

Original

NO. 33828-9-II

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KIRT D. JONES,

Appellant.

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APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-02311-8

HONORABLE PAULA CASEY, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether the defendant's trial counsel rendered ineffective assistance of counsel in failing to object to the use of the defendant's admissions as evidence of the charges in Counts 3, 4, and 5 due to the lack of any independent evidence that the defendant had possessed the guns referenced in those Counts.

2. Whether the defendant's 1986 conviction for possession of stolen property in the second degree and his 1997 conviction for forgery washed out for purposes of calculating his offender score in the present cause based on the defendant's criminal history between 1997 and 2004.

3. Whether the trial court properly included the defendant's 1986 conviction for possession of stolen property in the second degree in calculating his offender score on the basis of the provisions of the Sentencing Reform Act in effect at the time he committed the crimes in the present case, even though that prior offense had washed out under a prior version of the Sentencing Reform Act.

4. Whether, in the amended Judgment and Sentence, the trial court properly treated Count 2 as separate criminal conduct while treating Counts 3, 4, and 5 as the same criminal conduct.

5. Whether the defendant can contest the legality of the search of his vehicle for the first time on appeal.

6. Whether the requirement for a CrR 3.5 hearing was waived by the defense prior to the trial.

7. Whether the defendant has shown a violation of his right to a speedy trial pursuant to CrR 3.3.

8. Whether the defendant's trial counsel rendered ineffective assistance of counsel by failing to propose a lesser included instruction as to the charge of residential burglary.

B. STATEMENT OF THE CASE

On December 19, 2004, in the course of a burglary investigation, Olympia Police Detectives Bakala and Costello contacted the defendant while he was in his van with another male named Kelly Anderson. Trial RP 60-61, 69. When first contacted, the defendant was lying on a bed inside the van. Trial RP 92.

The police officers obtained a search warrant and conducted a search of the van. They found a zippered case between the bed and the side of the van, about three feet from where the defendant had been laying. The case was of a sort normally used to carry a gun. Inside the case was a .357 caliber revolver. Trial RP 92-93. The weapon was taken into evidence. It was later test fired and determined to be operable. Trial RP 96.

The officers also found multiple documents inside the van. A number of them pertained to the

address of 705 "Z" Street in Tumwater, and appeared related to a person whose last name was "Hutson". Trial RP 97. This information was then conveyed to Lieutenant Mize of the Tumwater Police Department. Trial RP 63.

Mize went to the residence at 705 "Z" Street, and then with the help of neighbors made contact with the owner, Norman Hutson. Trial RP 22-23. Hutson had been living elsewhere due to a serious illness, and had not been back to the residence for three or four months. Trial RP 37-41.

On December 19th, Hutson met police officers outside his residence on "Z" Street. He gave them a key to enter. When the officers went inside, they observed that the residence was in total disarray. At trial, Mize testified that it appeared as if a tornado had struck inside the residence. Trial RP 25-26.

Hutson appeared shocked by the condition of his residence. He was eventually able to determine that items of his property were missing from the residence. Among the missing items were

a number of firearms, including a 30/30 rifle, at least one .22 caliber rifle, and a .12 gauge shotgun. Trial RP 29, 43-47. Hutson was not acquainted with the defendant, and had never given the defendant permission to enter Hutson's residence. Trial RP 51.

On December 20, 2004, Costello and Bakala contacted the defendant at the Thurston County Jail. The defendant stated he was a heroin addict and was suffering from drug withdrawal. However, he did not display any difficulty in understanding what was said to him at that time. Trial RP 66-67, 102.

The officers informed the defendant of his Miranda rights. The defendant stated he was familiar with those rights, and was willing to answer questions. Trial RP 84, 102-103. The defendant was interviewed for about a half hour. He was then asked to provide a taped statement. However, the defendant declined and asked to go back to his cell. Therefore, the interview was terminated. Trial RP 75, 85, 107.

During the interview, the defendant admitted that he had gone into Hutson's residence and had stolen a shotgun and five rifles from inside the residence. The defendant further stated he had placed the weapons in his van, the guns had been taken from his van without his knowledge, and he did not where they could be found. Trial RP 81, 105-106. The defendant explained that he had intended to sell the guns for his heroin habit. Trial RP 106. The defendant also admitted he had possessed the .357 revolver, but denied it had come from the Hutson residence. Trial 79-80.

On December 29, 2004, an Information was filed in Thurston County Superior Court charging the defendant with one count of residential burglary and one count of unlawful possession of a firearm in the first degree. CP 4. On January 24, 2005, a First Amended Information was filed adding three counts of unlawful possession of a firearm in the first degree. CP 6-7.

On June 22, 2005, a Second Amended Information was filed. In Count 1, the defendant

was charged with one count of residential burglary, alleged to have occurred during the period of August 1, 2004 through December 19, 2004. Count 2 charged unlawful possession of a firearm in the first degree alleged to have been committed on or about December 19, 2004. In Count 3, the defendant was charged with unlawful possession of a firearm in the first degree, specifically a 30/30 rifle, alleged to have been committed during the period of August 1, 2004 through December 17, 2004. In Count 4, the defendant was charged with one count of unlawful possession of a firearm in the first degree, specifically a .22 caliber rifle, alleged to have been committed during the period of August 4, 2004 through December 17, 2004. Finally in Count 5, the defendant was charged with one count of unlawful possession of a firearm in the first degree, specifically a .12 gauge shotgun, alleged to have been committed during the period of August 4, 2004 through December 17, 2004. CP 12-13.

The case proceeded to trial on June 29, 2005.

At that trial, a certified copy of judgment and sentence was admitted showing that the defendant had previously been convicted for the offense of delivery of a controlled substance. Trial RP 100. This was the offense relied on by the State to show that the defendant's possession of a firearm was unlawful.

The defendant was sentenced on August 26, 2005. His felony criminal history was determined to consist of a 1986 conviction for possession of stolen property in the second degree, a 1989 conviction for unlawful possession of a controlled substance, a 1997 conviction for the unlawful delivery of a controlled substance, and a 1997 conviction for forgery. None of these convictions were considered to have washed out. All of the defendant's current offenses were considered as separate criminal conduct. Therefore, the defendant was determined to have an offender score of eight. For residential burglary, the standard range was determined to be 53 to 70 months in prison. For the unlawful possession of a firearm

counts, the standard range was determined to be 77 to 102 months.

The defendant was given a sentence in accordance with the drug offender sentencing alternative in RCW 9.94A.660. His sentence for residential burglary was 30.75 months in confinement and 30.75 months on community custody. For each unlawful possession of a firearm in the first degree conviction, the defendant was sentenced to 44.75 months of confinement, with 44.75 months of community custody thereafter. CP 51-59.

On December 12, 2005, the defendant filed a Motion to Correct Judgment and Sentence. In that motion, he argued that his four convictions for unlawful possession of a firearm in the first degree constituted the same criminal conduct, and that he should be re-sentenced accordingly. CP 74-92. Then, on April 21, 2006, the defendant filed a Motion to Modify Judgment and Sentence. In this motion, the defendant argued that his 1986 conviction for possession of stolen property in

the second degree had washed out, and therefore should not have counted in determining his offender score. CP 93-96.

A hearing on these motions was held on May 26, 2006. At that time, the court entered an amended Judgment and Sentence. CP 97-106. With regard to the defendant's argument for the same criminal conduct, the court granted the defendant's motion in part. The court found that Counts 3, 4, and 5 constituted the same criminal conduct. However, the court treated Count 2 as separate criminal conduct because of the different date of violation. CP 97-106.

The court further clarified its determination of the defendant's criminal history by adding Appendix 2.2 to the Judgment and Sentence, in which the defendant's misdemeanor and felony criminal history was listed. That history showed that subsequent to the defendant's 1986 conviction for second-degree possession of stolen property, there was never a time when he had remained crime free for five consecutive years. Therefore, the

defendant's motion to treat the second-degree possession of stolen property conviction as washed out was denied. CP 97-106.

C. ARGUMENT

1. The defendant has shown that his trial counsel rendered ineffective assistance of counsel for failing to object to the use of the defendant's admissions as evidence of Counts 3, 4, and 5, due to the lack of any independent evidence that the defendant had possessed the guns referenced in those counts.

Proof of the corpus delicti of a crime requires evidence that the crime charged was committed by someone. State v. Hamrick, 19 Wn. App. 417, 418, 576 P.2d 912 (1978). Under Washington law, the admissions of a defendant, without any other independent evidence, are never enough to establish that a crime occurred, or in other words to establish the corpus delicti. State v. Smith, 115 Wn.2d 775, 780, 801 P.2d 975 (1990). There must also be some independent evidence that the crime was committed.

The independent evidence does not have to be of such a character as to prove that the crime was committed beyond a reasonable doubt, or by a

preponderance of the evidence, or even to the point of legal sufficiency necessary to send the case to the jury. State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). The independent evidence is sufficient if it would support a logical and reasonable inference that the crime was committed. In assessing the legal sufficiency of the independent evidence, the court should assume the truth of the State's evidence and all reasonable inferences from that evidence in the light most favorable to the State. Aten, 130 Wn.2d at 656, 658. The existence of such independent evidence of a crime's corpus delicti is a prerequisite for the use of a defendant's statements to prove a particular charge. Aten, 130 Wn.2d at 656-657.

What independent evidence is necessary to establish the corpus delicti depends, of course, on the particular crime charged. In the case of residential burglary, as charged in this case, the corpus delicti of the crime is that there was an unlawful entry into Hutson's residence by someone,

and that someone had the intent to commit a crime against a person or property therein. The independent evidence in this case from the police witnesses and Hutson showed that the home had been ransacked by someone, and that items of property were missing. Such evidence supports a logical and reasonable inference that the home had been burglarized. It was then appropriate to prove the defendant's culpability for that criminal act by use of the defendant's statements that he was at least one of the persons responsible for this burglary, in that he had gone inside and had taken property, including firearms, from the residence. Ultimately, then, the charge of residential burglary was proved beyond a reasonable doubt by a combination of the independent evidence and the admissions of the defendant.

The elements of the crime of unlawful possession of a firearm in the first degree, as charged in this case, are that the defendant had in his possession or control a firearm after having been convicted for a serious offense. In

the case of this crime, the distinction between the corpus delicti of the crime (whether the crime was committed) and the issue of culpability for the crime (whether the defendant was the one responsible) becomes more blurred. There was independent evidence in this case that someone was in possession of Hutson's firearms and removed them from his home. However, such evidence alone would not support a logical and reasonable inference that the crime of unlawful possession of a firearm in the first degree was committed, because that would depend on the status of the person removing the guns; that is, whether the person had previously been convicted for a serious offense.

In the case of Count 2, referring to the .357 revolver, there was independent evidence that the gun was possessed by a person who was legally prohibited from doing so because of a prior conviction of a serious offense, that person being the defendant. The admission of the defendant that he possessed the gun simply confirmed the

logical and reasonable inference arising from the observations of the police investigators, coupled with the evidence of the defendant's prior conviction.

However, the only evidence in this case that a person who had previously been convicted of a serious offense had possessed Hutson's guns, which is the corpus delicti for Counts 3 through 5, was that the defendant stated he had possessed them. Thus, there was no independent evidence supporting a logical and reasonable inference that the crimes charged in those three counts were committed, and so no independent evidence of the corpus delicti.

It could be argued that the lack of independent evidence of corpus delicti for those three crimes in this case is of no consequence. As discussed above, there was certainly sufficient evidence of the corpus delicti of residential burglary to justify the admission at trial of all of the defendant's admissions to police in this case.

However, it would appear that such an

argument would apply too narrow a view of the corpus delicti rule. It seems to be more than just a requirement for the admissibility at trial of a defendant's statements. The rule precludes a conviction, regardless of the overall sufficiency of the evidence, unless there exists sufficient independent evidence to support a logical and reasonable inference that the crime truly was committed. Aten, 130 Wn.2d at 655-657. Unless that burden can be met, the defendant's admissions simply cannot be used to establish evidentiary sufficiency to justify a conviction. Aten, 130 Wn.2d at 667. See also State v. Dodgen, 81 Wn. App. 487, 493-494, 915 P.2d 531 (1996).

At the same time, the defense never objected to the absence of independent evidence for the corpus delicti of these three crimes. The corpus delicti rule is a judicially created rule of evidence requiring that a proper foundation be laid before a defendant's statements can be considered as part of the evidence of the crime, and so is not constitutionally based. Thus, the

failure to comply with the corpus delicti rule is a nonconstitutional error requiring a proper objection in the trial court. A failure to raise the issue at the trial court level waives the right to raise the issue on appeal. State v. C.D.W., 76 Wn. App. 761, 763-764, 887 P.2d 911 (1995).

However, the defendant has also argued that his attorney's failure to object to the use of his statements as evidence in support of Counts 3 through 5, based on the corpus delicti rule, violated his constitutional right to effective representation. If a showing of ineffective assistance would present a reasonable probability of a different outcome, then there is a sufficient showing of manifest constitutional error to justify review of this issue for the first time on appeal pursuant to RAP 2.5(a)(3). State v. McFarland, 127 Wn.2d 322, 333-334, 899 P.2d 1251 (1995).

When a convicted defendant claims that his trial counsel's assistance was ineffective, he has

the burden to show that counsel's performance fell below an objective standard of reasonableness. The appellate court must apply a strong presumption that the defendant was properly represented. Deficient performance is not shown by matters that go to trial strategy and tactics.

The defendant must also show prejudice by establishing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Garrett, 124 Wn.2d 504, 517-519, 881 P.2d 185 (1994); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

In the present case, it has been conceded above that there was no independent evidence in this case supporting a reasonable and logical inference that this defendant had possessed Hutson's guns. Therefore, it appears inescapable that defense counsel's failure to object on the basis of corpus delicti as to the use of the defendant's statements to prove Counts 3 through 5 constituted deficient performance. Moreover, since these charges would necessarily have been

dismissed for insufficient evidence without the jury's ability to consider the defendant's admissions as evidence of those charges, there is a reasonable probability that there would have been a different result had defense counsel made that objection. State v. C.D.W., 76 Wn. App. at 764-765. Therefore, the defendant's convictions for Counts 3, 4, and 5 must be reversed.

2. Between 1997 and the dates of violation in the present case, the defendant did not remain crime free for five consecutive years, and therefore his prior convictions for second-degree possession of stolen property and forgery did not wash out.

The defendant contends on appeal that the trial court erred in considering the defendant's 1986 conviction for second-degree possession of stolen property and his 1997 conviction for forgery as applicable criminal history in calculating his offender score. He argues that both are Class C felonies, and therefore wash out if the defendant spends five consecutive years in the community without committing a crime which results in a conviction. RCW 9.94A.525(2). The last felony conviction listed as criminal history

in the original Judgment and Sentence in this case was in 1997, more than five years before the date of violation for any of the convictions in the present case. Therefore, the defendant argues, both these Class C felonies would have washed out for purposes of this case.

However, in the Amended Judgment and Sentence in this case, entered on May 26, 2006, the trial court clarified in Appendix 2.2 that in March, 2001, the defendant committed the crime of driving while license suspended in the third degree for which he was convicted. CP 97-106. Therefore, he did not spend five consecutive years in the community without committing a new crime. Consequently, the defendant's prior convictions did not wash out.

3. In determining the defendant's offender score, the court properly applied the law in effect at the time the defendant's crimes were committed in the present case, and therefore the court properly included the defendant's 1986 conviction for possession of stolen property in the second degree in that determination.

As noted above, under RCW 9.94A.525(2), as in effect from August 1, 2004 through December 19,

2004, the defendant's 1986 conviction for possession of stolen property in the second degree was properly included as part of the defendant's criminal history because there was no consecutive five-year period from 1986 until August, 2004, in which the defendant refrained from the commission of any crime. However, even if that is so, the defendant still contends that it was error to include the 1986 conviction in determining the defendant's offender score.

The defendant argues that under a version of the Sentencing Reform Act prior to 1995, the rule had been that a prior felony offense washed out if the defendant had spent five consecutive years in the community without having been convicted of another felony. While that rule was in effect, its conditions for wash out were met by this defendant with regard to his 1986 conviction for possession of stolen property in the second degree. Relying upon State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999), and State v. Smith, 144 Wn.2d 665, 30 P.3d 1245 (2002), the defendant

argues that, even though under present sentencing law the 1986 conviction would be applicable criminal history, the effect of the prior wash out permanently precludes the use of that prior conviction to determine the defendant's offender score in this case.

However, the defendant's argument fails to address the effect of the amendments to the Sentencing Reform Act in Laws of 2002, chapter 107, and the holding of the Washington Supreme Court in State v. Varga, 151 Wn.2d 179, 191-193 and 198, 86 P.3d 139 (2004), that those amendments are controlling and provide for the use of previously washed out felony convictions in determining the offender score for crimes committed after the effective date of those amendments. The amendments to the Sentencing Reform Act in Laws of 2002, chapter 107 went into effect on June 13, 2002, and are codified in RCW 9.94A.525 and RCW 9.94A. 030. Varga, 151 Wn.2d at 185. Since the defendant's crimes in this case were committed in 2004, those amendments apply

here.

In the 2002 amendments, the definition of "criminal history" in RCW 9.94A.030(13) was amended as follows:

...(b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

(c) The determination of a defendant's criminal history is distinct from the definition of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

Laws of 2002, ch. 107, s. 2. In another section of the amendments, further clarification on this point was provided by the Legislature in an amendment to RCW 9.94A.525.

The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Accordingly, prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires

including or counting those convictions,
Laws of 2002, ch. 107, s. 3; RCW 9.94A.525(18).

In Varga, 151 Wn.2d at 195, the State Supreme Court ruled that the state legislature could amend the Sentencing Reform Act to include previously washed out convictions in determining the offender score with regard to crimes committed after the effective date of that legislation. The court then found that such was the intent of the Legislature in the amendments to the Sentencing Reform Act in Laws of 2002, chapter 107, and that those amendments were controlling for crimes committed after June 13, 2002. Varga, 151 Wn.2d at 191 and 198.

Thus, pursuant to RCW 9.94A.525(18), the fact that the defendant's 1986 conviction for second-degree possession of stolen property had washed out under a prior version of the Sentencing Reform Act had no significance for the court's determination of the offender score in this case. Consequently, it was not error to include that conviction as applicable criminal history in the

determination of that offender score.

4. In the amended Judgment and Sentence, the court properly treated Counts 3, 4, and 5 as the same criminal conduct, and properly treated Count 2 as separate criminal conduct.

The defendant contends that his four convictions for unlawful possession of a firearm in the first degree constituted the same criminal conduct. The phrase "same criminal conduct" means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a).

In the present case, Count 2 was alleged to have been committed on or about December 19, 2004. CP 12-13. The evidence was that the defendant had a .357 revolver in his possession when contacted by police on December 19, 2004. However, the offenses charged in Counts 3, 4, and 5 were alleged to have been committed during the period of August 1, 2004 through December 17, 2004. CP 12-13. Further, the evidence was that the defendant had previously possessed the guns which were the subject of Counts 3 through 5, but that by December 19th someone had taken the guns from

the defendant. Trial RP 106. Thus, Count 2 could not be the same criminal conduct as the other three counts because it was committed at a different time.

As regards Counts 3 through 5, the trial court treated them as the same criminal conduct in the amended Judgment and Sentence. CP 97-106. Therefore, the defendant has already received all the relief to which he is entitled in regard to this issue.

5. Because the defendant failed to contest the legality of the search of his vehicle in the trial court, he cannot make that challenge for the first time on appeal.

In the defendant's statement of additional grounds for review, he challenges the sufficiency of the probable cause for the issuance of the search warrant which resulted in the search of his vehicle. However, the legality of that search was never challenged in the trial court. His failure to do so constitutes a waiver of any claim of error in regard to that search, and so the legality of that search cannot be challenged for the first time on appeal. State v. Mierz, 127

Wn.2d 460, 468, 901 P.2d 286 (1995).

The defendant also contends that his attorney provided ineffective assistance of counsel by not challenging that search. However, as previously discussed in this Brief, it is the defendant's burden to show deficient performance on the part of his attorney. The failure to move for a suppression hearing is not per se deficient representation. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

In the present case, the defendant's argument in support of his claim of ineffective assistance in regard to the search issue is based entirely on allegations outside the trial court record. Such allegations cannot be considered when raised for the first time on appeal. McFarland, 127 Wn.2d at 335-336. Therefore, the defendant has failed to satisfy his burden of showing that his attorney's representation was deficient in regard to the search issue.

6. The defendant waived the requirement of a CrR 3.5 hearing in this case by his counsel's stipulation to the admissibility of his custodial statements, and by the fact that the defense did

not challenge that admissibility at trial.

The defendant was contacted by Olympia detectives while in custody at the jail. According to the testimony of those detectives, the defendant was informed of his Miranda rights. He stated he understood his rights and agreed to speak with the officers. Only later, when asked for a tape statement, did he choose to end the interview. Trial RP 66-67, 84-85, 101-107.

The statements made by the defendant in that interview were admitted into evidence at the trial. No CrR 3.5 hearing was held before those statements were admitted. On appeal, for the first time, the defendant contends that the trial court erred in admitting the statements without first having conducted a CrR 3.5 hearing to determine whether the statements were admissible.

While a CrR 3.5 hearing is generally a mandatory requirement for the admissibility of a defendant's custodial statements, that requirement can be waived. State v. Rice, 24 Wn. App. 562, 565, 603 P.2d 835 (1979). In the present case, an

Omnibus Hearing was held on April 28, 2005. The court approved and entered a Consolidated Omnibus Order that was jointly submitted by the parties. CP 107-110. In that Omnibus Order, a section addressed custodial statements by the defendant. The form had a number of options ranging from a stipulation to the admissibility of those statements to a demand for a CrR 3.5 hearing. In the Order submitted in this case, the following option was checked: "Defendant's statements may be admitted into evidence without hearing by stipulation of the parties". CP 109.

This stipulation constituted a waiver of the general requirement for a CrR 3.5 hearing before admitting the defendant's admissions at trial. State v. Fanger, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). Such a waiver could properly be made by the defendant's attorney on his behalf. Fanger, 34 Wn. App. at 637. A waiver of a CrR 3.5 hearing was also made at trial when the defense did not object to the testimony regarding the defendant's custodial statements and did not claim

any defect in the previously made written waiver. Fanger, 34 Wn. App. at 637. Thus, there was no error in admitting evidence of the defendant's statements without a prior CrR 3.5 hearing.

The defendant argues that his attorney rendered ineffective assistance in waiving the CrR 3.5 hearing. However, his argument in that regard consists of allegations regarding his own communications with his attorney and allegations regarding his own version of his contact with detectives at the time of his statements, all of which allegations are outside the trial record. Such allegations cannot be considered for the first time on appeal, and therefore the defendant has failed to show deficient performance by his attorney in regard to this matter. McFarland, 127 Wn.2d at 335-336.

7. Because the defendant failed to make a pretrial objection to the timeliness of the date of his trial, he is precluded from claiming a violation of speedy trial on appeal, but in any event has failed to show any violation even if his claim could be considered.

The defendant contends that extensions of the trial date in his case violated his right to a

speedy trial pursuant to CrR 3.3. However, the record of those extensions shows no such violation.

The defendant was arraigned on March 15, 2005. At that time, a trial date was set for the week of May 2, 2005. 3-15-05 Hearing RP 5. May 2nd was the 47th day following the arraignment. Thus, at that point, there were still 13 days left in a 60-day speedy trial period.

On May 2, 2005, the court approved a stipulation by the parties to continue the trial date to May 16, 2005. CP 111. On May 16th, the State moved for a continuance because the prosecutor was in another trial. After that trial ended, the prosecutor was scheduled to leave out-of-state for a vacation that had been paid for six months earlier. The court agreed to continue the trial date to June 6, 2005. 5-16-05 Hearing RP 4.

On June 6, 2005, the trial court continued the trial once again to June 13th because the defendant's attorney was in another trial. 6-6-05 Hearing RP 3. On June 13th, the parties

stipulated to a continuance until June 20, 2005, and the trial court therefore approved that continuance. CP 112. The trial actually took place on June 29, 2005.

Any period of time covered by a continuance of the trial date granted by the court is excluded from computing the time for trial. CrR 3.3(e)(3) and (f). The extensions of the trial date from May 2, 2005 until June 20, 2005 were all based upon court-approved continuances, and so that whole period must be excluded from any calculation of the defendant's time for trial. Thus, as of June 20, 2005, there were still thirteen days left from the defendant's initial 60-day speedy trial period. Furthermore, under CrR 3.3(b)(5), the defendant's speedy trial period could not terminate until 30 days past the end of any excluded period, which would be 30 days past July 20, 2005. Either way, the trial date of June 29, 2005, was clearly still well within the allowable time for trial in this case.

Moreover, the defendant admits that he never

objected to the trial date prior to his appeal, although he attempts to blame his attorney for this failure to object. In CrR 3.3(d), the rule states the following in regard to any trial setting.

A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(3). Thus, having failed to make the appropriate objection, the defendant cannot now challenge the trial date as beyond his speedy trial period.

8. Apart from defense counsel's failure to contest the corpus delicti for Counts 3, 4, and 5, the defendant has failed to show that his trial attorney rendered ineffective assistance of counsel.

On appeal, the defendant claims that his trial counsel rendered ineffective assistance in many respects. The matter of challenging the

corpus delicti for Counts 3 through 5 has been addressed above, and will not be discussed further here. For the most part, the defendant's other claims of ineffective assistance are based on allegations outside the trial record and cannot be considered in this appeal.

The defendant does argue that his attorney was ineffective by failing to propose a jury instruction on his residential burglary charge for a lesser included offense of first or second degree possession of stolen property. However, an instruction on a lesser included offense is only proper if the proponent can show that every element of the lesser offense is a necessary element of the offense charged, and that the evidence would support an inference that only the lesser charge was committed. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990).

A person is guilty of residential burglary if, with the intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a

vehicle. RCW 9A.52.025. It is apparent that one could commit the crime of residential burglary without ever possessing stolen property, and therefore neither first nor second-degree possession of stolen property is a lesser included offense of residential burglary. Thus, the defendant's counsel properly chose not to propose such a lesser included instruction.

D. CONCLUSION

The State agrees that the defendant's convictions for Counts 3, 4, and 5 must be reversed. A new sentencing hearing is required to address the impact of vacating those convictions. However, in all other respects, the claims of the defendant on appeal should be denied.

DATED this 5th day of June, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

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NO. 33828-9-II

STATE OF WASHINGTON

BY Cmm IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
KIRT D. JONES,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 5th day of June, 2006, I caused to be mailed to appellant's attorney, PATRICIA A. PETHICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Patricia A. Pethick,
Attorney at Law
P.O. Box 7269
Tacoma, WA 98406-0269

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 5th day of June, 2006 at Olympia, WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney