

COURT OF APPEALS
DIVISION II

00 JUN 22 AM 9:12

STATE OF WASHINGTON

BY cm

No. 38133-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jacob Yaden, Jr.

Appellant.

Clallam County Superior Court Cause No. 04-1-00348-1

The Honorable Judges George L. Wood, S. Brooke Taylor, Kenneth

Williams, and Commissioner Brian Coughenour

Appellant's Reply Brief

Jodi R. Backlund

Manek R. Mistry

Attorneys for Appellant

BACKLUND & MISTRY

203 East Fourth Avenue, Suite 404

Olympia, WA 98501

(360) 352-5316

FAX: (866) 499-7475

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 3

I. Respondent concedes that Mr. Yaden’s trial commenced after expiration of his speedy trial period, and had not been reset before the speedy trial period expired..... 3

II. The U.S. Supreme Court has foreclosed argument that a court-appointed attorney’s inaction can prejudice an accused person’s Sixth Amendment right to a speedy trial. 5

III. Defense counsel’s error shifted the burden of proof and prejudiced Mr. Yaden. 6

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

Vermont v. Brillon, ___ U.S. ___, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009)
..... 6

WASHINGTON CASES

State v. Becerra, 66 Wn.App. 202, 831 P.2d 781 (1992) 4

State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004)..... 7

State v. Carson, 128 Wn.2d 805, 912 P.2d 1016 (1996) 4

State v. Carter, 127 Wn. App. 713, 112 P.3d 561 (2005)..... 7

State v. Chenoweth, 115 Wn.App. 726, 63 P.3d 834 (2003) 4

State v. Malone, 72 Wn.App. 429, P.2d 990 (1994)..... 4

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 7

State v. Sims, 119 Wn.2d 138, 829 P.2d 1075 (1992)..... 6

OTHER AUTHORITIES

CrR 3.3..... 3, 4, 5

ARGUMENT

I. RESPONDENT CONCEDES THAT MR. YADEN'S TRIAL COMMENCED AFTER EXPIRATION OF HIS SPEEDY TRIAL PERIOD, AND HAD NOT BEEN RESET BEFORE THE SPEEDY TRIAL PERIOD EXPIRED.

Respondent concedes that Mr. Yaden's time for trial expired on March 13, 2008,¹ that the trial did not commence as scheduled on February 12, 2008, and that no new trial date was set until a hearing held on May 2, 2008. Brief of Respondent, pp. 15, 16-17, 26, 27. Under these facts, as conceded, CrR 3.3 requires dismissal of the charges. CrR 3.3(h).

Mr. Yaden made a timely objection and did not waive his right to have his trial commence by March 13, 2008. Under CrR 3.3, his obligation to object did not arise until the court set a new trial date. CrR 3.3(d). When the February 12th date lapsed, the court had a responsibility to set a new date, but failed to do so. If, prior to March 13th, the court had set a new date, Mr. Yaden's silence would have waived his right object to any delay. However, the court did not set a new date in a timely fashion, and Mr. Yaden's speedy trial expiration date passed. His objection on May 2nd was made even before the court set a new date, and was therefore timely. No waiver occurred under CrR 3.3(d).

¹ Respondent incorrectly notes a February 28 expiration date, but later acknowledges the March 13th date. Brief of Respondent, pp. 25-26, 27.

Respondent's brief does not even mention CrR 3.3(d). Instead, unable to establish a waiver under the rule, Respondent seeks to circumvent CrR 3.3(d). Brief of Respondent, pp. 22-27. Respondent makes two arguments.

First, Respondent attempts to characterize Mr. Yaden's objection as "untimely." Brief of Respondent, p. 23. This is incorrect. Mr. Yaden's duty to object arose on May 2nd, when the trial court set a new date. CrR 3.3(d). His May 2nd objection was therefore timely under the rule. CrR 3.3(d); RP (5/2/08). This is in contrast to the cases upon which Respondent relies. *See* Brief of Respondent, pp. 23-25 (citing *State v. Chenoweth*, 115 Wn.App. 726, 63 P.3d 834 (2003); *State v. Malone*, 72 Wn.App. 429, 864, P.2d 990 (1994); *State v. Becerra*, 66 Wn.App. 202, 831 P.2d 781 (1992)). For example, in *Chenoweth, supra*, the defendant's objection was clearly untimely, because it was made many months after receipt of the notice of trial setting. *Chenoweth*, at 736-737. The same is true in *Malone*, as Respondent acknowledges. Brief of Respondent, p. 24. In *Becerra*, the defendant failed to object at the time his trial was recessed for two days, when any problem could have been cured. *Becerra*, at 206.

Second, Respondent erroneously asserts that Mr. Yaden's case is controlled by *State v. Carson*, 128 Wn.2d 805, 912 P.2d 1016 (1996). In *Carson*, the Supreme Court upheld retroactive five-day continuances

granted by the trial court under former CrR 3.3(d)(8). In doing so, the Court noted that defense counsel's failure to object contributed (in part) to the delay,² and upheld the trial judge's exercise of discretion. *Carson*, at 816. In this case, the trial judge did not grant retroactive continuances to cure the speedy trial problem, and could not have granted such continuances without violating the applicable rule. *See* CrR 3.3(g).³

Respondent has conceded facts that require dismissal under CrR 3.3. Accordingly, Mr. Yaden's convictions must be reversed and the case dismissed with prejudice. CrR 3.3(h).

II. THE U.S. SUPREME COURT HAS FORECLOSED ARGUMENT THAT A COURT-APPOINTED ATTORNEY'S INACTION CAN PREJUDICE AN ACCUSED PERSON'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

Respondent concedes that trial commenced almost four years after Mr. Yaden's arrest, and that such a delay is "presumptively prejudicial,"

² The retroactive continuances were also granted because the court and both attorneys were unavailable, and because the parties had miscalculated the speedy trial expiration date.

³ That section is captioned "cure period," and reads as follows: "The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period." CrR 3.3(g).

but argues that the delay didn't violate Mr. Yaden's constitutional right to a speedy trial. Brief of Respondent, p. 29. Curiously, Respondent fails to cite the U.S. Supreme Court's recent decision in *Vermont v. Brillon*, ___ U.S. ___, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009).⁴ In that case, the Court held that a public defender's inaction cannot be held against the state for Sixth Amendment speedy trial purposes. The decision in *Vermont v. Brillon* resolves Mr. Yaden's constitutional speedy trial claim.

III. DEFENSE COUNSEL'S ERROR SHIFTED THE BURDEN OF PROOF AND PREJUDICED MR. YADEN.

The affirmative defense of unwitting possession (with its attendant burden on the accused person) has no place in a trial for Possession of Pseudoephedrine with Intent to Manufacture Methamphetamine. Logically, a person who is unaware of her or his possession of a substance does not possess that substance with intent to manufacture. *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). Despite this, Mr. Yaden's attorney proposed an instruction requiring Mr. Yaden to prove by a preponderance of the evidence that his possession was unwitting. Instruction No. 13, CP 39.

⁴ The decision in *Vermont v. Brillon* was issued in March 2009, after Appellant's Opening Brief was filed, but before Respondent's brief was filed.

Although the “to convict” instruction in this case correctly stated the law, the “unwitting possession” instruction created a serious inconsistency. Instructions Nos. 7 and 13, CP 33, 39. Because the inconsistency resulted from a clear misstatement of the law, it is presumed prejudicial. *State v. Carter*, 127 Wn. App. 713, 718, 112 P.3d 561 (2005). The erroneous instruction undermined Mr. Yaden’s defense—that he didn’t even know pseudoephedrine was present in the car. RP (7/2/08) 394-429, 496, 498, 509. Furthermore, the prosecutor exploited the error in closing. RP (7/2/08) 517.

Under these circumstances, there is a reasonable probability that the erroneous instruction affected the verdict. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Respondent does not even attempt to argue that the error was harmless. Instead, Respondent suggests that the instructions were proper. Brief of Respondent, pp. 41-42 (citing *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004)). But *Bradshaw* involved convictions for simple possession, not possession with intent to manufacture. *Bradshaw*, at 531. *Bradshaw* has no bearing on this case.

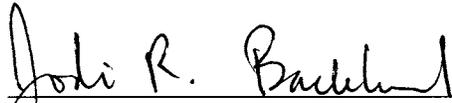
Mr. Yaden was denied the effective assistance of counsel. Accordingly, his conviction must be reversed and the case remanded to the trial court for a new trial. *Reichenbach, supra*.

CONCLUSION

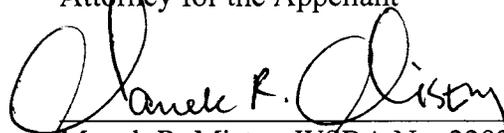
Mr. Yaden's conviction must be reversed and his case dismissed with prejudice for violation of his right to a speedy trial. In the alternative, the case must be remanded for a new trial, with directions not to instruct on the affirmative defense of unwitting possession.

Respectfully submitted on June 19, 2009.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917 
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

COURT OF APPEALS
DIVISION II

09 JUN 22 AM 9:12

STATE OF WASHINGTON

BY ca
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Jacob Yaden, DOC #771696
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

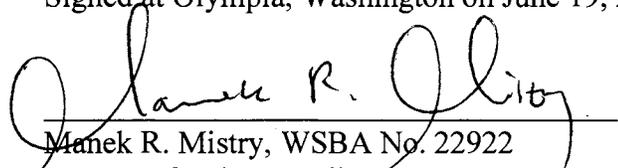
Clallam County Prosecuting Attorney
223 E. 4th Street, Suite 11
Port Angeles, WA 98362-0149

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 19, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 19, 2009.



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant