

FILED  
COURT OF APPEALS  
DIVISION II

08 OCT 17 AM 11:20 NO. 37458-7-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
BY ~~DEPUTY~~  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

TRAMAINE GREGORY MILES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Susan K. Serko

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BRIEF OF APPELLANT

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RM 10/16/08

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to speedy sentencing.

Issue Pertaining to Assignment of Error

Is dismissal required where the trial court violated appellant's constitutional right to speedy sentencing by granting the State's motion to continue sentencing which unreasonably delayed appellant's sentencing and the delay was purposeful and oppressive?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

On November 24, 2007, the State charged appellant, Tramaine Gregory Miles, with count I, robbery in the first degree with a deadly weapon enhancement; count II, attempting to elude a pursuing police vehicle with a deadly weapon enhancement; count III, obstructing a law enforcement officer; and count IV, driving while in suspended or revoked status in the second degree. CP 1-3. On January 3, 2008, the State filed a persistent offender notice. CP 6. The State amended the information on January 24, 2008 and deleted count IV. CP 9-11. On January 28, 2008, the State filed a second amended information and deleted the deadly

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<sup>1</sup> There are 10 volumes of verbatim report of proceedings: 1RP - 11/26/07; 2RP - 1/17/08; 3RP - 1/22/08; 4RP - 1/23/08; 5RP - 1/24/08; 6RP - 1/28/08 a.m.; 7RP - 1/28/08 p.m.; 8RP - 1/29/08; 9RP - 2/29/08; 10RP - 3/14/08.

weapon enhancement for count II. CP 12-13; RCW 9A.56.190, RCW 9A.56.200(1)(a)(ii), RCW 46.61.024(1), RCW 9A.76.020(1). Following a trial before the Honorable Susan K. Serko, a jury found Miles guilty as charged on January 29, 2008 and the court set sentencing for February 29, 2008. CP 41-44; 8RP 4-5, 11. On February 29, 2008, the court granted the State's motion to continue sentencing to March 14, 2008. 9RP 8. On March 14, 2008, the court entered findings of fact and conclusions of law classifying Miles as a persistent offender and sentenced him to life in prison without the possibility of parole. CP 51-52, 66-69; 10RP 18-20.

2. Substantive Facts

a. Trial

Vincent San Nichols, a loss-prevention officer for Marshalls in the Lakewood Towne Center, testified that he was monitoring the store's video surveillance system on November 24, 2007. 7RP 310. Marshalls had seven or eight cameras positioned throughout the store. 7RP 311. San Nichols and Amparo Medina-Perez, a store detective, were working in the surveillance office and paying particular attention to an area in the store where Phat Farm jackets were displayed because of recent thefts. 7RP 310-12. Between nine to eleven similar jackets had been stolen from the store. 7RP 344.

At approximately 4:15 p.m., San Nichols noticed a man looking at the Phat Farm jackets that were secured to a rack with cables and a locking mechanism. 7RP 313-15. San Nichols focused the camera system on the man when he selected a jacket, pulled it down, and reached into his pocket, "that's when I zoomed in." 7RP 315. San Nichols saw a cable falling down from the rack and the man walking away with the jacket so he sent Medina-Perez to "make contact" with the man if he left the store. 7RP 315-16. He also notified the store manager and assistant manager. 7RP 316.

While Medina-Perez was waiting in the vestibule area at the front of the store, San Nichols continued to watch the man who was carrying the jacket and walking into the men's department, "at this point, he kneels down. And after a minute, he pops back up into camera view, and he puts on a bag that is filled with something." 7RP 317-18. When the man went toward the front of the store, San Nichols called Medina-Perez on his cell phone and he ran after the man as he was leaving the store. Although all the jackets had an electronic tag on them, no one heard the security alarm as the man passed through the doors. 7RP 330-32, 4RP 155-56, 190. San Nichols saw Medina-Perez approach the man and "it looked like she was falling backwards as he was walking away." 7RP 320-21. He heard the

man say, “[s]tep back” and then the man ran through the parking lot and jumped in a maroon or red truck. 7RP 321-22.

San Nichols noticed a patrol car in the parking lot so he told the store manager to “make contact with the police officer.” 7RP 322. San Nichols continued to follow the man and heard something drop “that sounded like metal.” 7RP 322. San Nichols searched for what he thought was a weapon but recovered a chrome flashlight that the man dropped as he fled the scene. 7RP 322-24, 346. San Nichols saw a patrol car turn on its lights and pursue the truck that kept going when the patrol car got behind it. 7RP 324. He gave the flashlight that he retrieved to police. 7RP 324.

Thereafter, an officer returned to Marshalls and transported the store manager and San Nichols to a location where he identified a suspect apprehended by the police as the man “that was involved with the incident.” 7RP 325-26. San Nichols testified that Miles was the man he recorded on the surveillance system on November 24, 2007 and he described what occurred as the jury viewed the video tape which was admitted as evidence. 7RP 327, 337-42.

Amparo Medina-Perez testified that she and San Nichols watched Miles on the surveillance system as he detached a coat from a rack and was walking around the store carrying the coat. 4RP 169-71. San Nichols

instructed her to go out to the vestibule so that she could confront Miles if he attempted to leave the store with the coat. 4RP 172. Medina-Perez waited in the vestibule and as Miles came through the first set of doors, she approached Miles and identified herself as store security. 4RP 184. When she attempted to speak to Miles, he said, "Step back, little girl. You're going to get stepped on," and pushed her back. 4RP 184. Miles left through the second set of doors and as she followed him, he said, "Step back," and took out something that "appeared to be a blade" and pointed it at her. 4RP 185-86. She was standing "pretty far away" from Miles. 4RP 187. Medina-Perez backed up and "stopped all communication, stopped everything." 4RP 188.

Darrell Butorac, operations manager for Marshalls, testified that he and the store manager followed two of the store's security personnel as they saw Miles leaving the store with a "backpack." 4RP 23. As Medina-Perez tried to speak to Miles in the vestibule area, Butorac heard him say, "Back off or you're going to get hurt." 4RP 153. Miles walked out onto the sidewalk and at that point Butorac saw something in his hand. Then he heard, "It's a knife," and everybody backed off. 4RP 153. Butorac could not see what Miles was holding because his view was blocked and Miles was too far away. 4RP 157.

Officer Kenneth Devaney identified Miles as the man police apprehended on November 24, 2007. 3RP 72-73. Devaney was parked in the parking lot in front of Marshalls when an employee from Marshalls came up to him and said "a man had just pulled a knife on their security." 3RP 65-68. The employee said the man got in a red truck and pointed out the location so he immediately went to search for the truck and saw it at a stop sign. 3RP 68-71. Devaney drove up in front of the truck, activated his emergency lights, got out of his patrol car and yelled at Miles to put his hands up. 3RP 71-72. Miles backed up and drove over the sidewalk and accelerated to 50 to 60 miles an hour into heavy traffic. 3RP 74-76, 4RP 115-16. Devaney notified dispatch and followed the truck with Officer Wurts trailing behind him during the pursuit. 3RP 73-77. Devaney eventually trapped the truck in a small cul-de-sac where Miles got out and ran. 3RP 82-84.

As Devaney began running after Miles, Officer Latimer arrived and chased Miles down as he tried to climb over a fence. 3RP 84-85. The officers handcuffed Miles and conducted a search. Devaney found a folding knife and wire cutters in his pants pocket. 3RP 86-87; 4RP 117. After taking Miles into custody, Devaney searched his truck and found a bag with a jacket in it. 4RP 121. Officers held Miles until two employees

from Marshalls were brought to the scene and they identified Miles as the man involved in the incident at the store. 4RP 129-32.

Officer Latimer testified that he heard Devaney report on the radio that he was pursuing a red pickup truck so Latimer went to the location of the chase. 4RP 198. He arrived at a cul-de-sac where he helped Devaney block off the truck. 4RP 199-200. Then Latimer saw a man fleeing from the truck and ran after him, ordering him to stop. When the man did not stop, Latimer deployed his taser but he kept running. 4RP 200-01. Latimer caught the man when he tried to scale a fence. 4RP 201. After a struggle, officers forced him to the ground and handcuffed him. 4RP 202-03. Latimer identified Miles as the man they apprehended and took into custody. 4RP 203.

Officer Brian Wurts testified that he was near the Lakewood Towne Center when he heard Devaney advising that a robbery had just occurred at the shopping center and he was pursuing a suspect in a vehicle. 4RP 213. Wurts realized that they were coming in his direction and then "the suspect vehicle blew through the intersection" in front of him. 4RP 213. Wurts activated his lights and siren and positioned himself behind Devaney as they chased the vehicle for several blocks. 4RP 215. When the vehicle went into a cul-de-sac, Devaney pinned the vehicle in with his patrol car. 4RP 216. As a man sprinted from the vehicle, Wurts ran after

him and yelled out for him to stop. 4RP 216-17. After a foot chase, officers tackled him and a struggle ensued. The man would not respond to verbal commands so Wurts “started striking him, telling him to comply.” 4RP 218. Wurts identified Miles as the man they eventually handcuffed and arrested. 4RP 219.

Officer Shirley McLamore testified that she reported to the location where Devaney and other officers apprehended an armed robbery suspect at the end of a cul-de-sac. 4RP 224-25. McLamore was instructed to go to Marshalls and pick up the store manager and a loss-prevention officer. 4RP 225-26. McLamore transported them to the scene in her patrol car where they identified Miles who was standing in plain view with the officers. 4RP 226-28.

b. Sentencing

At the end of trial on January 29, 2008, the court set sentencing for February 29, 2008. 8RP 11. On February 29, 2008, the State requested a continuance to March 14, 2008 because it needed more time to compile Miles’ criminal history. 9RP 2-4. The State acknowledged that the delay created a speedy sentencing issue but argued that “the speedy sentencing rule is somewhat illusory in that there’s no real remedy for that violation” because the defendant must show prejudice. 9RP 4-5. Defense counsel argued that the State provided certified copies of judgment and sentences

that establish Miles' offender score, which Miles would stipulate to, and therefore the court should proceed with sentencing to avoid any prejudice. 9RP 5-6. The court granted the State's request and set sentencing for March 14, 2008, ruling that Miles would not be prejudiced by allowing the State time to "figure out what the true offender score is and whether or not Mr. Miles qualifies as a persistent offender." 9RP 8.

C. ARGUMENT

THE TRIAL COURT VIOLATED MILES' CONSTITUTIONAL RIGHT TO SPEEDY SENTENCING BY GRANTING THE STATE'S MOTION TO CONTINUE SENTENCING WHICH UNREASONABLY DELAYED HIS SENTENCING AND THE DELAY WAS PURPOSEFUL AND OPPRESSIVE.

Dismissal is required because the trial court violated Miles' constitutional right to speedy sentencing by granting the State's motion to continue sentencing which unreasonably delayed his sentencing and the delay was purposeful and oppressive.

Our courts have long held that the right to a speedy sentencing is encompassed within the right to a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington State Constitution. State v. Ellis, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994); State v. Halgren, 87 Wn. App. 525, 537, 942 P.2d 1027 (1997), reversed on other grounds, 137 Wn.2d 340, 971 P.2d 512 (1999). To determine whether there has been a violation of the right to

speedy sentencing, courts look to whether the delay was “purposeful or oppressive.” Pollard v. United States, 352 U.S. 354, 361, 77 S. Ct. 481, 1 L. Ed. 2d 393 (1957); State v. Johnson, 100 Wn.2d 607, 629, 674 P.2d 145 (1983), overruled on other grounds, 105 Wn.2d 1, 711 P.2d 1000 (1985).

The determination of whether a delay is purposeful or oppressive is based on the balancing of four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant’s assertion of his right, and (4) the extent of prejudice to the defendant. State v. Rupe, 108 Wn.2d 734, 742, 743 P.2d 210 (1987), vacated on other grounds, 863 F. Supp. 1307 (W.D. Wash. Sep 19, 1994); State v. Modest, 106 Wn. App. 660, 663, 24 P.3d 1116 (2001); See Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Whether delay in sentencing amounts to an unconstitutional deprivation of rights depends upon the circumstances. Pollard, 352 U.S. at 361 (citing Beavers v. Haubert, 198 U.S. 77, 87; Frankel v. Woodrough, 7 F.2d 796, 798); Juarez-Casares v. United States, 496 F.2d 190, 192 (5<sup>th</sup> Cir. 1974). When a delay has been purposeful or oppressive, the remedy is dismissal. Ellis, 76 Wn. App. at 395.

Here, both the State and defense agreed to the sentencing date of February 29, 2008. 8RP 10-11. The State had informed the trial court on January 17, 2008 that Miles had an “extensive criminal history” and that it had filed a persistent offender notice because “he very well might be a

third strike candidate.” 8RP 11-13. The State explained that a 1984 conviction for robbery in the first degree in Pierce County was a “clearly a strike offense,” but it was trying to obtain records from New York on a 1980 conviction for attempted robbery in the second degree, which was potentially another strike. 8RP 13.

Despite being aware of the extent of Miles’ criminal history for at least two months, the State appeared on February 29, 2008 asserting that it needed more time because “[t]here are a number of issues that have come up.” 8RP 3-4. Contrary to its earlier representation to the court, the State claimed that it was now “unclear” whether the 1984 robbery conviction was dismissed and blamed its inability to get records on the 1980 attempted robbery conviction on New York. 8RP 3-4, 7. When the court asked if there was a speedy sentencing issue, the prosecutor responded, “sure, we have speedy sentencing, it’s a procedural rule that’s in place, but essentially what the courts have found is violation of the speedy sentencing rule is somewhat illusory in that there’s no real remedy for that violation.” 8RP 4-5. The prosecutor argued that the defendant must show prejudice. 8RP 5.

Defense counsel urged the court to proceed with sentencing to avoid any prejudice, emphasizing that the State had provided certified copies of judgments and sentences that established Miles’ offender score,

“So we would stipulate to his offender score being an eight, and ask that we proceed to sentencing today.” 8RP 6. Miles clarified for the court that the 1984 robbery conviction was not dismissed. 8RP 7-8.

The trial granted the State’s request to continue sentencing to March 14, 2008, stating that it “may be completely off base” but the only prejudice it foresees is “if someone can have gotten out of jail or out of incarceration but was kept in because of the delay on speedy sentencing.” 8RP 6. The court concluded, “I think there is no prejudice to Mr. Miles, because regardless of whether his offender score is seven, a nine-plus, or I am sentencing under the persistent offender statute, in any case, he’s going to remain incarcerated at least through the 14<sup>th</sup> of March.” 8RP 8.

As the United States Supreme Court concluded, [t]he time for sentence is of course not at the will of the judge” and sentence must be imposed without unreasonable delay. Pollard, 352 U.S. at 361. The record substantiates that the trial court’s decision to continue sentencing was unreasonable because the delay was purposeful and oppressive under the balancing test established by the State Supreme Court. Rupe, 108 Wn. 2d at 742; Johnson, 100 Wn.2d at 629. Although the length of the delay was not extraordinary, this factor is outweighed by the fact that there was no justification for the delay. The State had at least two months to investigate Miles’ record, which is more than a reasonable amount of time

to fulfill its duty to prove his criminal history. It is apparent from the record that the State was unconcerned with delaying Miles' sentencing because it considered a violation of the right to speedy sentencing "illusory." 8RP 4. A federal and state constitutional right should not be taken so lightly. The third factor bears weight given the important fact that Miles emphatically asserted his right to speedy sentencing on February 29, 2008. 8RP 6, 7-8. Furthermore, contrary to the court's ruling, Miles was mercilessly prejudiced by the delay because he continued to languish in the county jail faced with the prolonged uncertainty of his fate and the prospect of serving the rest of his life in prison without parole. When properly balancing the four factors, which the trial court failed to do, it is evident that the delay was unconstitutionally purposeful and oppressive.

As emphasized by Division Three of this Court, "a convicted defendant should not be subjected to needless and uncertain delay" and our "criminal justice system is not served" when the defendant is not promptly sentenced. Modest, 106 Wn. App. at 664. Dismissal is required because the purposeful and oppressive delay in Miles' sentencing, as a consequence of the State's dilatory and cavalier conduct, violated his right to speedy sentencing guaranteed under the constitutions of the United States and State of Washington.

D. CONCLUSION

For the reasons stated, this Court should set aside Mr. Mile's judgment and sentence and dismiss his convictions.

DATED this 16<sup>th</sup> day of October, 2008.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

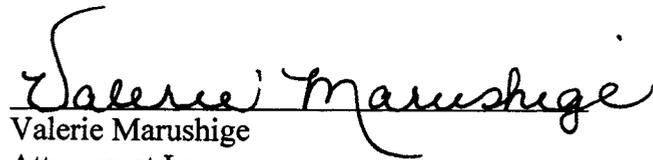
Attorney for Appellant

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Tramaine Miles, Booking No. 2007328040, Pierce County Jail, 910 Tacoma Avenue South, Tacoma, Washington 98402-2168.

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

DATED this 16<sup>th</sup> day of October, 2008 in Kent, Washington.



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Attorney at Law  
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