

NO. 34362-2-II

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

STATE OF WASHINGTON,

Appellant,

v.

CLYDE WALSH,

Respondent.

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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-01211-9

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF the ISSUE.....	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT	11
A. UNDER CRR 3.3 AS AMENDED, THE TRIAL COURT HAS NO AUTHORITY TO DISMISS A CASE ABSENT A SHOWING THAT THE DEFENDANT’S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN VIOLATED.	11
1. The Defendant’s speedy trial rights under CrR 3.3 were not violated because the order for a competency evaluation tolled the calculation of speedy trial.	12
2. The delay in the present case was insufficient to demonstrate a constitutional speedy trial violation.....	15
B. ASSUMING, <i>ARGUENDO</i> , THAT EVEN AFTER THE AMENDMENTS TO CRR 3.3 A TRIAL COURT MAY DISMISS A CASE FOR A NON-CONSTITUTIONAL, NON RULE-BASED SPEEDY TRIAL VIOLATION, THE TRIAL COURT ABUSED ITS DISCRETION WHERE THE STATE WAS AT WORST GUILTY OF A SINGLE INSTANCE OF SIMPLE NEGLIGENCE WHICH DID NOT SUPPORT THE EXTRAORDINARY REMEDY OF DISMISSAL.....	26
V. CONCLUSION.....	31

TABLE OF AUTHORITIES
CASES

Barker v. Wingo,
407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).....16, 25

State v. Blackwell,
120 Wn.2d 822, 845 P.2d 1017 (1993).....27, 29

Cain v. Smith,
686 F.2d 374 (6th Cir. 1982)16

Doggett v. United States,
112 S. Ct. at 2690.....16

Hakeem v. Beyer,
990 F.2d 750 (3d Cir. 1993).....20

Jackson v. Ray,
390 F.3d 1254 (10th Cir. 2004)17, 21

Norris v. Schotten,
146 F.3d 314 (6th Cir. 1998)20

State v. Becerra,
66 Wn. App. 202, 831 P.2d 781 (1992).....23

State v. Carson,
128 Wn. 2d 805, 912 P.2d 1016 (1996).....15, 22

State v. Castillo,
129 Wn. App. 828, 120 P.3d 137 (2005) (CrR 4.1(a)(2)).....14

State v. Corrado,
94 Wn. App. 228, 972 P.2d 515.....17, 19, 25

State v. Dailey,
93 Wn. 2d 454, 610 P.2d 357 (1980).....28

<i>State v. Duggins</i> , 68 Wn. App. 396, 844 P.2d 441 (1993).....	6, 27, 29
<i>State v. Fladebo</i> , 113 Wn. 2d 388, 779 P.2d 707 (1989).....	15
<i>State v. Flinn</i> , 119 Wn. App. 232, 80 P.3d 171 (2003).....	27, 29
<i>State v. Greenwood</i> , 120 Wn. 2d 585, 845 P.2d 971 (1993).....	14
<i>State v. Higley</i> , 78 Wn. App. 172, 902 P.2d 659.....	15, 16
<i>State v. Hoffman</i> , 116 Wn. 2d 51, 804 P.2d 577 (1991).....	15
<i>State v. Malone</i> , 72 Wn. App. 429, 864 P.2d 990 (1994).....	22, 23, 24
<i>State v. Michielli</i> , 132 Wn. 2d 229, 937 P.2d 587 (1997).....	5, 11, 14, 26, 27, 28, 30
<i>State v. Monson</i> , 84 Wn. App. 703, 929 P.2d 1186 (1997).....	15
<i>State v. Olmos</i> , 129 Wn. App. 750, 120 P.3d 139 (2005).....	14
<i>State v. Sherman</i> , 59 Wn. App. 763, 801 P.2d 274 (1990).....	28, 29, 30
<i>State v. Whelchel</i> , 97 Wn. App. 813, 988 P.2d 20 (1999).....	16
<i>State v. Wilson</i> , 149 Wn. 2d 1, 65 P.3d 657 (2003).....	27, 29, 30, 31
<i>Takacs v. Engle</i> , 768 F.2d 122 (6th Cir. 1985)	17

<i>U.S. v. Clark</i> , 83 F.3d 1350 (11th Cir. 1996)	25
<i>United States v. Brown</i> , 325 F.3d 1032 (8th Cir. 2003)	20
<i>United States v. Derosé</i> , 74 F.3d 1177 (11th Cir. 1996)	18
<i>United States v. Gerald</i> , 5 F.3d 563 (D.C. Cir. 1993)	18
<i>United States v. Goodson</i> , 204 F.3d 508 (4th Cir. 2000)	20
<i>United States v. Gregory</i> , 322 F.3d 1157 (9th Cir. 2003)	20, 25
<i>United States v. Harris</i> , 376 F.3d 1282 (11th Cir. 2004)	21
<i>United States v. Koller</i> , 956 F.2d 1408 (7th Cir. 1992)	17
<i>United States v. Lugo</i> , 170 F.3d 996 (10th Cir. 1999)	18
<i>United States v. Molina</i> , 407 F.3d 511 (1st Cir. 2005)	20
<i>United States v. Otero-Hernandez</i> , 743 F.2d 857 (11th Cir. 1984)	18
<i>United States v. Pollock</i> , 726 F.2d 1456 (9th Cir. 1984)	19
<i>United States v. Register</i> , 182 F.3d 820 (11th Cir. 1999)	21

<i>United States v. Schreane</i> , 331 F.3d 548 (6th Cir. 2003)	18, 25
<i>United States v. Simmons</i> , 536 F.2d 827 (9th Cir.)	17
<i>United States v. Tannehill</i> , 49 F.3d 1049 (5th Cir. 1995)	20
<i>United States v. White Horse</i> , 316 F.3d 769 (8th Cir. 2003)	18
<i>United States v. Williams</i> , 372 F.3d 96 (2d Cir. 2004).....	20
<i>United States v. Woolfolk</i> , 399 F.3d 590 (4th Cir. 2005)	17
<i>Virgin Islands v. Birmingham</i> , 788 F.2d 933 (3d Cir. 1986).....	18
<i>Wells v. Petsock</i> , 941 F.2d 253 (3d Cir. 1991).....	17

STATUTES

18 U.S.C. § 3161(c)(1).....	19
RCW ch. 10.77	2
U.S. Const. amend. VI	15

I. ASSIGNMENTS OF ERROR

1. The trial erred in dismissing the case pursuant to CrR 8.3(b) due to an alleged speedy trial violation.
2. The trial court erred in finding that the Defendant was prejudiced.
3. The trial court erred in finding that there had been mismanagement by the State.
4. The trial court erred in finding that the Defendant had been deprived of his right to a speedy trial
5. The trial court erred in finding that there was no lesser remedy than dismissal available.
6. The trial court erred in finding that there was sufficient cause to dismiss the charges with prejudice.

II. STATEMENT OF THE ISSUE

1. Whether, under CrR 3.3 as amended, the trial court has the authority to dismiss a case absent a showing that the defendant's constitutional right to a speedy trial has been violated?
2. Whether, assuming, *arguendo*, that even after the amendments to CrR 3.3 a trial court may dismiss a case for a non-constitutional, non Rule-based speedy trial violation, the trial court abused its

discretion where the State was at worst guilty of a single instance of simple negligence which did not support the extraordinary remedy of dismissal?

III. STATEMENT OF THE CASE

Clyde Walsh was formally charged by information filed at his arraignment in Kitsap County Superior Court on August 10, 2005. RP (8/10) 2; CP 12. Walsh was charged with felony stalking and violation of a civil anti-harassment order. CP 1-11. The trial court found probable cause existed. CP 12.

At the arraignment the State also moved for a competency evaluation. RP (8/10) 8; CP 13. Pursuant to the State's motion, the trial court ordered a competency evaluation, based upon the fact that Walsh had previously been found incompetent under RCW ch. 10.77. CP 16. The order provided that the evaluation would take place at Western State Hospital. CP 15, 17. It also tolled the time for trial under CrR 3.3 pending the trial court's entry of an order finding Walsh competent. CP 19-20. Walsh's counsel signed off on the order. RP (8/10) 8; CP 20.

The trial court appointed the Crawford firm to represent Walsh. RP (8/10) 7. On August 29, 2005, the firm of Case and Hemstreet filed a notice of appearance indicating that it had assumed representation of Walsh. CP 21.

The first competency status hearing was held on September 8, 2005. CP 24. Walsh's counsel noted that he had recently been assigned and had not heard anything regarding the evaluation. RP (9/8) 3. Counsel noted that he "would anticipate at this point that [they were] looking at probably several months before [the evaluation was] going to happen." RP (9/8) 3. The parties therefore asked that the matter be set over. RP (9/8) 3; CP 24.

At the status hearing held on October 11, 2005, Walsh informed the court that it had not heard from Western State Hospital regarding the status of his evaluation. RP (10/11) 2; CP 25. Walsh informed the court that he had called and written to the hospital, but had not had any response. RP (10/11) 2. The court and the State also confirmed that they had no correspondence from the hospital. RP (10/11) 2. The matter was set over to November 1, 2005, and the court suggested that the State contact the hospital as well. CP 25. Walsh's counsel again noted, however, that "[r]ealistically, [he] wouldn't expect [Western] State to visit Mr. Walsh for probably another month." RP (10/11) 2-3.

At the status hearing on November 1, 2005, Walsh moved to dismiss under CrR 8.3 because he did not believe Western State Hospital had been notified of the court's evaluation order. RP (11/1) 2; CP 26. Walsh's counsel asserted that he had contacted the prosecutor and asked her if she could contact the hospital under the theory that it might be more responsive

to the State. RP (11/1) 3. When the prosecutor contacted the hospital she was informed that it had no record of Walsh. RP (11/1) 3. Nor did the State have a copy of the evaluation order in its file. RP (11/1) 3. On October 27, 2005,¹ Walsh's counsel had transmitted the information to the hospital, but had not heard back by the time of the hearing. Based on these facts, Walsh orally moved for dismissal, "based on prosecutorial error." RP (11/1) 3.

The prosecutor in court noted that he was unclear who had filed the motion, but in any event, objected to the bringing of an oral motion without prior notice. RP (11/1) 4. The court instructed Walsh to file a written motion and properly note it for hearing. RP (11/1) 4-5; CP 26.

The next status hearing was held on November 29, 2005. CP 27. No written motion to dismiss had been filed at that time. Western State Hospital had informed the court, however, that the evaluation would occur in several weeks. RP (11/29) 2. After noting that he had been in custody for 112 days, Walsh asked that a hearing be set to hear his motion to dismiss. RP (11/29) 2; CP 27. A briefing schedule and time for hearing were established. RP (11/29) 2-3.

On December 5, 2005, Walsh filed a motion to dismiss because he had not yet been evaluated for competency. CP 28. Walsh conceded that the

¹ This is the date of the "Thursday" before the hearing. See RP (11/1) 3.

time for trial was tolled under CrR 3.3 by the order for competency evaluation. CP 29. He therefore argued that the State's failure to forward the order to Western State Hospital was governmental mismanagement that justified dismissal of the charges under CrR 8.3² and *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997). CP 29.

At the hearing on the motion, defense counsel argued that the State erred in not sending the report to Western State, but conceded that it was his practice, and the practice of other defense attorneys in the county to also send the order to Western State. RP (12/14) 5. The defense also asked the court, if the court was not inclined to dismiss the case, to consider a "middle ground" of releasing the defendant from custody and signing an order for the evaluation to be done out of custody. RP (12/14) 6. The trial court acknowledged that the defense had suggested the alternate remedy of release. RP (12/14) 18.

The State responded to the motion to dismiss with a memorandum of authorities filed on December 13, 2005. CP 33. The State noted the facts set forth above. CP 33-34. It additionally noted that apparently both the defense and the State had neglected to fax the original order for competency evaluation to Western State Hospital. CP 38. The State noted that the

² In what was clearly a typographical error, Walsh cited CrR 3.8. CP 29.

defense usually delivers the order to the hospital, although it was arguable that since the State had obtained the evaluation order it was the State's responsibility in this case to transmit the order. CP 38. Neither the State nor either of the counsel that represented Walsh initially noticed the oversight. CP 38.

The oversight came to the parties' attention after Walsh's counsel emailed the prosecutor on October 19, 2005, for help determining the status of the evaluation. CP 34. The prosecutor contacted Western State Hospital, which had no record of Walsh. CP 34.

The State then determined that the paperwork had never been sent to the hospital. CP 34. After consultation, hospital staff suggested it would be most expeditious to enter an amended order providing for a single evaluator to conduct the interviews at the county jail. CP 34. The hospital was willing to follow that procedure. CP 34.

The State argued that to be entitled to dismissal under CrR 8.3(b), Walsh had to prove both governmental mismanagement,³ and ensuing prejudice. CP 35. It pointed out that relief under the rule may not be predicated on simple negligence. CP 35 (*citing State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441 (1993)). After discussing cases where CrR

³ Walsh has not argued affirmative misconduct.

8.3(b) dismissals had been upheld, the State argued that its conduct in Walsh's case did not rise to the level justifying dismissal as a remedy, because it had committed, at most, simple negligence. CP 36-37, 38.

The State further argued that even if the court were to determine that a sanction was warranted, it should consider other alternatives short of dismissal, such as releasing the defendant from custody. CP 37. The State also pointed out that Walsh had not been in custody for even the minimum sentence he was facing. CP 38.

Although Walsh provided the hospital with the paperwork at the end of October, Walsh had not yet been examined on December 14 because of the hospital's backlog. RP (12/14) 3. Based on the correspondence from the hospital the expected time for the examination was somewhere between December 8 and 23, 2005. RP (12/14) 4.

The State had contacted the supervisor at the hospital and was informed that if the evaluation were done with only one evaluator, it could be done within a week or two. RP (12/14) 7. As to the merits of the motion, the State noted that while the State did file the motion, there was no affirmative duty on either party to send the order to the hospital. RP (12/14) 8. It also noted that the defense was typically the party that transmitted the order. RP (12/14) 8. The State did concede that it was probably negligent in not

sending the order. RP (12/14) 8. The State pointed out however, that as soon as it became aware of the problem Walsh's counsel was having, it contacted the hospital. RP (12/14) 8. When they realized that the hospital did not have the paperwork, both parties sent it. RP (12/14) 9. It also noted that the recorded information at the hospital informed callers that if the caller had not received a referral letter from the hospital the caller should re-fax the materials to the hospital. RP (12/14) 9.

The State further argued that even if it had a duty to fax the order, it was guilty at worst of simple negligence. RP (12/14) 10. It noted, however, that simple negligence was not a basis for relief under CrR 8.3(b). RP (12/14) 10-11. Walsh's counsel conceded that the State's mismanagement had been neither egregious nor ongoing. RP (12/14) 17.

The trial court expressed concern that if Walsh were sentenced to the minimum term for the offense, his sentence would be complete, with credit for time served and good-time, on January 10, 2006. RP (12/14) 12. The court nevertheless reserved ruling on the motion to dismiss until December 30, 2005, so that it could "readdress the motion on the merits with the order in hand." RP (12/14) 18; CP 40.

As the parties suggested, the court, with defense agreement, entered an amended evaluation order that provided that Walsh was to be examined at

the Kitsap County Jail. RP (12/14) 3, 18; CP 44. The order also again noted that the time for trial under CrR 3.3 was tolled until the court entered an order finding Walsh competent. CP 47.

On December 30, 2005, Walsh's counsel informed the court that Walsh was presently at Western State Hospital undergoing evaluation. RP (12/30) 2. Walsh's counsel suggested that the hearing be continued until the court received the hospital's report. RP (12/30) 2. The State also asked that it be set over. RP (12/30) 3. The trial court declined to continue the hearing, and issued its ruling. RP (12/30) 3.

The court found that the State had committed misconduct, although there was no finding that it was egregious or part of a pattern. RP (12/30) 7. The court immediately then turned to whether there had been prejudice. RP (12/30) 7. The court found prejudice, because the error "deprived Mr. Walsh of his right to speedy trial under the court rules." RP (12/30) 7, 10. It then entered an order dismissing the charges with prejudice and ordered the defendant released. RP (12/30) 10; CP 50. After ordering the dismissal, the court did finally address the necessity that the mismanagement be egregious, and found that because the rule-based speedy trial period was "completely consumed" it "had to be an egregious violation." RP (12/30) 11.

On January 23, 2006, Western State Hospital advised the trial court

that although it had undertaken competency evaluations of Walsh on December 19, 2005, and January 3, 2006, it would not be submitting a report because defense counsel had informed the hospital that the charges had been dismissed. CP 54.

The trial court entered findings of fact regarding the dismissal on January 27, 2006:

- 1.1 The defendant, Clyde Walsh, was charged with Stalking and Violation of a Civil Anti-Harassment Order on August 10, 2005.
- 1.2 The State filed a motion for Mr. Walsh to be evaluated by Western State Hospital (WSH) to determine his competency to stand trial. The motion was granted by the court.
- 1.3 Mr. Walsh was held without bail since that date.
- 1.4 The State acknowledges it was responsible to notify WSH of the Court's order.
- 1.5 The State became aware of that WSH had not received notice of the Court's order on October 19, 2005.
- 1.6 Between October 19th and 26th, both the State and the Defense faxed documents to WSH.
- 1.7 On October 28, 2005, WSH provided notice to all parties that the referral was complete and they would conduct an evaluation in 6 to 8 weeks.
- 1.7^[4] Mr. Walsh had spent at least 70 days in custody before WSH was notified of the Court's order for an examination.

CP 51-52. Based on the these findings, the trial court made the following

⁴ Sic.

findings and dismissed the charges under the purported authority of CrR

8.3(b):

- 2.1 Under CrR 8.3(b), the Court may dismiss charges “due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.
- 2.2 Failure to notify WSH of the Court’s order for a competency evaluation was mismanagement by the State.
- 2.3 Loss of the right to a speedy trial prejudices the rights of a defendant. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).
- 2.4 The State’s misconduct deprived Mr. Walsh of his right to a speedy trial.
- 2.5 There is no lesser remedy than dismissal.

CP 52-53.

On January 27, 2006, the State timely filed a notice of appeal.

IV. ARGUMENT

A. UNDER CRR 3.3 AS AMENDED, THE TRIAL COURT HAS NO AUTHORITY TO DISMISS A CASE ABSENT A SHOWING THAT THE DEFENDANT’S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN VIOLATED.

In its findings of fact and conclusions of law, the trial court held that Walsh was deprived of his right to a speedy trial, and that the loss of the right to a speedy trial prejudices a defendant. CP 52. This finding was error because Walsh’s speedy trial rights under the rule were not violated, and

because CrR3.3(a)(4) states that if a trial delayed by circumstances not addressed in the rule, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

- 1. The Defendant's speedy trial rights under CrR 3.3 were not violated because the order for a competency evaluation tolled the calculation of speedy trial.***

CrR 3.3(e)(1) provides that, in computing the time for trial, the period beginning on the date when a competency evaluation is ordered and terminating when the court enters a written order finding the defendant to be competent is excluded from the computation of time to trial. In the present case, an order for a competency evaluation was entered at arraignment, and the trial court dismissed the charges before an order finding the defendant competent was ever entered. Under the plain language of the rule, the time for trial had not expired in the present case, and the time for trial was tolled by the entry of the order for a competency evaluation. Walsh conceded this fact below. CP 30. Walsh, therefore, was not deprived of his right to a speedy trial under the plain language of CrR 3.3.

CrR 3.3 was significantly amended in 2003, and CrR 3.3(a)(4) now states that:

The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed

unless the defendant's constitutional right to a speedy trial was violated.

As there was not violation of Walsh's speedy trial rights under the language of CrR 3.3, the language of the rule (as amended in 2003) states that the if there was a delay caused by circumstances not addressed by the rule, the charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated. The trial court in the present case did not find that a constitutional violation had occurred, and thus the trial court's dismissal violated the plain language of CrR 3.3(a)(4).

Additionally, CrR 3.3(h) provides that 'no case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.'

As noted above, nothing in CrR 3.3 or any other speedy trial rule allows a trial court to dismiss charges when speedy trial has been tolled due to the filing of an order for a competency evaluation. Accordingly, because CrR 3.3(a)(4) expressly limits the trial court's authority to dismiss this case to circumstances where the defendant's constitutional speedy trial rights were violated, the trial court erred in dismissing this case for a rule-based speedy trial violation. In addition, the trial court erred in applying a CrR 8.3(b) analysis to an alleged speedy trial violation, when CrR 3.3(a)(4) and CrR 3.3(h) specifically prohibit a dismissal based upon a delay unless there has

been a constitutional violation or a statute expressly requiring the dismissal.

The trial court cited *State v. Michelli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997) for its finding that the loss of the right to a speedy trial prejudices the rights of the defendant. CP 52. The trial court's reliance on *Michelli*, however, was misplaced, as there was no violation of the speedy trial rule in this case, as outlined above. Furthermore, because the plain language of the speedy trial rules specifically preclude the trial court from looking beyond the speedy trial rules, statutes, or constitutional provisions, *Michelli* no longer applies to rule-based violations. Washington courts have reached similar holdings regarding the *Striker* and *Hilton* constructive arraignment arguments, and held that these principles no longer apply to rule-based violations. See, *State v. Olmos*, 129 Wn. App. 750, 120 P.3d 139 (2005) (amendments to rules superseded the constructive arraignment principles in *Striker* and *State v. Greenwood*, 120 Wn. 2d 585, 845 P.2d 971 (1993)); *State v. Castillo*, 129 Wn. App. 828, 120 P.3d 137 (2005) (CrR 4.1(a)(2) precluded court from considering reason for delay in bringing defendant before the court when determining whether defendant was timely arraigned).

As the time for trial under CrR 3.3 had not expired, there was no violation of the rule. In addition, as the rule explains, if the rule itself has not been violated, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated. The trial court,

therefore, erred in finding that the Walsh's speedy trial rights were violated and by using the non-existent speedy trial violation as a basis for dismissal under CrR 8.3(b).

2. *The delay in the present case was insufficient to demonstrate a constitutional speedy trial violation.*

Criminal defendants are constitutionally guaranteed the right to a speedy trial. Const. art. I, sec. 22; U.S. Const. amend. VI. CrR 3.3 does not purport to mark the bounds of the constitutional guarantees. *See State v. Hoffman*, 116 Wn.2d 51, 77, 804 P.2d 577 (1991). As discussed above, Walsh's rule-based speedy-trial rights were not violated. Our Supreme Court has previously ruled that, where there is no violation of CrR 3.3, there is no violation of the speedy trial guaranties of either the United States or the Washington Constitutions. *See State v. Carson*, 128 Wn.2d 805, 820-21, 912 P.2d 1016 (1996). Even were that not the case, Walsh would be unable to show any constitutional violation.

The constitutional speedy-trial provisions require that defendants be brought to trial within a "reasonable time" and does not mandate a fixed time limit. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997); *State v. Higley*, 78 Wn. App. 172, 184-85, 902 P.2d 659, *review denied*, 128 Wn.2d 1003, 907 P.2d 296 (1995). The threshold for a constitutional violation is "much higher than that for a violation of the superior court rules." *State v.*

Fladebo, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); *State v. Whelchel*, 97 Wn. App. 813, 823, 988 P.2d 20 (1999), *review denied*, 140 Wn.2d 1024 (2000). Generally, no set time is applicable, and Washington courts have held that a court must examine the facts to determine whether a reasonable time has elapsed. *Higley*, 78 Wn. App. at 185 (citing *Barker v. Wingo*, 407 U.S. 514, 537, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (White, J., concurring)).

Washington courts have adopted the four part test outlined in *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 2187, 33 L. Ed. 2d 101 (1972) to determine when a criminal defendant's right to a speedy trial is violated. *See, for instance, Whelchel*, 97 Wn. App. at 824. The Court identified four major factors to consider in this balance: the length of the delay, the reason for the delay, whether or not the defendant asserted the right, and the prejudice to the defendant. *Barker*, 407 U.S. at 530, 92 S. Ct. 2182.

The first factor, the length of delay, is "a triggering mechanism" because "until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors." *Barker v. Wingo*, 407 U.S. at 530; *see also Doggett v. United States* 112 S. Ct. at 2690 ("[s]imply to trigger speedy trial analysis, accused must allege that interval between accusation and trial crossed threshold dividing ordinary from 'presumptively prejudicial' delay") (quoting *Barker v. Wingo*, 407 U.S. at 530-31); *Cain v. Smith*, 686

F.2d 374, 381 (6th Cir. 1982) (length of delay is triggering mechanism).

If the defendant makes this threshold showing of a delay which is presumptively prejudicial, only then does the Court consider the extent of the delay. *State v. Corrado*, 94 Wn. App. 228, 233, 972 P.2d 515, *review denied*, 138 Wn.2d 1011 (1999), *citing Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

In *Corrado*, the court found that there was some consensus that delays greater than eight months have been held “presumptively prejudicial.” *Corrado*, 94 Wn. App. at 233-34. Other courts have held that delays of approximately six months are sufficiently lengthy to presume prejudice and trigger further inquiry. *See, for example, Takacs v. Engle*, 768 F.2d 122, 127-28 (6th Cir. 1985) (six and one half month pretrial delay sufficient to necessitate further inquiry into speedy trial violations); *United States v. Simmons*, 536 F.2d 827, 831 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976) (a six month delay before trial for forgery charges was sufficient to trigger a speedy trial analysis); *Wells v. Petsock*, 941 F.2d 253, 257-58 (3d Cir. 1991) (217-day delay and incarceration triggered Barker inquiry); *United States v. Woolfolk*, 399 F.3d 590, 597-98 (4th Cir. 2005) (8-month delay triggered Barker inquiry); *United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992) (8 1/2-month delay triggered Barker inquiry); *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004).

Other courts, however, have held that delay of less than five months, and sometimes even longer delays, do not trigger constitutional inquiry. *See, Virgin Islands v. Birmingham*, 788 F.2d 933, 936 (3d Cir. 1986) (less than five month delay not sufficiently prejudicial to trigger constitutional inquiry); *United States v. Otero-Hernandez*, 743 F.2d 857, 858 n.3 (11th Cir. 1984) (seven month delay for charge of importing and possessing marijuana with intent to distribute not presumptively prejudicial enough to trigger speedy trial analysis); *United States v. Lugo*, 170 F.3d 996, 1002 (10th Cir. 1999) (7-month delay not presumptively prejudicial; court need not consider other Barker factors); *United States v. Derose*, 74 F.3d 1177, 1184 (11th Cir. 1996) (8-month delay not presumptively prejudicial; court need not consider other Barker factors); *United States v. White Horse*, 316 F.3d 769, 774 (8th Cir. 2003) (9 1/2-month delay too short to be presumptively prejudicial); *United States v. Gerald*, 5 F.3d 563, 566 (D.C. Cir. 1993) (11-month delay not presumptively prejudicial because no showing of actual prejudice and several months of delay attributable to defendant's pretrial motions; court need not consider other Barker factors); *United States v. Schreane*, 331 F.3d 548, 559 (6th Cir. 2003) (13 1/2-month delay attributable to government not presumptively prejudicial because delay was not "shockingly long").

In the present case, the trial court found that the defendant was charged on August 10, and that there was a delay of until "between October

19th and 26th,” when the necessary documents were sent to Western State. CP 52. The trial court thus calculated that there had been a delay of approximately 70 days before Western State was informed of the competency order.

Although delays for periods of as low as six months have been held to be sufficient to trigger inquiry under a constitutional speedy trial claim, the State has found no cases in which a delay of only 70 days was held to be sufficient to even trigger a constitutional inquiry. Furthermore, it is worth noting that under the Federal Speedy Trial Act, a defendant must be brought to trial within seventy days of the indictment or his initial appearance before a judicial officer. 18 U.S.C. § 3161(c)(1). In addition, the courts have held that the time limits set in the Federal Speedy Trial Act and more restrictive than the broader constitutional speedy trial limits. *United States v. Pollock*, 726 F.2d 1456, 1459-60 (9th Cir.1984). Given all of these facts, a delay of 70 days is insufficient to even trigger an inquiry regarding an alleged constitutional speedy trial violation, and further inquiry is not required.

Even assuming, however, that Walsh could meet the threshold inquiry and show a delay that was “presumed prejudicial,” the length of the delay would be only one factor to be considered in determining whether he was brought to trial within a constitutionally reasonable time. *Corrado*, 94 Wn. App. at 234. In examining the other factors, courts have held that the most

important factor is whether there has been a demonstration that the delay caused prejudice. *See, e.g., United States v. Molina*, 407 F.3d 511, 533 (1st Cir. 2005) (defendant's failure to demonstrate that delay caused prejudice to defense weighs heavily against defendant); *United States v. Williams*, 372 F.3d 96, 113 (2d Cir. 2004) (most important in *Barker* analysis was defendant's failure to articulate prejudice with any specificity); *Hakeem v. Beyer*, 990 F.2d 750, 761-64 (3d Cir. 1993) (defendant must show actual prejudice; 14 1/2-month incarceration did not give rise to presumption sufficient to establish speedy trial violation absent showing of oppressive conditions not normally attendant to incarceration); *United States v. Goodson*, 204 F.3d 508, 515 (4th Cir. 2000) (prosecution's failure to find witnesses in timely manner does not establish speedy trial violation in absence of prejudice to defendant); *United States v. Tannehill*, 49 F.3d 1049, 1054 (5th Cir. 1995) (defendant must show actual prejudice though there was extraordinarily long delay of 5 1/2 years); *Norris v. Schotten*, 146 F.3d 314, 328 (6th Cir. 1998) (defendant must establish prejudice if length of delay less than 1 year and defendant faces serious charges such as rape and kidnapping); *United States v. Brown*, 325 F.3d 1032, 1035 (8th Cir. 2003) (defendant must show actual prejudice despite 3-year delay because government acted reasonably and defendant failed to diligently assert his right); *United States v. Gregory*, 322 F.3d 1157, 1163 (9th Cir. 2003) (defendant must show actual

prejudice because presumption of prejudice for 22-month delay was not, by itself, enough to establish speedy trial violation); *Jackson v. Ray*, 390 F.3d 1254, 1263-66 (10th Cir. 2004) (no speedy trial violation where defense not prejudiced); *United States v. Harris*, 376 F.3d 1282, 1290 (11th Cir. 2004) (speedy trial rights not violated in conviction for fraudulent use of Social Security number because no prejudice from delay; defendant failed to show delay resulted in "specific prejudice to his defense"); *United States v. Register*, 182 F.3d 820, 827 (11th Cir. 1999) (defendant must show actual prejudice unless first 3 factors weigh heavily enough against government).

In the present case, there was no showing of any prejudice caused by the delay, and this fact must weigh heavily against a claim of a constitutional violation.

Another factor to be considered is whether the defendant asserted his right to a speedy trial. As also noted above, Walsh conceded that the time for trial was tolled, and the first claim of mismanagement was not made until November 1. CP 29, RP (11/1) 1-3. By this time, the order had already been sent to Western State, and the problem, therefore, had been addressed. In addition, defense counsel stated that it was his usual practice, and the practice of other defense attorney's in the county to also send the order to Western State themselves. RP (12/14) 5.

In *Carson*, the defendant's trial was not called on the day set, and was delayed for several days because the judge and both counsel were involved in another unrelated case. *Carson*, 128 Wn.2d at 814-15. Defense counsel knew that the delay would result in a speedy trial violation, knew that the state and the court were mistaken about the speedy trial expiration date, but asserted he had no obligation to tell anyone about it. *Carson*, 128 Wn.2d at 815. After the speedy trial period expired, the defendant moved to dismiss. *Carson*, 128 Wn.2d at 816. The trial court denied the motion and granted a retroactive extension to rectify the problem. *Carson*, 128 Wn.2d at 816.

The Washington Supreme Court affirmed. It noted that attorneys for both parties and the trial judge were unavailable on the original hearing date, which constituted an unforeseen circumstance warranting a trial extension. *Carson*, 128 Wn.2d at 814-15. The court further held that although the court is ultimately responsible for ensuring a speedy trial for the defendant, defense counsel has some responsibility to assert speedy trial rights before the speedy trial period expires. *Carson*, 128 Wn.2d at 816. Because defense counsel did not object when the trial did not begin on the scheduled trial date, but instead intentionally waited to assert his client's speedy trial rights until he knew the trial court could not take action to avoid violation of the rule, the defendant waived his speedy trial objection. *Carson*, 128 Wn.2d at 819, 822.

In *State v. Malone*, 72 Wn. App. 429, 431, 864 P.2d 990 (1994), the

state charged the defendant with a misdemeanor drug offense in district court. When that complaint was dismissed without prejudice, 26 days of the speedy trial period had elapsed. *Malone*, 72 Wn. App. at 431-32. The state then charged Malone with a felony in superior court based on the same underlying facts. *Malone*, 72 Wn. App. at 431. Malone's attorney did not object when the court set a January 25 trial date, although the speedy trial period had expired on January 4 due to the 26 day lapse. *Malone*, 72 Wn. App. at 432. On February 7, Malone moved for dismissal on speedy trial grounds. *Malone*, 72 Wn. App. at 432. The court held that CrR 3.3(f)(1) requires a party objecting to a trial date on speedy trial grounds to do so within 10 days or waive the objection. *Malone*, 72 Wn. App. at 433. The court held that 'a known speedy trial violation must be objected to before the speedy trial period expires to avoid violation of the rule or it is deemed waived.' *Malone*, 72 Wn. App. at 433 (citing *State v. Becerra*, 66 Wn. App. 202, 206, 831 P.2d 781 (1992) (holding that it was the defendant's 'responsibility to raise the {speedy trial} issue when action could still be taken to avoid violation of the rule')). Malone argued that because his counsel did not know of the elapsed time, counsel was unable to timely object. *Malone*, 72 Wn. App. at 434. The court held that trial counsel 'cannot wait to investigate easily ascertainable facts relevant to setting the correct trial date until after the speedy trial period expires.' *Malone*, 72 Wn. App. at 435. The court noted that Malone did not

dispute that the fact of his district court charge and the time elapsed was easily ascertainable. *Malone*, 72 Wn. App. at 434. Thus, the court concluded that Malone waived his speedy trial objection by failing to timely object to the trial date. *Malone*, 72 Wn. App. at 436.

In the present case Walsh did not make a speedy trial claim at all, but conceded that speedy trial was tolled. CP 29. Furthermore, Walsh did not even claim mismanagement until November 1; by which time the problem had been rectified and the order for evaluation had been sent to Western State. CP 52. Walsh, therefore, did not even allege a speedy trial violation, and even if the claim of mismanagement were construed as an assertion of a speedy trial violation, this assertion did not occur until after the problem with the order for evaluation had been rectified.

The other remaining factor is the reason for the delay. Although the trial court held that the State should have sent the necessary documents to Western State earlier than it did, there was no finding, nor was there even an allegation, that the State did so intentionally or did so in order to gain a tactical advantage of any kind. In short, there was no finding an intentional delay. This conclusion was bolstered by the fact that the State sought to immediately rectify the oversight when it was informed of the problem.

The fact that the reason for the delay was inadvertent, and that the

usual practice was for the defense attorneys to send a copy of the order for evaluation to Western State, supports a conclusion that the reason for the delay should be given less weight than might otherwise be the case. *See Barker*, 407 U.S. at 531 (stating that a deliberate attempt to delay trial in order to hamper defense "should be weighted heavily against the government"; a "more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered because the ultimate responsibility for such circumstances must rest with the government"; and "a valid reason, such as a missing witness, should serve to justify appropriate delay");); *U.S. v. Schreane*, 331 F.3d 548, 554-56 (6th Cir. 2003) (delay not weighted against government because motivation not bad faith and defendant equally responsible for delay); *U.S. v. Gregory*, 322 F.3d 1157, 1162 (9th Cir. 2003) (delay due to negligence weighted against government, though less heavily than deliberate delay); *U.S. v. Clark*, 83 F.3d 1350, 1353 (11th Cir. 1996) (per curiam) (delay due to government attempt to impede defense weighted more heavily against government than delay due to negligence).

The final step is to balance all the factors together. *Corrado*, 94 Wn. App. at 235. In the present case the length of delay does not rise to the level of a constitutional violation, Walsh has shown no specific prejudice, Walsh did not assert a speedy trial claim (and the claim of mismanagement was not

made until after the problem had been rectified, and the reason for the delay, even if attributable to the State, was mitigated by the fact that the delay was unintentional and not done maliciously, and by the fact that the defense also failed to send the order for evaluation to Western State. For these reasons, the record does not support a finding of a violation of Walsh's constitutional right to a speedy trial.

B. ASSUMING, ARGUENDO, THAT EVEN AFTER THE AMENDMENTS TO CRR 3.3 A TRIAL COURT MAY DISMISS A CASE FOR A NON-CONSTITUTIONAL, NON RULE-BASED SPEEDY TRIAL VIOLATION, THE TRIAL COURT ABUSED ITS DISCRETION WHERE THE STATE WAS AT WORST GUILTY OF A SINGLE INSTANCE OF SIMPLE NEGLIGENCE WHICH DID NOT SUPPORT THE EXTRAORDINARY REMEDY OF DISMISSAL.

CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Thus, the defendant must show two things before the court can dismiss charges under CrR 8.3(b). First, the defendant must show arbitrary action or governmental misconduct. *Michielli*, 132 Wn.2d at 239.

Governmental misconduct can be actions of an evil or dishonest nature or mismanagement. *Michielli*, 132 Wn.2d at 239 citing *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). Second, the defendant must show prejudice affecting the defendant's right to a fair trial. *Michielli*, 132 Wn.2d at 240. Thus, once the defendant has shown governmental misconduct, he then must show that such misconduct prejudiced his right to a fair trial.

Although mismanagement is sufficient to establish governmental misconduct, Washington courts have clearly maintained that dismissal under CrR 8.3 is an extraordinary remedy to which the court should resort only in "truly egregious cases of mismanagement or misconduct." See *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441; see also *Blackwell*, 120 Wn.2d at 830; *State v. Flinn*, 119 Wn. App. 232, 247, 80 P.3d 171 (2003); *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441 (1993) (court's authority to grant a dismissal under CrR 8.3 has been limited to truly egregious cases of mismanagement or misconduct by the prosecutor and does not extend to acts of "simple negligence"). Washington courts have explained that CrR 8.3(b) is a remedy that trial courts should turn to only as a last resort. *Wilson*, 149 Wn.2d at 12.

The cases where Washington appellate courts have upheld a trial court's decision to dismiss under CrR 8.3(b) involve situations where there

were numerous incidents of prosecutorial mismanagement or egregious misconduct by the State. For example, in *State v. Dailey*, 93 Wn. 2d 454, 458, 610 P.2d 357 (1980), the trial court dismissed the case based on numerous incidents of prosecutorial mismanagement that occurred throughout the proceedings. The Washington Supreme Court upheld the dismissal because it found that the State had violated court rules and specific court orders throughout the course of the proceedings. *Dailey*, 93 Wn. 2d at 459.

In *Michielli*, the Washington Supreme Court upheld the dismissal based on governmental mismanagement where the prosecutor amended the information to add four additional charges five days before trial despite having possessed all the necessary information regarding the defendant's actions since filing the original information five months before. *Michielli*, 132 Wn.2d at 243-44. The Court indicated that the prosecutor gave no reasonable explanation for the delay and that the facts strongly suggested that the prosecutor's delay in adding the charges was done to harass the defendant. *Michielli*, 132 Wn.2d at 243-44. The Court concluded that dismissal was appropriate given that the prosecutor's actions forced the defendant to either give up his right to a speedy trial or go to trial unprepared. *Michielli*, 132 Wn.2d at 244-45.

In *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990), the

Washington Court of Appeals found that dismissal was proper because there were numerous instances of prosecutorial mismanagement. In *Sherman*, the State filed a late amendment of the information, failed to produce a separate witness list as ordered, attempted to expand the witness list on the day of trial, and failed to produce IRS forms as it agreed to do in the omnibus order and failed to move for reconsideration until the day after trial was set to begin. *Sherman*, 59 Wn. App. 763. In upholding the dismissal, the Court stressed the fact that the State's actions had forced the defendant to either give up her right to a speedy trial or go to trial represented by counsel who had not had sufficient time to prepare a defense. *Sherman*, 59 Wn. App. at 769-773.

The State's conduct in this case does not reach the level of governmental misconduct intended by CrR 8.3 as justifying the extraordinary remedy of dismissal. Courts should look to dismissal only in truly egregious cases and only as a last resort. See *Wilson*, 149 Wn.2d 1; *Duggins*, 68 Wn. App. 396; *Blackwell*, 120 Wn.2d 822; *Flinn*, 119 Wn. App. 232. "When they deem it necessary, Washington appellate courts have not hesitated in overturning a trial court's dismissal of charges." *Sherman*, 59 Wn. App. at 767. A trial court's decision to dismiss under CrR 8.3 has focused on cases where there have been numerous instances of prosecutorial misconduct and mismanagement that have resulted in forcing a defendant to either give up his

right to a speedy trial or go to trial unprepared. *See Michielli*, 132 Wn.2d 229; *see also Sherman*, 59 Wn. App. 763. This case simply does not reach the level of governmental misconduct warranting dismissal.

Furthermore, the trial court failed to impose a remedy less drastic than dismissal, despite the fact that the State (as well as the defense) had suggested that releasing Walsh pending his trial was possible. CP 37, RP (12/14) 6, 18.

If the trial court is contemplating the extraordinary remedy of dismissal, it should first consider whether there are any intermediate alternatives. *See Wilson*, 149 Wn.2d at 12. In *Wilson*, the State's witness was uncooperative and a witness interview did not occur by the deadline. *Wilson*, 149 Wn.2d at 4-6. The State suggested releasing the defendant from custody, thereby adding 30 days to the speedy trial clock, in hopes of gaining the witness' cooperation (the other defendants were out of custody so speedy trial was not an issue yet). *Wilson*, 149 Wn.2d at 4-6. The trial court denied this request and dismissed the case under CrR 8.3(b). *Wilson*, 149 Wn.2d at 5-6. The Court of Appeals, in an unpublished opinion, reversed the trial court; the Washington Supreme Court affirmed. *Wilson*, 149 Wn.2d at 8, 13. The Washington Supreme Court explained:

Because Irons was not in custody and his speedy trial expiration was not imminent, his case should not have been dismissed until speedy trial expiration became an issue. Furthermore, the trial court could have ordered Wilson and Taylor released in order to extend the speedy trial expiration from 60 to 90 days, giving the prosecutors

more time to arrange interviews with the now cooperating witnesses. Although release may not be ideal, such an intermediate step should have been attempted before resort to the extraordinary remedy of dismissal.

Wilson, 149 Wn.2d at 12. Although granting Walsh pretrial release might not have been ideal in the present case, such a step should have been attempted before the trial court imposed the remedy of last resort: dismissal. Pretrial release would have meant that Walsh could have remained out of custody while Western State prepared its report and while the parties litigated his competency. These periods would normally, of course, had been excluded from the calculation of speedy trial, and thus granting pretrial release would have ameliorated the prolonged detention he incurred due to the delay. The trial court, therefore, erred in not considering a remedy less drastic than dismissal.

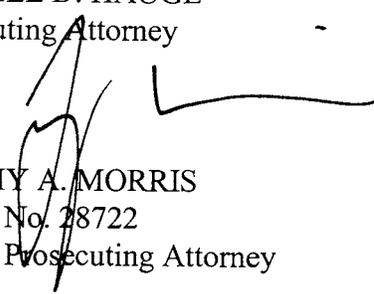
V. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court's order dismissing the case with prejudice and remand the cause for trial.

DATED July 28, 2006.

Respectfully submitted,

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