NO. 36022-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STEWARD S. BERGLUND,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

THE HONORABLE RICHARD D. HICKS, JUDGE

CAUSE NO. 06-1-02226-6

BRIEF OF RESPONDENT

EDWARD G. HOLM
Thurston County
Prosecuting Attorney

JEREMY R. RANDOLPH WSBA NO. 2248
Special Senior Deputy
Prosecuting Attorney
Attorneys for Respondent
P.O. Box 1206
Cannon Beach, OR 97110
360.219.6861

TABLE OF CONTENTS

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 1

A. BERGLUND'S RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED BY THE GRANTING OF TWO 5 DAY EXTENSIONS DUE TO THE UNAVAILABILTY OF THE STATE'S ATTORNEY..... 1

B. BERLUND DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE A TIME FOR TRIAL EXTENSION WAS FOR GOOD CAUSE AND WOULD HAVE BEEN PROPER WITH OR WITHOUT AN AGREED ORDER OF CONTINUANCE 7

C. THE TRIAL COURT DID NOT ERROR IN CALCULATING BERGLUND'S OFFENDER SCORE BY INCLUDING HIS TWENTY-ONE PRIOR CONVICTIONS WHERE THE PARTIES ACKOWLEDGED THE EXISTENCE OF, AT LEAST, TWENTY PRIOR CONVICTIONS AND DEFENSE COUNSEL ARGUED FOR A TOP OF THE RANGE SENTENCE OF 29 MONTHS THAT WAS THE TOP OF THE RANGE OF 22-29 MONTHS FOR A PERSON WITH NINE OR MORE PRIOR CONVICTIONS 8

IV. CONCLUSION.....12

TABLE OF AUTHORITY

Table of Cases

In re PR of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) . 9,10

In re PR of Goodwin, 146 Wn2d 861, 50 P.3d 618 (2002) 10

State ex rel. Carrol v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 6

State v. Berglund, 65 Wn.App. 648, 829 Wn2d 247 (1992) 11

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) 12

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 7

State v. Johnson, 118 Wn.2d 151, 132 P.3d 737 (2006) 3

State v. Kelly, 64 Wn.App. 775, 828 P.2d 1106 (1992) 6

State v. Kenyon, 2008 Wash. App. *LEXIS* 389 3

State v. Krause, 82 Wn.App. 688, 919 P.2d 123 (1996) 6

State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002). 10

State v. McFarland, 127 Wn2d 322, 899 P.2d 1251 (1995) 8

State v. Nitsch, 100 Wn.App. 512 P.2d 1000 (2002) 12

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 8

State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003) 9

Court Rules:

CrR 3.3 1,5

CrR 3.3(b) 2

CrR 3.3(c)(1)_ 3

CrR 3.3(e) 2

CrR 3.3(e)(3) 2

CrR 3.3(f) 2

CrR 3.3(f)(1) 2

CrR 3.3(f)(2) 2

A. STATEMENT OF THE ISSUES

1. Whether the trial court erred in continuing Berglund's trial when the judge made findings that "good cause" for a resetting existed due to the unavailability of the State's assigned trial attorney?

2. Whether Berglund received ineffective assistance of counsel where his attorney agreed to a continuance?

3. Whether the trial court erred in calculating Berglund's offender score by including 20 prior felony convictions that were acknowledged by the defense?

B. STATEMENT OF THE CASE

The State accepts as adequate, for the purposes of this response, Appellant's "Statement of the Case" [App. Br. 2-3] and the recitation of facts set out in the introductory portion of Appellant's "Argument" [App. Br. 3-5], subject to notations contained in argument.

C. ARGUMENT

1. Berglund's right to a speedy trial was not violated by the granting of two 5 day extensions due to the unavailability of the State's attorney.

Under CrR 3.3, a defendant must be brought to trial within 60 days of the commencement date

specified in the rule if the defendant is in custody, or within 90 days of the commencement date if the defendant is out of custody, minus any period of time which is excluded in computing the time for trial and minus a period of 30 days beyond any such excluded period. CrR 3.3(b) and (e). Any delay in the form of a continuance granted by the court pursuant to CrR 3.3(f) constitutes such an excluded period. CrR 3.3(e)(3).

Under CrR 3.3(f), a continuance may be granted by a written agreement of the parties signed by the defendant. CrR 3.3(f)(1). The court can also continue the trial date without agreement of both parties if the court determines that the continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his defense. CrR 3.3(f)(2). As has been recently noted by this court, "It is clear that the relaxation (in 2003) of the speedy trial rule was meant to transition from a hyper-technical

application of the rules to one that allowed more time for the State, defense counsel, and the trial court to prepare for trial." *State v. Kenyon,* 2008 Wash. App. *LEXIS* 389, para. 29.

When an appellate court examines whether a defendant's trial occurred beyond the speedy trial period, such an examination requires an application of the court rule to particular facts. Therefore, the issue is a question of law, and so the appellate court determines de novo whether the speedy trial period was exceeded. *State v. Swenson,* 150 Wn.2d 181, 186, 75 P.3d 513 (2003). Additionally, an appellate court reviews the trial court's decision to grant a motion for a continuance for abuse of discretion. *State v. Johnson,* 132 Wn.App. 400, 411, 132 P.3d 737 (2006), *review denied,* 153 P.3d 196 (2007).

The arraignment in this cause took place on 13 December 2006. Thus, that became the commencement date pursuant to CrR 3.3(c)(1). Since the defendant was in custody, the trial was initially set for 5 February 2007, within a 60-

day period from the commencement date and 7 days before the time for trial expiration date - 12 February 2007. On 31 January 2007, after being informed that the State's attorney had previously scheduled a trip out of the state [RP 01.31.08 @ 3], the calendar judge reset the trial for 12 February 2007. At the hearing, defense counsel indicated that she had no objections stating: "I think a delay would be in Mr. Berglund's best interest for a couple of reasons . . ." and Berglund told the judge, "I have no problem signing a waiver 30, 60 days it is to get a new attorney." [RP 01.31.08 @ 4].

On 12 February 2007, the case was set over to 20 February 2007 (19 February was holiday) at the State's request because the assigned State's attorney had a trial conflict for the week of 12 February 2007. [RP 02.12.08 @ 4-5]. Defense counsel also needed a continuance due to a scheduled trial conflict for the week of 20 February 2007. The defendant having indicated that he was willing to sign a time of trial at the

31 January hearing, defense counsel signed an agreed order of continuance. [CP 62]. The trial date was again reset because the assigned State's trial attorney had a trial scheduling conflict on the 20th, 21st, 22nd and 26th of February. [RP Trial 7].

The result of the forgoing was that the case was tried 15 days (10 judicial days) after the initial expiration date. At the commencement of the trial, the trial judge, in response to Berglund's motion to dismiss for a time of trial violation, made findings that the continuances had been made for "good cause," specifically, unavailability of the State's assigned trial attorney. [RP Trial 10-11].

Under earlier "hyper-technical" versions of CrR 3.3, appellate courts have found that cases continued beyond the time for trial expiration date because of a deputy prosecutor's scheduling conflicts or a deputy prosecutor's pre-planned vacation were unavoidable or unforeseen circumstances justifying an extension of the time

for trial period. *State v. Krause,* 82 Wn.App. 688, 698, 919 P.2d 123 (1996), *review denied,* 131 Wn.2d 1007 (1997) [conflict in deputy prosecutor's trial schedule]; *State v. Kelly,* 64 Wn.App. 755, 767, 828 P.2d 1106 (1992). [deputy prosecutor had planned vacation]. It is the State's position that under the current reading of the rule the 2 extensions granted based on the deputy prosecutor's trial scheduling conflicts were for "good cause." Abuse of discretion occurs when the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel Carrol v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial judge did not manifestly abuse his discretion by granting the extensions and Berglund submits no evidence of substantial prejudice by the delay. Neither his constitutional "speedy trial" rights nor his court created "time for trial" rights were violated.

2. <u>Berglund did not receive ineffective assistance of counsel where a time for</u>

trial extension was for good cause and would have been proper with or without an agreed order of continuance.

Berglund argues that he received ineffective assistance of counsel where his attorney signed an agreed order of continuance for a week. As noted above, the extensions first from 12 February to 20 February and then to 27 February were granted for good cause due the State's attorney's trial scheduling conflicts. Whether or not an agreed order was signed by defense counsel and whether or not Berglund was present, the trial judges did not abuse their discretion in extending the time for trial for a total of 10 judicial days. Berglund shows no prejudice from the brief delay.

To show ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation was deficient and that the deficiency prejudiced the trial's outcome. *State v. Hendrickson,* 129 Wn.2d 61, 77-8, 917 P.2d 563 (1996). Prejudice results where there is a reasonable probability that, but for counsel's deficient performance, the outcome would have

differed. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

An appellate court presumes that counsel provided competent and adequate representation and reviews performance in light of the entire record. *State v. Lord,* 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Counsel's representation is deficient only if it falls below an objective standard of performance. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

3. The trial court did not error in calculating Berglund's offender score by including his twenty-one prior convictions where the parties acknowledged the existence of, at least, twenty prior convictions and defense counsel argued for a top of the range sentence of 29 months that was the top of the range of 22-29 months for a person with nine or more prior convictions.

At sentencing, all parties were aware that Berglund had, at least, twenty (20) prior convictions. [RP Sentencing 3-7]. At the outset of the sentencing, the trial judge specifically refers to the State's statement of criminal history in the following manner: "Mr. Berglund's criminal history, which is fairly substantial, and

he has an offender score of 22, which is off the chart. The chart only goes up to nine, and so his standard range is 22-29 months" [RP Sentencing 3]. In argument the State referred to a criminal history of 21 prior felonies. [RP Sentencing 4]. In her argument defense counsel acknowledged that the standard range was 22 to 29 months [RP 5] and agreed that the State's top of the range sentence recommendation was a "very fair recommendation." [RP Sentencing 5}. Defense counsel did indicate that Berglund felt that his criminal history "should be one point less." Counsel further noted that "There was an appeal heard but did not result in any less points on his history."

Berglund now disputes the calculation of his offender score for the first time on appeal. An appellate court reviews a sentencing court's calculation of an offender score de novo. *State v. Tili,* 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of*

Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). If the State alleges the existence of prior convictions at sentencing and the defense fails to "specifically object" before the imposition of sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence. *State v. Lopez,* 147 Wn.2d 515, 520, 55 P.3d 609 (2002). If, as here, the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after the sentence is imposed. *In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Sentencing courts can rely on defense acknowledgment of prior convictions without further proof. *Cadwallader,* 155 Wn.2d at 873. Acknowledgement includes not objecting to information included in presentence reports. *Id.* at 874. It is the State's position that failure to object to information in a

prosecutor's statement of criminal history also amounts to an acknowledgement of the prior convictions contained therein. Here, while the defendant did object to inclusion of one felony conviction, defense counsel indicated to the court that there had not been a reversal of the conviction. A review of cases in LexisNexis and MSRC involving Stewart S. Berglund indicate but one case which was an affirmation of Berglund's 1990 King County second degree burglary conviction, 65 Wn.App. 648, rev. denied, 119 Wn.2d 1012 (1992). Defense counsel was correct.

Calculation of an offender score may not be challenged for the first time on appeal where, as here, defense counsel not only failed to identify a factual dispute for the sentencing judge's resolution, but explicitly acknowledged the State's offender score calculation, clearly leading the sentencing judge to believe that the proper sentencing range was 22-29 months - the range for second degree theft for a person with 9 or more felony priors. *State v. Nitsch,* 100

Wn.App 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000).

D. CONCLUSION

Berglund's conviction and sentence should be affirmed.

Pursuant to RAP 14.2 and 14.3 and RCW 10.73.160, the State respectfully requests that appellant be required to pay all taxable costs of this appeal, including the cost of the reproduction of briefs, verbatim transcripts, clerk's papers, filing fee, and the fee to be paid to appellant's court-appointed counsel. *State v. Blank,* 131 Wn.2d 230, 910 P.2d 545 (1996).

Dated this 28th day of February, 2008.

Respectfully submitted,
ED HOLM, Thurston County
Prosecuting Attorney

By _____
JEREMY R. RANDOLPH WSBA 2248
Special Senior Deputy
Prosecuting Attorney
for Thurston County
Attorney for Respondent
P.O. Box 1206
Cannon Beach, OR 97110
360.219.6861

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CERTIFICATE

I certify that on the 4th day of March, 2008 I mailed a copy of the foregoing Response Brief by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

Thomas E. Doyle P.O. Box 510 Hansville, WA 98340-0510	Steward S. Berglund c/o Thomas E. Doyle same address

DATED this 4th day of March, 2008.

Jeremy Randolph