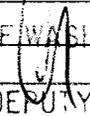


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DIVISION II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TRAMAINE GREGORY MILES, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Susan K. Serko

No. 07-1-05900-0

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**BRIEF OF RESPONDENT**

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GERALD A. HORNE  
Prosecuting Attorney

By  
MICHELLE LUNA-GREEN  
Deputy Prosecuting Attorney  
WSB # 27088

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Were defendant's right to speedy sentencing violated when the trial court granted the State's motion to continue as defendant was possibly a persistent offender and the State was awaiting formal documents from another state regarding defendant's offender score?

B. STATEMENT OF THE CASE.

1. Procedure

On January 28, 2008, the Pierce County Prosecutor's Office charged TRAMAINE GREGORY MILES, hereinafter "defendant," by a second amended information with one count of first degree robbery with a deadly weapon enhancement, one count of attempting to elude a pursuing police vehicle, and one count of obstructing law enforcement officer. CP 12-13. The case proceeded to trial on January 17, 2008, in front of the Honorable Susan K. Serko. RP(01/17/08)<sup>1</sup> 3.

On January 29, 2008, the jury found defendant guilty of all three counts and answered yes to the special verdict form. CP 41-44; RP

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<sup>1</sup> The Verbatim Report of Proceedings is contained in 10 volumes, only some of which are paginated consecutively. Citations to the pages of the record will be preceded by "RP([date of proceeding])." I.e., "RP(01/17/08) 1" refers to the first page of the proceedings of January 17, 2008.

(01/29/08) 4-5. A sentencing hearing was held on February 29, 2008, in front of the Honorable Susan Serko. The sentencing was continued until March 14, 2008, in order for defendant's offender score to be resolved as the prosecution was waiting for formal records from the State of New York. RP (02/29/08) 4-8.

On March 14, 2008, the court found defendant to be a persistent offender. CP 60-64, 66-69; RP (03/13/08) 20. He was sentenced to 24 months of flat time for the deadly weapon enhancement, life without the possibility of parole for Count I, 29 months of confinement for Count II, and 365 days of confinements for Count III. CP 60-64, 66-69; RP (03/13/08) 20. The term of confinement was to be followed by 18 to 36 months of community custody. CP 60-64, 66-69; RP (03/13/08) 20. Defendant filed a timely notice of appeal. CP 65.

## 2. Facts

Around 4 p.m. on November 24, 2007, the Marshall's department store loss prevention personnel, Amparo Medina-Perez and Vince San Nicolas, were watching a surveillance video of a specific area of the store where Phat Farm jackets had been reported stolen in the last few days. RP (01/23/08) 162. The jackets were held by wire on crossed metal bars that formed an x, and department personnel had found cut wires on the ground recently. RP (01/23/08) 163-64. While watching the camera in the loss prevention office, Ms. Medina-Perez witnessed a man, later identified as

defendant, walk into the store and go straight to the Phat Farm jackets. RP (01/23/08) 169. He looked at the jackets and turned away from the camera when Ms. Medina-Perez saw a wire fall to the ground. RP (01/23/08) 170. Defendant left the area and never made any attempt to purchase the jacket. RP (01/23/08) 171.

Ms. Medina-Perez gathered two security officers and went to stand in the vestibule area between the interior and exterior doors of the store in case defendant tried to leave with the jacket. RP (01/23/08) 172. She was on the phone with Mr. Van Nicolas who stayed inside the loss prevention room and continued to watch defendant on the camera. RP (01/23/08) 181.

Darrell Butorac, the operation's manager for Marshall's, was told that somebody was removing a jacket from the rack. RP (01/23/08) 148. Mr. Butorac was behind the customer service area when he witnessed defendant walking through the store with a backpack on. RP (01/23/08) 149. He never saw defendant make any attempt to purchase anything. RP (01/23/08) 149.

Defendant began to leave the store and was followed by four people including loss prevention and the store manager. RP (01/23/08) 150. Ms. Medina-Perez identified herself to defendant and said "Marshall's loss prevention, we just need to go inside and talk about the unpaid for merchandise." RP (01/23/08) 151, 184. Defendant replied "Step back little girl. You're going to get stepped on." RP (01/23/08)

184. Defendant pushed Ms. Medina-Perez and went out of the exterior doors onto the sidewalk. RP (01/23/08) 184-85. She followed him trying to convince him to come back in and defendant held what appeared to be a silver blade and pointed it at her. RP (01/23/08) 186. Mr. Butorac heard someone yell "it's a knife". RP (01/23/08) 153. At that point, everyone backed off and defendant got into a pickup truck and left. RP (01/23/08) 154, 188.

Officer Kenneth Devaney was sitting in his marked patrol car outside of the Lakewood Towne Center when Tim Owens, the store manager of Marshall's Department store, came up to his window. RP (01/22/08) 66; RP (01/23/08) 154. He told Officer Devaney that a man had just pulled a knife on the Marshall's store security. RP (01/22/08) 67-68, 73. Mr. Owens gave Officer Devaney a description of defendant and the red truck he was in. RP (01/22/08) 69-70. Officer Devaney drove his car to the area where Mr. Owens had pointed to look for the defendant. RP (01/22/08) 69.

Officer Devaney located the red truck stopped second in line at a stop sign and pulled his vehicle in front at an angle with the emergency lights activated. RP (01/22/08) 71. He got out of the vehicle and yelled at the driver of the red truck, who was alone in the vehicle, to stop and put his hands up. RP (01/22/08) 72. Defendant nodded his head as if to comply, but then began backing up the truck. RP (01/22/08) 72. Officer Devaney got back into his car and radioed dispatch of the situation. RP

(01/22/08) 73. With his lights and sirens activated, Officer Devany followed defendant as he drove over the sidewalk of Bed, Bath and Beyond and drove away into heavy traffic. RP (01/22/08) 74-75. Officer Devany followed defendant as he drove 50-60 mph in a 25 mph zone and crossed lanes of traffic. RP (01/22/08) 76.

Another patrol car, Officer Brian Wurts caught up and followed behind Officer Devany. RP (01/22/08) 77. Eventually, Officer Devany moved alongside defendant and tried to perform a “pursuant immobilization technique” where an officer tries to get a pursuing vehicle to stop using his own vehicle. RP (01/22/08) 80. Initially, it did not work, but the second try caused defendant’s vehicle to fishtail causing the rear tire on the passengers side to hit a curb and blow out. RP (01/22/08) 81. Defendant went up on someone’s front yard, but was able to maneuver back to the roadway where defendant continued driving. RP (01/22/08) 81. Officer Devany attempted a third unsuccessful PIT maneuver. RP (01/22.08) 82.

Officer Devany noticed the defendant’s driver’s side door start to open so he pinned his front bumper to the truck to keep defendant inside. RP (01/22/08) 82-83. The truck came to a stop and defendant got out through the passenger door and started running away. RP (01/22/08) 84. Officer Devany followed after defendant on foot. RP (01/22/08) 84. Officer Darrin Latimer entered the foot pursuit and was able to grab defendant as he tried to climb over a fence. RP (01/22/08) 85; RP

(01/23/08) 201. The officers yelled verbal commands at defendant while they tried to handcuff and detain him. RP (01/22/08) 86.

Once they had control of defendant, the officers searched him and found a folding knife with a three and one-quarter inch blade in his right front pants pocket and some wire cutters. RP (01/22/08) 86-87; RP (01/23/08) 119. Upon searching the red truck, the officers found a bag in the front passenger seat with a Baby Phat jacket in it. RP (01/23/08) 121. The jacket had a Marshall's price tag and security tag on it. RP (01/23/08) 124.

Another officer named Shirley McLamore had gone to Marshall's and brought back two witnesses to the scene where the defendant was to do an in-field identification. RP (01/23/08) 130. The two witnesses, Mr. San Nicolas and Mr. Owens, sat in Officer McLamore's backseat as defendant was brought out of Officer Devany's patrol car. RP (01/23/08) 131. Mr. San Nicolas identified defendant as the person who used the knife and stole the jacket at Marshall's. RP (01/23/08) 133. Returning to the store later, Officer Devany obtained the surveillance video from inside the store from Mr. San Nicolas. RP (01/23/08) 134. It was played during trial and depicted defendant taking the jacket from the rack. RP (01/28/08) 337-42.

C. ARGUMENT.

1. DEFENDANT'S RIGHT TO SPEEDY SENTENCING WAS NOT VIOLATED WHEN DEFENDANT WAS POSSIBLY A PERSISTENT OFFENDER AND THE TRIAL COURT GRANTED THE STATE'S MOTION TO CONTINUE AS THEY WERE AWAITING DOCUMENTS REGARDING DEFENDANT'S OFFENDER SCORE.

RCW 9.94A.500(1) states:

Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing.

A sentence is not automatically reversed when a trial court sentencing a defendant on a criminal conviction fails to fulfill the forty day sentencing obligation. *State v. Anderson*, 92 Wn. App. 54, 60, 960 P.2d 975 (1998). Rather, the defendant must show prejudice arising from such a violation in order to reverse his sentence. *Anderson*, 92 Wn. App. at 60-61. The decision to extend time for sentencing is a discretionary one made by the trial court. *State v. Garibay*, 67 Wn. App. 773, 777, 841 P.2d 49 (1992).

Only where a delay is purposeful or oppressive does it violate the constitutional right to speedy sentencing. *State v. Ellis*, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994). To determine if a delay is purposeful or oppressive, courts balance a number of factors, including: (1) the length of

the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and, (4) the prejudice to the defendant. *Ellis*, 76 Wn. App. at 394. An appellate court reviews a trial court's ruling on speedy sentencing issues for an abuse of discretion. *Ellis*, 76 Wn. App. at 395.

In the present case, the trial court's decision to extend defendant's sentencing hearing was not prejudicial. Defendant is a persistent offender and was facing the possibility of life in prison without parole. CP 60-64, 66-69; RP (03/13/08) 20. The prosecutor requested a continuance in an effort to ensure that defendant's offender score was calculated correctly as the State was waiting for documentation regarding defendant's prior criminal history in the State of New York. RP (02/29/08) 4-8. The court properly concluded that "the prejudice that [it] would foresee there being potentially is if someone can have gotten out of jail or out of incarceration but was kept in because of the delay speedy sentencing." RP (02/29/08) 6. The court further questioned the attorneys about whether such reasoning was "completely off base" and both parties responded "no." RP (02/29/08) 6.

Essentially, the prejudice that would result is defendant being incarcerated for a period longer than needed. Here, defendant was going to remain in jail until March 14, 2008, regardless of when he was sentenced and as such, the prosecutor's efforts to calculate the proper

offender score were not prejudicial to defendant. Furthermore, in *State v. Garibay*, the court held that a delay of 77 days was not prejudicial to a defendant. *Garibay*, 67 Wn. App. at 777.

Defendant's legal argument regarding this issue is inapplicable to the present case because it relies on the analyses used in restitution cases. Defendant's legal citations for reversal of a speedy sentencing delay cites to cases which have been distinguished from criminal convictions. The cases defendant cites discuss RCW 9.94A.142(1) and the legislature's intent in ordering the amount of restitution due to be determined within sixty days. Those cases involving violations of orders of restitution require reversal if the delay is purposeful or oppressive which is determined by balancing four factors. This is not the same law nor analysis that is applied to sentencing hearings in criminal cases. This distinction is exemplified by the court in *State v. Anderson* when they state "we are therefore not bound to apply the rationale of *Krall, Moen*, and *Mollich* [cases involving delays in orders of restitution] in cases where there is delay in conducting a sentencing hearing." *Anderson*, 92 Wn. App. at 59. Therefore, defendant's legal argument has no authority with respect to the delay in sentencing hearings.

