore failed to demonstrate that his CrR 8.2 argument involves an issue of "substantial public interest" under RAP 13.4(b).

B. Maling has failed to demonstrate that *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), are wrongly decided and deserving of review by this Court

Maling argues that *Chavez-Romero* and *Kelly* are wrongly decided and should be overruled. Petition for Review at 2–3. Specifically, Maling claims that both cases conflict with CrR 3.2, governing a defendant's release prior to trial. *Id.* at 12.

Kelly held that CrR 3.2 should be interpreted to neither compel absurd results nor reward defendants for disingenuous resistance to release. *Kelly*, 60 Wn. App. at 926–27. Critically, *Kelly* cited *People v. Sibley*, 41 Ill. App. 3d 616, 622, 354 N.E.2d 442, 447 (1976), for the proposition that "the creation and enforcement of constitutional and statutory rights for the protection of defendants cannot be used for manipulation 'in such a way as to provide an avenue to escape legitimate prosecution . . . .'" *Kelly*, 60 Wn. App. at 928 (quoting *Sibley*, 41 Ill. App. 3d at 622).

Contrary to Maling's argument, *Kelly* grounded its analysis squarely within the confines of CrR 3.2. Maling's interpretation, similar to that put forth by the defendant in *Kelly*, would "frustrate" protecting the public, a central purpose underlying CrR 3.2. *Id.* at 927. As noted in *Kelly*,

> [i]t would be a perversion of CrR 3.2 to hold that a court may not release a defendant to provide a trial within the 90-day limit, but rather must release him on the 60th day and dismiss the charge with prejudice simply because he was a defendant who had merited incarceration pending trial.

Id.

Further, CrR 3.2(k) permits modification of a defendant's conditions of release based on a "showing of good cause." CrR 3.2(k). In *Kelly*, the State moved to release the defendant as a critical witness would have been unavailable for trial within sixty days. *Kelly*, 60 Wn. App. at 923. Similarly, in *Chavez-Romero* it appears that the State moved to release the defendant as a witness was unavailable to testify for a suppression motion. *Chavez-Romero*, 170 Wn. App. at 573–74. Under Maling's proposal, the release of defendants for similarly legitimate reasons would violate CrRs 3.2 and 3.3, gifting the defendant undeserved relief from the pending criminal charge.

Under *Kelly* and *Chavez-Romero*, discretion ultimately lies with the trial court to release a defendant to extend time for trial under CrR 3.3. *See id.* at 578. Stripping the trial court of that discretion, as proposed by

Maling, would result in defendants avoiding otherwise legitimate prosecutions by disingenuously resisting release.

Accordingly, Maling has failed to demonstrate that revisiting *Kelly* and *Chavez-Romero* would substantially benefit the public. *See* RAP 13.4(b). Although reform of pretrial incarceration is under review both nationally and in Washington, the principle underlying *Kelly* and *Chavez-Romero* does not touch on the initial determination of conditions of release. Instead, the cases address a substantially different issue—a defendant's release, following pre-trial incarceration adhering to judicial application of CrR 3.2, to extend time for trial under CrR 3.3. Given the distinguishable procedural posture separating the initial pre-trial conditions of release decision from that involving the release of a defendant much later in the case, this Court should decline review and allow *Kelly* and *Chavez-Romero* to remain settled law.

C. Maling's proposed "pragmatic" definition of a "day" is not an appropriate subject for review by this Court as Maling's proposal would both be contrary to the term's common understanding and unworkable in practice

Maling argues that the sixtieth day of time for trial should be interpreted to have ended once "the case is not called for trial and any jurors summoned to appear are released and unavailable to serve." Petition for Review at 11. Maling urges the Court to adopt a "pragmatic" definition

of a "day," under which his time for trial would have expired prior to Maling's release. *See id.*

A generic "day" refers to "[a] period of time consisting of twenty-four hours" or "[t]he space of time which elapses between two successive midnights." BLACK'S LAW DICTIONARY 396 (6th ed. 1990). This comports with the commonsense understanding of a "day"—a twenty-four hour period lasting from one midnight to the next. Although Maling argues that a "day" "under the speedy trial rule can be susceptible of various meanings," *see* Petition for Review at 11, Maling has not provided a reasonable basis for this Court to deviate from the everyday understanding of the term. *See State v. Engel*, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009) ("A reading that produces absurd results should be avoided, if possible, because we presume the legislature does not intend them."); *State v. McGee*, 122 Wn.2d 783, 789, 864 P.2d 912 (1993) ("The rule of lenity does not require [a court] to reject an 'available and sensible' interpretation in favor of a 'fanciful or perverse' one.") (quoting *Commonwealth v. Tata*, 28 Mass. App. Ct. 23, 25–26, 545 N.E.2d 1179 (1989)).

Further, courts have consistently described the time for trial period in definitive terms. *See State v. Logan*, 102 Wn. App. 907, 912, 10 P.3d 504 (2000) (noting that time for trial rules are strictly applied); *State v.*

Monson, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997) (describing CrR 3.3 time for trial as ending at "the expiration of a fixed time"). Courts' utilization of consistently firm language weighs in favor of finding that time for trial expires at the conclusion of the final day, not the randomized and arbitrary point at which an official decides the State will no longer be able to proceed. A strict application counsels against Maling's proposal—how can a court strictly apply a concept that has a fluid deadline?

Additionally, Maling's proposed definition is unworkable and would result in disparate treatment for similarly situated defendants. When would a given defendant's time for trial period expire? Who would make that determination? Court systems might utilize different procedures for commencing a jury trial which may vary depending on the day of the week or time of year. Instead of a firm deadline, every time for trial period would be susceptible to alteration until the final twenty-four hour period expired. As above, a "strict" interpretation of time for trial rules counsels against Maling's proposed "pragmatic," yet malleable and nebulous, definition. *See Logan*, 102 Wn. App. at 912.

Maling has presented no reason to re-define a "day" from how the term is understood in common parlance—a full twenty-four hour period. Accordingly, Maling has not demonstrated that this Court should address

his proposed "pragmatic" definition of a "day" as an issue of "substantial public interest." *See* RAP 13.4(b).

VI. CONCLUSION

Maling has failed to satisfy any of the criteria for review under RAP 13.4(b). As such, Maling's petition for review should be denied.

Dated this 19th day of February, 2019.

STATE OF WASHINGTON

/s/Michael J. Ellis
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DECLARATION OF SERVICE

I, Michael J. Ellis, state that on February 19, 2019, by agreement of the parties, I emailed a copy of ANSWER TO PETITION FOR REVIEW to Ms. Andrea Burkhart at andrea@2arrows.net.

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

DATED this 19th day of February, 2019, at Yakima, Washington.

____/s/Michael J. Ellis_____

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