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COURT OF APPEALS
DIVISION II

09 JUN 22 PM 2:00

STATE OF WASHINGTON
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Nº. 38226-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

KEVIN JOSEPH SMITH,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 08-1-00288-6
The Honorable Toni Sheldon, Presiding Judge

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A. ASSIGNMENT OF ERROR

Mr. Smith's right to a speedy trial was violated where he was never arraigned on the bail jump charge in cause number 07-1-01010-4 and the trial court permitted the State to voluntarily dismiss the bail jump charge in cause number 07-1-01010-4 and to refile it as a separate charge in cause number 08-1-00288-6.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does the State have the authority to voluntarily dismiss a charge?
2. May a trial court dismiss a charge and permit the State to refile a charge for purposes of avoiding a violation of a defendant's right to speedy trial?
3. Was Mr. Smith's right to a speedy trial violated when he was charged with bail jump on January 28, 2008, was never properly arraigned on that charge, but the trial court allowed the State to dismiss the bail jump charge and refile it in a new cause number to avoid the speedy trial issue?

C. STATEMENT OF THE CASE

Factual and Procedural Background

On July 14, 2007, Mr. Kevin Smith was arraigned in Kitsap County Superior Court cause number 07-1-01010-4 on one count of unlawful possession of a controlled substance. CP 1-5, 453-455.¹ On October 16, 2007, Mr. Smith posted bail and signed a scheduling order

¹ Mr. Smith is appealing his conviction for bail jump in cause number 08-1-00288-6. However, the bail jump charge arose in the course of the prosecution of cause number 07-1-01010-4. It is therefore necessary to refer to the record of the proceedings in cause number 07-1-01010-4 in order to fully review the issues in this appeal.

confirming his trial date of November 13, 2007. CP 1-5; RP 2-3, 1-13-07.²

On November 13, 2007, Mr. Smith did not appear for his trial in cause number 07-1-01010-4. RP 2-3, 1-13-07.

On January 28, 2008, the State amended the charges against Mr. Smith in cause number 07-1-01010-4 to include one count of unlawful possession of a controlled substance and one count of bail jumping. CP 453-455. The trial court read the charges to Mr. Smith, but did not take a plea from Mr. Smith regarding the charges. RP 2-3, 1-28-08. Mr. Smith objected to the arraignment under Court Rule 11. RP 2-3, 1-28-08.

On February 29, 2008, acting pro se, Mr. Smith filed a Motion to Dismiss the charges against him for violation of CrR 3.3(g) and 3.3(h) and a Motion to Dismiss with Prejudice for violations of the Court Rules. CP 461-462.³ The trial court denied both motions. RP 19, 23, 3-3-08.

On March 3, 2008, Mr. Smith filed an Objection to Trial Date Violations of Court Rules. CP 471-475. During argument on this motion,

² The transcripts of Mr. Smith's trials in cause numbers 07-1-01010-4 and 08-1-00288-6 are not numbered continuously between the different dates of proceedings. Reference to the verbatim record will be made by giving the Report of Proceedings page number followed by the date of the hearing being referenced.

³ The Clerk's Papers indicate that Mr. Smith's Motion to Dismiss for Violation of the Court Rules is contained at pages 450-460 and his Motion to Dismiss for Violation of CrR 3.3 is contained at pages 461-462. However, Mr. Smith's motion regarding the court rules is actually six pages long and his motion regarding CrR 3.3 is actually four pages long. All pages are contained in the clerk's papers, but no official CP number was

Mr. Smith pointed out to the court that he had never been arraigned on the bail jump charge filed on January 28, 2008. RP 25-26, 3-3-08. The court did not rule on the motion and, instead, continued the hearing to Friday, March 7, 2008. RP 30-36. 3-3-08.

On March 7, 2008, the court indicated that it could not find in the court record anything that indicated that the court had accepted a plea from Mr. Smith on January 28, 2008. RP 1-3, 3-7-08. The court indicated that it would take a plea from Mr. Smith that day (RP 3-4, 3-7-08), but Mr. Smith objected to the arraignment under CrR 4.1. RP 9-10, 3-7-08. The State conceded that no plea had been entered on January 28, 2008. RP 11, 3-7-08. The trial court found that Mr. Smith had not been arraigned on count II of the amended information filed on January 28, 2008, the bail jump charge, because no formal plea had been entered. RP 11, 3-7-08.

Mr. Smith requested, and was granted, counsel as to the bail jump charge, but continued to represent himself as to the unlawful possession of a controlled substance charge. RP 16-20, 3-7-08. The trial court scheduled a hearing for Monday, March 10, 2008, in order for Mr. Smith to be arraigned on count II, the bail jump charge. RP 21-23, 3-7-08.

On March 10, 2007, the State objected to Mr. Smith proceeding pro se on the drug charge with standby counsel while the same standby

assigned to pages three through six of the motion regarding court rules or pages three and

counsel represented Mr. Smith on the bail jump charge. RP 2-5, 3-10-08. The State argued that Mr. Smith was entitled to representation on both charges or to be pro se on both charges, but not to have appointed counsel on one charge but be pro se on the other. RP 2-5, 3-10-08. The State requested that the trial court have Mr. Smith represent himself on both charges, or have appointed counsel on both charges, allow the State to dismiss the bail jump charge without prejudice and refile the bail jump charge as a separate case. RP 9-15, 3-10-08. The trial court ruled that dismissing the bail jump charge and refiling it was “the State’s prerogative” and permitted the State to dismiss the bail jump charge without prejudice in cause number 07-1-01010-4 and to refile it as a separate charge in cause number 08-1-00288-6. CP 1-5; RP 15, 21, 3-10-08; RP 3-4, 3-17-08.

On March 25, 2008, proceedings began on the bail jump charge in cause number 08-1-00288-6. RP 2, 08-1-00288-6.

On April 4, 2008, pro-se, Mr. Smith filed a Motion to Dismiss the charge for violation of CrR 3.3(h). CP 45-49.

On April 8, 2008, the court declared a mistrial in cause number 08-1-00288-6 based on a breakdown in communications between Mr. Smith and his appointed attorney. CP 56; RP 11, 4-8-08.

four of the motion regarding CrR 3.3.

On June 9, 2008, through his appointed counsel Mr. Smith filed a Motion and Declaration for change of venue to Jefferson County under CrR 5.2(b)(2), arguing that he could not receive a fair trial in Kitsap County because he had filed bar complaints and judicial conduct complaints against nearly every judge, prosecutor, and public defender in Kitsap County. CP 62-64.

On June 17, 2008, the State filed a Memorandum of Authorities Re: Defense Motion for Change of Venue arguing that a change of venue was improper since Mr. Smith had not presented sufficient evidence to establish that there had been sufficient pretrial publicity to make it impossible for him to receive a fair trial in Kitsap County. CP 65-68.

On June 20, 2008, Mr. Smith filed a Reply to the State's Memorandum pointing out that the State's Memorandum took the position that a defendant could never have the venue of his or her trial changed unless that defendant demonstrated prejudice based on pre-trial publicity. CP 69-71.

On June 23, 2008, proceedings commenced on a second trial in cause number 08-1-00255-6. RP 2, 6-23-08. The trial court denied Mr. Smith's motion for a change of venue. RP 30, 6-23-08.

On July 7, 2008, the State filed Motions in Limine. CP 85-90.

On July 21, 2008, Mr. Smith, through appointed counsel, renewed

the Motion to Dismiss for violation of CrR 3.3(h) which had been filed pro-se by Mr. Smith on April 4, 2008. RP 2, 7-21-08. The trial court declined to hear the motion since Mr. Smith was represented by counsel at the time the motion was filed, so counsel for Mr. Smith adopted it as his own and asked to argue the motion on Mr. Smith's behalf. RP 11, 7-21-08. Neither party had a complete copy of the motion, so argument was delayed until the afternoon of July 21, 2008. RP 12, 7-21-08.

Counsel for Mr. Smith did not object to the State's proposed jury instructions. RP 13, 7-21-08.

One of the State's motions in limine was to exclude reference to the procedural history case. CP 85-90, RP 15, 7-21-08. Counsel for Mr. Smith objected to this motion in limine on grounds that it was Mr. Smith's contention that the entire prosecution of Mr. Smith for bail jumping was retaliatory and Mr. Smith wanted to be able to inform the jury of this. RP 15-17, 7-21-08. The court granted the motion, but held that Mr. Smith could introduce evidence that he was in custody on the date of the alleged bail jump. RP 17-18, 7-21-08.

Rather than inform the jury that Mr. Smith was being prosecuted for possession of a controlled substance, counsel for Mr. Smith agreed to stipulate to the jury being informed that on the date of the alleged bail jump Mr. Smith was required to appear in court regarding a class C

felony. RP 19, 7-21-08.

Argument on the pro-se motion to dismiss filed by Mr. Smith on April 4, 2008, was heard on the afternoon of July 21, 2008. RP 33-43, 7-21-08. The trial court denied the motion. RP 43-47, 7-21-08.

Also on the afternoon of July 21, 2008, the State brought an oral motion to exclude defense witnesses 1 through 7 as listed on the defense witness list filed July 7, 2008, on the basis that the testimony offered by the individuals would be inadmissible as either hearsay or irrelevant. RP 51, 7-21-08. The trial court denied the motion. RP 53, 7-21-08.

On July 22, 2008, the trial court accepted the stipulation between the parties "sanitizing" the underlying offense of the bail jump charge. RP 67-68, 7-22-08.

Witness testimony began on July 22, 2008. RP 82, 7-22-08.

Bremerton police Detective Floyd Earl May testified that on July 13, 2007, he was assisting the Department of Corrections with a search at the Chieftan Motel when he came into contact with Mr. Smith. RP 82-84, 7-22-08. Mr. Smith was arrested for a class C felony and was transported to the jail. RP 84, 7-22-08.

On January 25, 2008, Det. May was at the Dunes Motel and he went to the restaurant parking lot next door to the motel and observed Detective Elton arrest Mr. Smith for an outstanding warrant for failure to

appear. RP 84-85, 7-22-08.

Margaret Rogers, the Kitsap County Clerk's Office Court Operations Manager, testified regarding various certified court documents issued in Mr. Smith's 07 cause number. RP 88-124, 7-22-08. Ms. Rogers testified that exhibit 10 was a certified copy of an order setting form, with the signature of "Kevin Smith", resetting Mr. Smith's trial date to November 13, 2007. RP 108-111, 7-22-08. Ms. Rogers could not verify that it was Mr. Smith who signed exhibit 10. RP 124, 7-22-08.

Ms. Rogers also testified that exhibit 13, was a certified copy of the clerk's minutes entry of November 13, 2007 which indicates that Mr. Smith did not appear. RP 116-117, 7-22-08.

At the close of the State's case, Mr. Smith moved to dismiss the case against him on grounds that the State had failed to identify Mr. Smith as the "Kevin Smith" at issue in the previous proceedings and who failed to appear on November 13, 2007. RP 126-128, 7-22-08. The trial court denied the motion. RP 130, 7-22-08.

Prior to Mr. Smith presenting his defense, the State moved to require Mr. Smith to present an offer of proof as to every witness he intended to call because the State believed the testimony of Mr. Smith's witnesses would be self-serving hearsay. RP 134, 7-22-08. Counsel for Mr. Smith indicated that the first defense witness would be Mr. Robert

Naon, one of Mr. Smith's previous attorneys in this matter. RP 135, 7-22-08. The State argued that an offer of proof regarding the subject matter of Mr. Naon's testimony was necessary prior to Mr. Naon testifying because the State anticipated that the entirety of Mr. Naon's testimony would be irrelevant and consist of self-serving hearsay. RP 135-136, 7-22-08.

Counsel for Mr. Smith indicated to the court that part of Mr. Smith's defense was that he believed his case had been dismissed, partly because he was suffering from a severe toothache. RP 137, 7-22-08. Counsel for Mr. Smith indicated that Mr. Naon would testify that Mr. Smith appeared to be in pain and that Mr. Smith believed his case was dismissed. RP 137, 7-22-08. The trial court granted the State's motion in part, ruling: any testimony by Mr. Naon as to what Mr. Smith told him would be hearsay; any indication as to what Mr. Smith knew would be speculation; and any statements by Mr. Naon as to a medical diagnosis of Mr. Smith, such as Mr. Naon thought Mr. Smith was suffering from an abscessed tooth, would lack a foundation. RP 140-141, 7-22-08.

The State also moved to exclude the testimony of Teresa Win and Margie Hicks. RP 142-144, 7-22-08. Counsel for Mr. Smith made an offer of proof regarding the anticipated testimony of Ms. Hicks. RP 144-145, 7-22-08. Counsel for Mr. Smith indicated that Ms. Hicks would offer testimony regarding several topics: that Mr. Smith's mother-in-law, Ms.

Linda Whitfield, was undergoing chemotherapy at the time Mr. Smith failed to appear in court; that she was present when Mr. Smith negotiated with the bonding agent, Mr. Schultz; that Mr. Smith informed Ms. Hicks that his case was dismissed and Mr. Smith was behaving under the belief that his case was dismissed when he ultimately found out that his case had not been dismissed; that Mr. Smith was caring for his wife, who had just miscarried, and his mother-in-law, who was undergoing chemotherapy for breast cancer. RP 144-145, 7-22-08.

The trial court granted the State's motion to exclude the testimony of Ms. Hicks, finding that Ms. Hicks' knowledge of Mr. Smith's negotiations with the bonding agent was irrelevant and that evidence that Mr. Smith was caring for his mother-in-law was also irrelevant. RP 151-152, 7-22-08.

Over defense counsel's objection, the trial court found that any evidence relating to the fact that Mr. Smith was prevented from appearing for his trial on November 13, 2007 by the fact that he was caring for his mother-in-law was also irrelevant. RP 152-153, 7-22-08. The trial court further held that Mr. Smith's negotiations with the bonding agent were irrelevant, but the fact that the bonding agent had to inform Mr. Smith that there was a warrant for his arrest and the date that that occurred would be relevant. RP 153-154, 7-22-08.

Mr. Robert Naon testified that he was standby counsel for Mr. Smith on October 26, 2007, as is indicated by exhibit 12. RP 161-162. Mr. Smith appeared to be in distress and requested a continuance based on a dental issue. RP 162-163, 7-22-08. Mr. Naon testified that Mr. Smith appeared to be having difficulty concentrating and appeared weary and unwell. RP 163-165, 7-22-08.

Counsel for Mr. Smith attempted to question Mr. Naon, who had been a Kitsap County Prosecutor for close to 18 years, about the charging discretion allowed to a prosecutor in deciding whether or not to file a bail jump charge, but the prosecutor objected and the trial court ruled that no witness could be questioned regarding the prosecutor's charging discretion. RP 166-172, 7-22-08.

Mr. Smith testified that at the October 26, 2007, hearing he informed the court he needed a continuance to allow Mr. Smith to go to a medical appointment later in the morning because he was in terrible pain and was unprepared to argue the motions scheduled for that morning. RP 180-181, 7-22-08. Mr. Smith testified that he didn't understand what the judge was saying but remembered the judge saying "dismissed" and asking Mr. Smith to sign something. RP 182, 7-22-08.

Mr. Smith testified that he remembered signing something on October 26, 2007, but that he did not comprehend what it was. RP 194, 7-

22-08. Mr. Smith testified that he had signed exhibit 10 on October 16, 2007, and that exhibit 10 indicates Mr. Smith's trial would be held on or before November 13, 2007. RP 194, 7-22-08.

Mr. Smith testified that he did not appear on November 13, 2007 because he thought the case had been dismissed. RP 182, 7-22-08. Mr. Smith testified that he first learned the case against him had not been dismissed when he called his mother-in-law in January of 2008 and learned that bounty hunters were looking for him. RP 182-183, 7-22-08. Mr Smith testified that he turned himself in to police on January 25, 2008, while police were raiding another room in the hotel where Mr. Smith was staying. RP 184, 7-22-08.

In rebuttal, over objection from Mr. Smith, the State called Bremerton Police Department Detective Aaron Elton. RP 216-226, 7-23-08. Det. Elton testified that on January 25, 2008, he was on duty on a parking lot next to the Dunes Motel assisting other officer securing a room while waiting for a search warrant to be obtained. RP 225-228, 7-23-08. Det. Elton was working as a plainclothes detective when he saw a man watching the other police officers. RP 228-229, 7-23-08. Det. Elton learned the man had a warrant for his arrest and arrested him. RP 229-237, 7-23-08. The man arrested by Det. Elton was Mr. Smith. RP 237-238, 7-23-08.

The jury found Mr. Smith guilty of the charge of bail jump. CP 418-427.

The trial court calculated Mr. Smith's offender score as 14 and sentenced Mr. Smith to 60 months confinement, the high end of the standard range, to run consecutive to the 07 cause number. CP 418-427; RP 46-52, 8-11-08.

Mr. Smith timely filed a notice of appeal on August 11, 2008. CP 429.

D. ARGUMENT

Mr. Smith's CrR 3.3 right to a speedy trial was violated.

CrR 3.3(b) mandates that a defendant who is detained in jail must be brought to trial within the longer of either 60 days after the commencement date specified in CrR 3.3 or within 30 days following any period of time excluded from the computation of the time for trial under CrR 3.3(e).

CrR 3.3(c)(1) mandates that "The initial commencement date shall be the date of arraignment as determined under CrR 4.1."

CrR 4.1(a)(1) mandates that a defendant who is detained in jail "shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court."

Mr. Smith was initially charged with bail jump as the second count

in cause number 07-1-01010-4 on January 28, 2008. CP 453-455; RP 2-3, 1-28-08. Therefore, under CrR 3.3(c)(1) and CrR 4.1(a)(1), Mr. Smith should have been arraigned no later than February 11, 2008. However, this did not happen.

An arraignment consists of three parts: (1) calling prisoner to bar by his name, and requesting him to hold up his hand or do some other act of identification; (2) reading indictment to him in such language as to convey to his mind nature of charge against him; (3) demanding of him whether he is guilty or not guilty. *Elick v. Washington Territory*, 1 Wash.Terr. 136, 138 (1861).

On January 28, 2008, Mr. Smith was called to the bar by name and was informed of the charges against him, however, the trial court never inquired as to whether Mr. Smith was pleading guilty or not guilty. RP 2-3, 1-28-08. Thus, Mr. Smith was not arraigned on January 28, 2008.

On March 7, 2008, the trial court found and the State conceded that Mr. Smith had not been arraigned on January 28, 2008. RP 1-3, 11, 3-7-08. The court indicated that it would take a plea from Mr. Smith that day (RP 3-4, 3-7-08), but Mr. Smith objected to the arraignment under CrR 4.1. RP 9-10, 3-7-08.

The trial court found that Mr. Smith had not been arraigned on count II of the amended information filed on January 28, 2008, the bail

jump charge, because no formal plea had been entered. RP 11, 3-7-08.

The trial court scheduled a hearing for Monday, March 10, 2008, in order for Mr. Smith to be arraigned on count II, the bail jump charge. RP 21-23, 3-7-08.

On March 10, 2007, the State requested that the trial court allow the State to dismiss the bail jump charge without prejudice and refile the bail jump charge as a separate case. RP 9-15, 3-10-08. The trial court ruled that dismissing the bail jump charge and refiling it was “the State’s prerogative” and permitted the State to dismiss the bail jump charge without prejudice in cause number 07-1-01010-4 and to refile it as a separate charge in cause number 08-1-00288-6. CP 1-5; RP 15, 21, 3-10-08; RP 3-4, 3-17-08.

As is discussed below, the trial court erred in allowing the State to dismiss the bail jump charge in cause number 07-1-01010-4 and refile it in cause number 08-1-0288-6. This error violated Mr. Smith’s right to a speedy trial since he was never lawfully properly arraigned and properly brought to trial.

- a. *The State lacks discretion to dismiss a charge without following the motion process mandated by CrR 8.3.*

At common law, prosecutors had the discretion to dismiss charges. *See State v. Sonneland*, 80 Wash.2d 343, 345-346, 494 P.2d 469 (1972).

However, this discretion was taken away when the legislature enacted

RCW 10.46.090:

The state argues that, at common law, only the prosecutor was empowered to move for the dismissal of a criminal charge. From that springboard it is urged that RCW 10.46.090 merely grants the trial court power equal to that possessed by the prosecuting attorney.

Such a narrow construction fails to give the statutory language its proper effect. RCW 10.46.090 provides: 'No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section'. Clearly this evidences a legislative intent that the trial court Alone is authorized to dismiss criminal charges. The statute completely abrogates the prosecuting attorney's common law discretion to dismiss a criminal prosecution.

Sonneland, 80 Wash.2d at 346, 494 P.2d 469.

RCW 10.46.090 has been superseded by CrR 8.3. CrR 8.3 grants the *trial court* discretion to dismiss a criminal charge *upon written motion of the prosecuting attorney* setting forth the reasons for the dismissal. Thus, prosecutors do not have the authority to simply dismiss charges, they must follow the motion process contained in CrR 8.3 and provide the court a written motion setting forth the reasons why the trial court should dismiss the charge.

Here, the trial court found that dismissal of the bail jump charge in cause number 07-1-01010-4 and refiling the charge in cause number 08-1-00288-6 was "the State's prerogative" and allowed the State to do so. RP CP 1-5; RP 15, 21, 3-10-08; RP 3-4, 3-17-08. This was error. The

trial court was incorrect that the State had the prerogative to dismiss the bail jump charge at will and refile it. As discussed above, a trial court must follow the motion process required by CrR 8.3 when seeking to dismiss a charge.

b. *Even if the State was not required to file a written motion, dismissal of the bail jump charge in cause number 07-1-01010-4 to avoid addressing the issue that Mr. Smith had not been timely arraigned on the bail jump charge was improper.*

CrR 8.3(a) gives the trial court discretion to dismiss “upon written motion of the prosecuting attorney setting forth the reasons therefor.” While a dismissal has the effect of tolling the speedy trial period under CrR 3.3(e)(4), “a sufficient reason must exist apart from the running of the speedy trial period to justify a dismissal without prejudice under CrR 8.3(a).” *State v. Bible*, 77 Wn.App. 470, 472, 892 P.2d 116, *review denied*, 127 Wn.2d 1011 (1995). And the trial court must evaluate possible prejudice to the defendant. *Bible*, 77 Wn.App. at 472.

Here, no written motion to dismiss was ever filed by the prosecutor. However, on March 10, 2008, the trial court was aware that Mr. Smith had not been arraigned on the bail jump charge and twice informed counsel for the State and Mr. Smith that it intended to take Mr. Smith plea on the bail jump charge that day. RP 2, 5, 3-10-08. When the trial court indicated it wished to take Mr. Smith’s plea, the State

interrupted the court and insisted on addressing the issue of Mr. Smith representing himself on the drug charge but having appointed counsel on the bail jump charge. RP 2, 3-10-08. Rather than allow Mr. Smith to be arraigned, however tardily, the State sought to avoid the issue of the untimely arraignment by dismissing the bail jump charge and refiling it in a new case. RP 13-15, 3-10-08. The State couched its argument in terms of being concerned that Mr. Smith was not allowed to be pro-se on one count but have representation on another (*See State v. Romero*, 95 Wash.App. 323, 326, 975 P.2d 564, *review denied* 138 Wash.2d 1020, 989 P.2d 1139 (1999) (“There is clearly no constitutional right to hybrid representation in this state where the rights in question are granted in the disjunctive. The right to self-representation in a criminal matter, thus far, is an all-or-nothing process.”)), however, this error could have been easily resolved without the dismissal of the bail jump count by having Mr. Smith elect to either represent himself on both counts or to have appointed counsel on both counts. The true benefit sought by the State in the dismissal and refiling of the bail jump charge was the resetting of the time for arraignment on the bail jump charge which would occur automatically under CrR 3.3(c)(1) and CrR 4.1(a).

Thus, the true reason the State sought to dismiss the bail jump charge from the 07 cause number and to refile it as a separate cause in the

08 cause number was to avoid the violation of Mr. Smith's right to speedy trial which had clearly happened when Mr. Smith was not arraigned in accordance with CrR 3.3 and CrR 4.1. Under *Bible*, this is not a proper reason to permit the State to dismiss a charge.

The trial court erred in permitting the State to dismiss the bail jump charge and refile it in order to avoid addressing the failure of the trial court to arraign Mr. Smith on the bail jump charge.

c. *This court should vacate Mr. Smith's conviction for bail jump and remand for dismissal with prejudice.*

The issue of what remedy is applicable to a violation of a defendant's right to speedy arraignment after the 2003 amendments to CrR 3.3 appears to be one of first impression. CrR 3.3 and CrR 4.1 are silent as to the proper remedy where a defendant is not arraigned in a timely manner. However, a review of the surrounding the purpose and intent of CrR 3.3 indicates that dismissal with prejudice is the appropriate remedy, if not in all cases, then at least in this one.

CrR 1.2 states that, "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, **and the elimination of unjustifiable expense and delay.**" (Emphasis added).

In *State v. Cornwall*, the court held that, “In promulgating CrR 3.3, the Supreme Court exercised its rule-making power **in aid of the constitutional imperative that there be prompt disposition of criminal cases**. The purpose of the rule is to insure speedy justice in criminal cases insofar as is reasonably possible.” *State v. Cornwall*, 21 Wn.App. 309, 312, 584 P.2d 988 (1978), *review denied*, 91 Wash.2d 1022 (1979) (emphasis added). It is clear that the purpose of the criminal rules in general, and of CrR 3.3 specifically, is to ensure that a defendant is brought to trial as quickly as reasonably possible.

Thus, the criminal rules are intended to facilitate defendants being brought to trial promptly and to eliminate unjustifiable expense and delay.

Additionally, a prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). “[I]t is the duty of a prosecutor, as a quasi judicial officer, to see that one accused of a crime is given a fair trial.” *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), *cert. denied*, 396 U.S. 1019, 90 S.Ct. 587, 254 L.Ed.2d 511 (1970). “A defendant has no duty to bring himself to trial.” *Barker v. Wingo*, 407 U.S. 514, 527, 92 S.Ct. 2182 (1972), *citing, Dickey v. Florida*, 398 U.S. 30, 37-38, 90 S.Ct. 1564, 1569, 26 L.Ed.2d 26 (1970) (“Although a great many accused persons seek to put off the confrontation

as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.”) “As between the defendant and the State, it is the State who has the primary duty to see that the defendant is tried in a timely fashion.” *State v. Jenkins*, 76 Wn.App. 378, 383, 884 P.2d 1356 (1994), *review denied*, 126 Wn.2d 1025, 896 P.2d 64 (1995).

In bringing a defendant to trial, the right to a speedy trial under Criminal Rules imposes upon the prosecution a duty of good faith and due diligence. *State v. Ross*, 98 Wn.App. 1, 4, 981 P.2d 888, *amended*, 990 P.2d 962, *review denied*, 140 Wn.2d 1022, 10 P.3d 405 (1999). “The Superior Court speedy trial rules were not designed to be a trap for the unwary” (*State v. Fladebo*, 113 Wn.2d 388, 394, 779 P.2d 707 (1989)), nor were they intended to be a source of authority for the State to delay bringing a defendant to trial.

Although the court is ultimately responsible for ensuring compliance with the speedy trial rule, the State is primarily responsible for bringing the defendant to trial within the speedy trial period. *Ross*, 98 Wn.App. at 4, 990 P.2d 962.

The prosecutor’s duty of good faith and due diligence as an officer of the court to bring a defendant to trial in timely fashion cannot be reconciled with the State’s actions in this case.

It is undisputed that the trial court failed to arraign Mr. Smith on the bail jump charge in a timely manner in cause number 07-1-01010-4. Where a defendant is held in custody, that defendant's speedy trial right is calculated as "60 days after the commencement date." CrR 3.3(b)(1)(i). The initial commencement date is the date of arraignment as determined under CrR 4.1. CrR 4.1(a) requires that a defendant held in jail shall be arraigned not later than 14 days after the date the information is filed.

CrR 3.3(h) provides that dismissal with prejudice is the remedy when the State fails to bring a defendant to trial within the time limit provided under CrR 3.3. However, neither CrR 3.3 nor CrR 4.1 indicate what the penalty is where the State fails to arraign a defendant in accordance with CrR 4.1 or CrR 3.3.

Under the current court rules, the State may, without penalty, effectively detain a defendant in jail without ever having to bring him to trial simply by failing to arraign him or her. Because no arraignment occurs, the time for speedy trial has no starting point from which to run. While the State is supposed to arraign a defendant 14 days after the information is filed, this does not always happen as is evidenced by this case.

This court should vacate Mr. Smith's conviction on the bail jump charge and remand for dismissal with prejudice because the State should

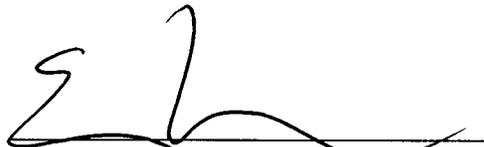
not be permitted to engage in a practice whereby it can hold someone in jail effectively indefinitely simply by failing to arraign them and therefore preventing the commencement date from ever occurring. Such actions are contrary to the intent and spirit of the rules as well as contrary to the prosecutor's duty as an officer of the court to bring a defendant to trial. Dismissal with prejudice is the proper remedy since it is clear that Mr. Smith's right to speedy trial was violated and since such a remedy will act as a deterrent to the State attempting to avoid arraigning a defendant in a timely manner in the future.

E. CONCLUSION

For the reasons sated above, this court should vacate Mr. Smith's conviction on the charge of bail jump and remand for dismissal with prejudice.

DATED this 17 day of June, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Eric Fong', written over a horizontal line.

Eric Fong, WSBA No. 26030
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	Appeal No. 38226-1-II
Respondent,)	Superior Court No. 08-1-00288-6
)	
vs.)	
)	DECLARATION OF MAILING
KEVIN JOSEPH SMITH,)	
)	
Appellant.)	
_____)	

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

Mr. Randall Sutton
Attorney at Law
614 Division Street, MS-35
Port Orchard, WA 98366

Mr. Kevin Joseph Smith
DOC #747352
Washington Correction Center
P.O. Box 900
Shelton, WA 98584

a true copy of the Brief of Appellant.

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

Dated this 19th day of June 2009, at Port Orchard, Washington.


ANN BLANKENSHIP

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