NO. 37466-8

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DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

HENRY HEINIG, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 07-1-01823-1

BRIEF OF RESPONDENT

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

1. Whether defendant's absence from the proceedings on August 9, 2007, tolled or reset the time for trial so that the defendant's rights were not violated?

2. Whether the defendant's failure to object during the setting of a new trial date constituted a waiver of his right to object to the time for trial so that his rights were not violated?

B. STATEMENT OF THE CASE.

1. Procedure

On April 4, 2007, the Pierce County Prosecutor's Office charged HENRY RAYMOND HEINIG, with one count of unlawful manufacturing of a controlled substance (Count I), one count of unlawful possession of psuedoephedrine and/or ephedrine with intent to manufacture methamphetamine (Count II), and one count of unlawful possession of a controlled substance (Count III). CP 1-2.

Trial, which was originally scheduled for May 23, 2007, was continued, first to July 10, 2007, and then to August 9, 2007, for pre-trial

preparation. CP 3, 4; RP (7/9/07) 4[1]. Prior to the August 9 trial date, the defendant was sentenced on another cause number. RP (08-09-07) 6, ln. 11-20. The court ordered him to be transported to DOC to serve his sentence, notwithstanding his pending trial date in this case. RP (08-09-07) 6-7.

On the August 9, 2007, trial date, defendant was being held in DOC custody, and therefore failed to appear for his scheduled trial date in this matter. The court issued a bench warrant for failure to appear and later a transport order was issued to DOC. CP 56; RP (8/9/07) 7.

The defendant returned to Pierce County from the Department of Corrections on August 28, 2007, and the court set a trial date of October 10, 2007. Nothing in the record shows that the defendant objected to the setting of the trial date.

On October 10, 2007, the case was continued because of attorney conflicts, and the defendant, present in the court, objected to the continuance arguing his speedy trial rights were being violated. CP 5; RP (10/10/07) 5. The case was continued again while defendant remained in jail on November 29, 2007, until December 3, 2007, due to no courtrooms being available. CP 6.

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[1] The Verbatim Report of Proceedings is contained in 13 volumes, none of which are paginated consecutively. Citations to the pages of the record will be proceeded by "RP([date of proceeding])." i.e., "RP(7/9/07) 1" refers to the first page of the proceedings of July 9, 2007.

The case ultimately proceeded to trial on January 2, 2008. RP (01/2/08) 6. After a bench trial, the court found defendant guilty on all three counts. CP 36-48; RP (01/08/08) 370-71.

The court sentenced defendant to 120 months with credit for 200 days served. CP 36-48; RP (3/14/08) 24, 29. Defendant filed a timely notice of appeal. CP 32.

2. Facts

Because the defendant's only challenge is to a time for trial violation, the underlying facts of the case are irrelevant to this appeal. Any additional relevant factual details will be incorporated into the body of the argument along with citations to the record.

C. ARGUMENT.

1. DEFENDANT'S ABSENCE FROM THE PROCEEDINGS ON AUGUST 9, 2007, IS CONTROLLED BY CrR 3.3(e)(6) WHEREBY THE TIME FOR TRIAL TOLLS AND NO VIOLATION OF DEFENDANT'S TIME FOR TRIAL OCCURRED.

Under CrR 3.3(b)(1)(i), a defendant held in jail pending trial should be brought to trial within 60 days of arraignment. If the defendant

is not brought to trial within the time limit determined under this rule, the charge should be dismissed with prejudice. CrR 3.3(h).[2]

Upon occurrence of any of eight specified events, the time for trial resets to zero. CrR 3.3(c)(2). One of the events is if the defendant fails to appear at any proceeding where his presence is required. CrR 3.3(c)(2)(ii). "Failure to appear" applies to a defendant who is not in attendance at a proceeding in an effort to thwart the government's attempt to provide him a constitutionally guaranteed right to speedy trial. ***State v. George***, 160 Wn.2d 727, 739, 158, P.3d 1169 (2007).

Because the case in ***George*** arose in a court of limited jurisdiction, the court in ***George*** considered time for trial under CrRLJ 3.3. However, CrRLJ 3.3 is substantially similar to CrR 3.3 which applies here. *See*, Washington Practice, Vol. 4A, Rule Practice p. 230 (Author's Comments to the 2003Amendment) Thompson/West, c. 2008.

Certain situations constitute excluded periods that toll the time for trial. CrR 3.3(e)(1)-(9). These situations extend, rather than reset, the time for trial. *Id.* CrR 3.3(e)(6) governs absences resulting from a defendant's incarceration outside the county or in federal custody. ***George,*** at 739.

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[2] CrR 3.3, the time for trial rule, underwent comprehensive revision in 2003. Accordingly, it is questionable whether any of the cases interpreting the pre-2003 version of the rule remain applicable. *See*, Washington Practice, Vol. 4A, Rule Practice p. 232 (Author's note) Thompson/West, c. 2008.

The time for trial tolls while defendant is in another county's custody. ***George,*** at 737.

On August 9, 2007, defendant did not show up for his trial date. RP (8/9/2007) 5. He was being held by the Department of Corrections(DOC) after being sentenced in Pierce County on unrelated charges. RP (8/9/2007) 5. He was transferred pursuant to the order of the sentencing court. A defendant's absence resulting from his incarceration outside the county jail is addressed by CrR 3.3(e)(6). ***George,*** at 739. As such, defendant's time for trial was tolled during this period and his speedy trial rights were not violated.

Defendant's argument that his time for trial rights were violated is flawed. Defendant relies on CrR 3.3(c)(2)(ii) and argues that his failure to appear was the fault of the State, and therefore should not have reset the time for trial. But, as the court in ***George*** recognized, "reliance on CrRLJ 3.3(c)(2)(ii) (failure to appear) to reset the time for trial [is] error because that provision does not apply when a defendant is incarcerated on unrelated charges." ***George,*** at 739. Rather, as in ***George,*** CrR 3.3(e)(2) controls. As such, defendant's argument that the time for trial should not reset to zero is moot since the time for trial actually tolled during that time.

a. Heinig's Time For Trial Deadline Based Upon An Excluded Period Analysis.

On July 9, 2007, the court approved an agreed motion (however, defendant refused to sign the order) for a continuance of the trial date because defense counsel needed more time to investigate legal motions. CP 4. Trial was continued to August 9, 2007, which resulted in a time for trial expiration date of September 8, 2007. CP 4. This is because any excluded period under CrR 3.3(e) (including a continuance), falls under CrR 3.3(b)(5), which establishes that the time for trial shall not expire earlier than 30 days after the end of the excluded period. Thus, the time until the new trial date was an excluded period, and the time for trial deadline extended to not less than 30 days after that, which is September 8. So prior to being transferred to DOC, Heinig's time or trial deadline was September 8, 2007.

The defendant has failed to show as part of the record when he was removed from the Pierce County jail and sent to the Department of Corrections to serve his sentence. However, based upon external records that are not part of the record in this case, the State concedes that defendant was transported out of the Pierce County jail and transferred to DOC on July 7, 2007. Therefore, under CrR 3.3(e)(6), and based upon this concession, the defendant's time for trial deadline was tolled from July 7, 2007, until August 28, 2007, or 55 days.

Since at the time he was transported out of the jail to DOC, defendant's time for trial deadline was September 8, 2007, the 55 day excluded period is added to the prior September 8, 2007, time for trial deadline. Thus, on defendant's August 28, 2007, reappearance in court, adjusting for the excluded time, defendant's time for trial deadline was extended to November 2, 2007.

When defendant reappeared on August 28, 2007, the court scheduled his trial date for October 10, 2007. Accordingly, under an excluded time analysis, his time for trial deadline of November 2, 2007, was not violated when, on August 28, 2007, the court re-scheduled his trial date for October 10, 2007.

b. Heinig's time for trial deadline based upon a resetting of the trial date.

Even if the court holds that defendant's failure to appear resets his trial date, defendant's time for trial did not expire. Once defendant reappeared in court on August 28, 2007, defendant's time for trial deadline would have been sixty days later (per CrR 3.3(c)(2)(ii) and CrR 3.3(b)(1)). Accordingly, his time for trial deadline would have been October 27, 2007.

Where defendant's trial date was set for October 10, 2007, it did not violate the time for trial deadline under a re-set trial date analysis.

2. DEFENDANT'S FAILURE TO OBJECT TO THE SETTING OF A NEW TRIAL DATE PRECLUDES HIM FROM ARGUING HIS TIME FOR TRIAL RIGHTS WERE VIOLATED.

Moreover, here the defendant failed to object to the setting of his trial date and lost the right to argue that his time for trial rights were being violated. The defendant has the burden of objecting to the setting of the time for trial. CrR 3.3(d)(3) requires that a party who objects to the setting of their trial date must, within ten days after notice is given, move that the court set a trial within the time limit. A party who fails to do so, regardless of the reason, loses their right to object that a trial commenced on such a date is not within the time for trial limits. CrR 3.3(d)(3). Defendant has failed to provide the record of proceedings from August 28, 2007, when the trial court set a new trial date of October 10, 2007. CP 80. The scheduling order shows defendant was present and signed the order for a new trial date.

When the defendant appeared again in court on August 28, 2007, it was prior to the September 8, 2007, time for trial deadline that had been established before he was transferred to DOC. Because the defendant made no objection on August 28, 2007, to the setting of his trial date, and failed within ten days to move that the court set a new trial date, defendant has lost the right to argue that his time for trial rights were violated.

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D. CONCLUSION.

The court should deny the appeal and affirm the lower court. Heinig's time for trial was never violated where the time for trial was tolled in Heinig's absence. Moreover, when Heinig appeared back in court before his original time for trial had expired, and he failed to object to the new setting of the time for trial, any objections were waived.

DATED: November 5, 2008.

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DEPUTY

GERALD A. HORNE
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Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
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Chelsey McLean
Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-5-08 Theresa K
Date Signature

APPENDIX "A"

Outline of Continuance History

Outline of Continuance History (With Citations To The Record)

Date of order/record	Trial Cont. to	Def. Object	CP#	Reason for Continuance	Comments
04-07-07	05-23-08	No	79*	[Original trial setting at arraignment]	See Scheduling Order of 04-04-07.
05-17-07	07-10-07	No	3	Continued upon agreement of the parties, Def. Counsel needed time to research and prepare motion (RP)	
07-09-07	08-09-07	?	4	Def. listed as refused to sign – but no record def. objected. Motion brought on behalf of defense.	
08-09-07	FTA	No	51	Def. failed to appear	Def. incarcerated at DOC on unrelated Pierce Co. matter
08-28-07	10-10-07	No	80*	Def. transported from DOC, new trail date seat at warrant hearing	See Scheduling Order of 08-28-07
10-10-07	11-29-07	Yes	5	Defense attorney and prosecutor both in trial on other matters	
11-29-07	12-03-07	N/A	6	No available courtrooms	
12-03-07	12-13-07	?	60*	Defense filed late motion to suppress See Criminal Case Reassignment of 12-03-07 and Memorandum of Journal Entry of 12-14-07	Case was assigned to Dept. 21 and called for trial. State objected to late filed motion to suppress by defense. 3.5 hearing held immediately, trial recessed to 12-13-07 so that late filed suppression motion could be heard on that date.

12-14-07 (for record of events of 12-13-08)	?	?	63-66*	Dept. cannot accommodate anticipated length of trial.	Case returned to Criminal Division Presiding judge for reassignment to new dept. See Memorandum of Journal Entry of 12-14-07
12-19-07	12-19-07	Yes	7, 67-70*		Case reassigned to Crim. Div. Presiding Judge See also, memorandum of Journal Entry of 12-19-07
12-20-07	12-31-07	?	8	No courtrooms available	
12-31-07	1-02-08	?	61,* 59*	Assigned to Dept. 8 Def. files affidavit of prejudice	
1-02-08 1-08-08			61,* 71-78*	Case assigned to Dep. 2,	Def. waives right to jury trial, trial held See Criminal Case Reassignment of 1-02-08 and Memorandum of Journal Entry filed 01-08-08.

* Indicates anticipated numbering of respondent's supplementally designated Clerk's Papers.