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COURT OF APPEALS  
DIVISION II

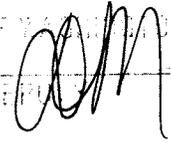
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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

DEPUTY



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STATE OF WASHINGTON,

Respondent,

vs.

STEWART S. BERGLUND,

Appellant,

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Richard d. Hicks, Judge  
Cause No. 06-1-02226-6

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in continuing Berglund's trial beyond the speedy trial period.
02. The trial court erred in failing to dismiss with prejudice Berglund's convictions where he did not receive a timely trial under CrR 3.3.
03. The trial court erred in permitting Berglund to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the agreed order on February 12 continuing his trial beyond the speedy trial period.
04. The trial court erred in calculating Berglund's offender score by including his alleged prior criminal convictions in determining his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in continuing Berglund's trial and in failing to dismiss with prejudice Berglund's convictions where he did not receive a timely trial under CrR 3.3? [Assignments of Error Nos. 1 and 2].
02. Whether the trial court erred in permitting Berglund to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the agreed order on February 12 continuing his trial beyond the speedy trial period? [Assignment of Error No. 3]
03. Whether the trial court erred in calculating Berglund's offender score by including his alleged prior criminal convictions in determining his offender score? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Stewart S. Berglund (Berglund) was charged by first amended information filed in Thurston County Superior Court on February 23, 2007, with vehicle prowling in the second degree, count I, and with four counts of theft in the second degree, counts II-IV, contrary to RCWs 9A.52.100(1) and 9A.56.040(1)(c), respectively. [CP 10].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7-8]. Trial to a jury commenced on February 27, the Honorable Richard D. Hicks presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 96].

The jury returned verdicts of guilty as charged, Berglund was sentenced within his standard range and timely notice of this appeal followed. [CP 14-18, 43-58].

02. Substantive Facts

On the morning of December 3, 2006, Berglund was observed in a parking reaching into the car through a broken window and grabbing a purse containing four credit cards belonging to the owner of the vehicle and then retreating to another vehicle driven by a female who drove the two from the scene. [RP 02/27/07 39-42, 45, 48-53, 63]. The purse containing the four credit cards was in the vehicle with Berglund

when he was arrested a short time later. [RP 02/27/07 62-63, 74]. He admitted to breaking into the vehicle in the parking lot and to taking the purse, further saying that the female driver knew nothing about what he was doing. [RP 02/27/07 83-89].

Berglund rested without presenting evidence. [RP 02/27/07 93].

D. ARGUMENT

01. BERGLUND'S SPEEDY TRIAL RIGHT WAS VIOLATED AND HIS CONVICTIONS MUST BE REVERSED AND DISMISSED WITH PREJUDICE.

01.1 Relevant Procedure

Following his arraignment on December 13, 2006, Berglund's trial was set for the week of February 5, 2007, under CrR 3.3(b)(2)(i). [CP 60; RP 01/31/07 3; RP 02/27/07 6, 14]. On January 31, 2007, the trial date was continued one week beyond the February 5 setting to February 12, the last allowable date for trial under the applicable 60-day rule. [RP 01/31/07 3-4, 6; CP 61]. On February 7, the court asked the prosecutor if the State was available for the pending trial "without conflicts?" [RP 02/07/07 5]. The prosecutor responded, "That's correct, your Honor." [RP 02/07/07 5]. On February 12, counsel for Berglund appeared in court without her client and made the following representation:

We are prepared to go to trial this week. I understand (the prosecutor) is requesting a one-week continuance. I have no objection to that, your Honor.

[RP 02/12/07 4].

Counsel for Berglund proceeded to sign an "Agreed Order of Trial Continuance(,)" therein continuing the trial date until February 20 and the last allowable date for trial to March 22. Berglund did not sign this order.

[CP 62]. Two days later at a status conference hearing on February 14, counsel for Berglund informed the court of the following:

We are prepared to go to trial next week. We have been prepared. (The prosecutor) is in trial at this time, and I believe this matter is going to be number two or three priority on his list next week. The reason I wanted to get this on the record, your Honor, is because Mr. Berglund is continuing to ask for new counsel, and objects to continuances, your Honor....

[RP 02/14/07 4].

On February 22, a notation order was entered indicating that the trial scheduled for February 22 is "Cancelled: Court's Request." [CP 63].

Prior to the start of trial on February 27, counsel for Berglund informed the court as follows:

Your Honor, this matter was continued on a couple of occasions for various reasons, court business, mostly, and Mr. Berglund has objected to those and he's asking for a dismissal based on denial of speedy trial.

RP 02/27/07 5-6].

In response, the prosecutor represented to the court that the previous continuances were the result of his unavailability due either to his being out of state or involved in other trials. [RP 02/27/07 7, 14-15].

Berglund made the following argument: “First of all, I wasn’t present on the 12<sup>th</sup> to sign a waiver of continuance.” [RP 02/27/07 9]. On this point, the court noted that the absence of Berglund’s signature “alone doesn’t necessarily invalidate the order. Some defendants just say I’m not going to sign anything.” [RP 02/27/07 11]. Berglund then informed the court: “All I know is I’ve asked my attorney twice on previous occasions to raise up my speedy trial rights at the hearings and she refused.” [RP 02/27/07 12-13]. Counsel for Berglund then noted that although she had tried to explain to her client “the matter of good cause for which this trial was continued each time that it was continued(,)”

his position was that he never would sign a waiver. And there was never any use calling him up to court because that was the position that he made clear to me in my discussions with him. [Emphasis added].

[RP 02/27/07 13].

The court denied Berglund’s motion to dismiss. [RP 02/27/07 15].

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## 01.2 Argument

A criminal charge must be dismissed with prejudice if it is not brought to trial within the time limit determined under CrR 3.3. CrR 3.3(h). The trial court bears the ultimate responsibility to ensure that the trial is held within the speedy trial period. CrR 3.3(a)(i); State v. Jenkins, 76 Wn. App. 378, 383, 884 P.2d 1356 (1994).

In reviewing an alleged violation of the speedy trial rule, the court applies the rule to the particular facts to determine whether there exists a violation that mandates dismissal. State v. Carlyle, 84 Wn. App. 33, 35, 925 P.2d 635 (1996). The application of a court rule to particular facts is a question of law reviewed de novo. Carlyle, 84 Wn. App. at 35.

The courts have “consistently interpreted CrR 3.3 so as to resolve ambiguities in a manner which supports the purpose of the rule in providing a prompt trial for the defendant once prosecution is initiated.” State v. Edwards, 94 Wn.2d 208, 216, 616 P.2d 620 (1980).

... [P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.

State v. Striker, 87 Wn.2d 870, 876-77, 557 P.2d 847 (1976) (citations omitted).

A defendant who has not been brought to trial within the time limits of CrR 3.3(b) is not required to show actual prejudice or prosecutorial misconduct. Instead, failure to comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice. State v. Ralph Vernon G., 90 Wn. App. 16, 20-21, 950 P.2d 971 (1998).

Under CrR 3.3(f)(1), an agreed order continuing a trial date is valid only if signed by the defendant. As the record demonstrates, Berglund did not sign the “Agreed Order” entered on February 12 that extended his trial beyond the last allowable date for his trial under CrR 3.3(b)(2)(i), in addition to extending the last allowable date for trial to the following March 22. [CP 62].

The reasons for this are appalling. Counsel for Berglund appeared in court on February 12 without her client and represented to the court that she had “no objection” to continuing the trial date [RP 02/12/07 4], even though she was aware that her incarcerated client had made it “clear” to her that he was opposed to this. [RP 02/14/07 4; RP 02/27/07 5-6, 13]. Not only did she not advise the court of this at that time, she knowingly and intentionally and with premeditation, if you will, unilaterally made the decision that there was “never any use” having her client in court to sign the order, as required by the above authority, because she knew his

decision differed from her own [RP 02/27/07 13], thus affording her the opportunity to present an unchallenged position adverse to her client's.

The fact that the trial date was again continued on February 22 at the "Court's Request" is of no consequence, since it was predicated on the invalid February 12 "Agreed Order(,)" which had improperly extended the relevant dates. And the trial court was way off when it denied Berglund's motion on the day of trial to dismiss for violation of his speedy trial rights, for the reason that his signature did not invalidate the February 12 order, as demonstrated by the court's very example. While it is no doubt true that some defendants just say they are "not going to sign anything," this would only occur if the defendant was afforded the opportunity to do so, which Berglund was intentionally denied.

Under the express language of CrR 3.3(f)(1), the "Agreed Order" here at issue was invalid because it was not signed by Berglund. There never was an agreement to continue the trial date, at least not one that included Berglund, whose opposition was intentionally shielded from the court by his attorney.

Under these unique facts, Berglund's convictions must be reversed and dismissed with prejudice because he did not receive a timely trial.

Ralph Vernon G., 90 Wn. App. at 20-21.

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02. BERGLUND WAS PREJUDICED AS A RESULT OF HIS TRIAL COUNSEL'S FAILURE TO OBJECT TO OR BY AGREEING TO THE AGREED ORDER ON FEBRUARY 12 CONTINUING HIS TRIAL BEYOND THE SPEEDY TRIAL PERIOD.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant,

State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the issues relating to the violation of Berglund's speedy trial rights previously set forth herein by either affirmatively assenting to or failing to object to the "Agreed Order" then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have so acted for the reasons set forth in the preceding section of this brief. None.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: but for counsel's actions and lack thereof, the court would not have entered the order at issue continuing the trial date beyond the applicable speedy trial period.

03. THE TRIAL COURT MISCALCULATED BERGLUND'S OFFENDER SCORE BY INCLUDING HIS ALLEGED PRIOR CRIMINAL CONVICTIONS IN DETERMINING HIS OFFENDER SCORE.

Without objection or acknowledgment, the trial court included Berglund's alleged prior criminal convictions in determining his offender score. [RP 03/09/07 3-8; CP 43-58].

One of the following must occur for a trial court to include prior convictions in a defendant's criminal history: (1) the State proves the prior convictions with the required evidence; (2) the defendant admits to the prior convictions; (3) the defendant acknowledges the prior convictions by failing to object to their inclusion in a presentence report. RCW 9.94A.500(1); RCW 9.94A.530(2).

Since none of the above happened during Berglund's sentencing [RP 03/09/07 3-8], the trial court erred by including his alleged prior criminal convictions in determining his offender score. While issues not raised in the trial court may not generally be raised for the first time on appeal, State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996), illegal or erroneous computations of an offender score that alter the defendant's standard sentence range may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). If Berglund's alleged prior criminal convictions were improperly included in his

offender score calculation, his offender score would drop from 22 points to one point, and, correspondingly, his sentencing range from 22 to 29 months to 0 to 90 days. [CP 57].<sup>1</sup> At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d at 479-80. A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d at 481-82.

Berglund's sentence should be remanded for resentencing under the general rule that the State is held to the existing record on remand. State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). At the sentencing hearing, given that the State presented no evidence to prove Berglund's alleged prior criminal convictions here at issue, there was nothing to object to in this regard. Unlike the facts in State v. Ford, 137 Wn.2d at 485, where our Supreme Court remanded for an evidentiary hearing to permit the State to prove the disputed matters because "defense counsel has some obligation to bring deficiencies of the State's case to the attention of the sentencing court(,)" 137 Wn.2d at 485, here there was no

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<sup>1</sup> Berglund was sentenced to 12 months for the vehicular prowling conviction in count I, a gross misdemeanor. [CP 45, 48].

“State’s case.” Nothing occurred that could possibly have warranted an objection from Berglund’s counsel.

In In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), a three-strikes case where Cadwallader had failed to object to his criminal history at sentencing, and thereby failed to put the sentencing court on notice that one of his prior strike convictions had washed out, our Supreme Court ruled that the State would be held to the existing record on remand, stating, “(g)iven that Cadwallader had no obligation to disclose his criminal history, it follows that he had no obligation to object to the State’s failure to include the 1985 Kansas theft conviction in his criminal history.” Id. at 876.

Here, because Berglund was under no obligation to prove his alleged prior criminal convictions – that being the State’s exclusive burden – he was under no obligation to object to the State’s failure to present any evidence to establish these convictions. In short, since there was no “State’s case” vis-à-vis these convictions, and thus nothing warranting an objection from Berglund, his sentencing on this issue should be remanded and the State held to the existing record.

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E. CONCLUSION

Based on the above, Berglund respectfully requests this court to reverse and dismiss his convictions or to remand for resentencing consistent with the arguments presented herein.

DATED this 26<sup>th</sup> day of October 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 26<sup>th</sup> day of October 2007.

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