

NO. 39806-1-II

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

STATE OF WASHINGTON, Respondent

v.

JERRY SIMS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE M. WOOLARD
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00035-2

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

19 APR 29 AM 7:32
STATE OF WASHINGTON
BY _____
KINNIE
FILED
COURT CLERK

TABLE OF CONTENTS

I. STATEMENT OF FACTS.....1
II. RESPONSE TO ASSIGNMENTS OF ERROR.....3
III. CONCLUSION17

TABLE OF AUTHORITIES

Cases

<u>Barker v. Wingo</u> , 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).....	11
<u>Doggett v. United States</u> , 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).....	12
<u>State v. Flinn</u> , 154 Wn.2d 193, 199, 110 P.3d 748 (2005).....	9
<u>State v. Hardesty</u> , 110 Wn. App. 702, 706, 42 P.3d 450 (2002)	10
<u>State v. Iniguez</u> , 143 Wn. App. 845, 855, 180 P.3d 855, review granted, 164 Wn.2d 1025 (2008).....	11
<u>State v. Mack</u> , 89 Wn.2d 788, 791, 576 P.2d 44 (1978)	12
<u>State v. Thomas</u> , 95 Wn. App. 730, 738, 976 P.2d 1264 (1999).....	9
<u>State v. Torres</u> , 111 Wn. App. 323, 330, 44 P.3d 903 (2002)	9
<u>State v. Williams</u> , 104 Wn. App. 516, 523, 17 P.3d 648 (2001)	10
<u>United States v. Mendoza</u> , 530 F.3d 758, 762 (9th Cir. 2008).....	12

Rules

CrR 3.3.....	3, 9, 10, 12
CrR 3.3(c)(2)(VII)	3
CrR 3.3(e)(6)	3
CrR 3.3(f)(2).....	9
CrR 4.1.....	10

Constitutional Provisions

U.S. CONST. Amend. VI.....	11
----------------------------	----

I. STATEMENT OF FACTS

The statement of facts necessary to resolve the issues in this case are succinctly set forth in the Findings of Fact and Conclusions of Law Regarding Defense Motion for Dismissal re: Speedy Trial and Prior Dismissal (CP 66) and filed by the trial court in this matter. They relate directly to the speedy trial issue that has been brought by the defendant. A copy of the Findings is attached hereto and by this reference incorporated herein.

Under the initial cause number of this matter that is now before the court, 08-1-00412-1, on August 29, 2008, Deputy Prosecutor Tonya Riddell made a motion to the court to dismiss the charges of Rape in the Second Degree and Rape of a Child in the Third Degree against the defendant without prejudice. A hearing was held on that date in front of a Superior Court Judge. The defendant and his counsel were both present. The Judge heard the State's motion and granted the request for dismissal without prejudice. Both the defendant and his counsel signed off on that particular order.

Following that dismissal without prejudice, charges were re-filed on January 9, 2009. Defendant at that time was summonsed for a first appearance on the new charges. He was summonsed to court on February

10, 2009 and the Summons was sent to his last three known addresses. He failed to appear on the date of February 10, 2009. A warrant for his arrest was authorized and he was eventually brought before the court on April 8, 2009 to make his first appearance. Defense counsel, Neil Cane, was appointed to represent the defendant and the matter was set over to April 15th for arraignment. On April 13, a decision was made by the court that Mr. Cane was not qualified to handle a three-strikes case. New counsel was appointed due to this disqualification. Arraignment then took place on February 15, 2009 and the date of June 8 was set for trial. On April 28, in response to defense's request for trial within 30 days of the arraignment date, trial was reset to May 11, 2009.

It is clear from the records and the recitation in court that the defendant was detained in federal custody during the period of February 4, 2008 through April 3, 2009. He was transferred here in 2008 for the purpose of this matter under the 2008 cause number, but he was still considered in federal custody. While under federal custody, he was placed in a halfway house in Oregon some time between March 6, 2009 and March 12, 2009. He was then released from federal custody on April 4, 2009 but placed in custody in Oregon and transferred to Clark County for his first appearance on this cause number on April 8, 2009. To obtain his presence from the federal system prior to release, the State would have

used a detainer act since he was in custody, not only by separate jurisdiction (the federal government), but also housed in another state.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The assignments of error raised by the defendant all deal with the speedy trial under CrR 3.3. During the time of the initial chargings and the failure of the defendant to appear where a warrant had to be issued, he was in federal custody. The time a defendant spends in federal custody is excluded from speedy trial calculations. CrR 3.3(e)(6). This defendant was in federal custody during the period of time when he was awaiting trial under the original cause number of 08-1-00142-1. This matter was dismissed without prejudice with all parties in agreement and the matter was re-filed January 9, 2009. Yet at that time the defendant was still in federal custody and housed outside of the State of Washington. The time periods could not begin until at least the point when he was either not in federal custody or custody of another state. CrR 3.3 (e)(6). He only arrived from Oregon on April 7, 2009 and made his first appearance in the Clark County Superior Court on April 8, 2009.

In addition to the commencement of new trial dates there was also the disqualification of his attorney. (CrR 3.3(c)(2)(VII)). In this case on April 8, 2009 the defense attorney Neil Cane was appointed for the

defense. He was removed from the case on April 13, 2009 because he didn't have the requisite experience to handle what was appearing to be a three-strikes case. A new attorney then was appointed in the defendant's behalf. Thus, as of April 13, 2009 there was another new commencement date, giving the State 60 days for trial. As such, speedy trial at this time does not run until June 12, 2009. The current trial date therefore was within speedy trial computations.

The trial then scheduled to commence in early June, 2009 hit another snag when the defense attorney indicated he was not available because of prior vacation plans. Mr. Dunkerly, the defense attorney, was asked by the court to talk to the defendant about whether he would consider waiving speedy trial and the defendant told his attorney that he was not willing to do so. (RP 94-95). With that in mind, the trial court did not wish to continue rehashing the speedy trial argument and appointed Susan Clark as his new attorney. It is obvious from the transcript that Ms. Clark and Mr. Dunkerly had both discussed this case and were both aware of the proposed Findings of Fact and Conclusions of Law (CP 66) that the State wanted to enter. The discussion in court by Ms. Clark concerning that was as follows:

THE COURT: And – and the – the charges are rape in the second degree, rape of a child in the third degree and over

eighteen and deliver a narcotic from Schedule I or Schedule II.

MS. CLARK (Defense Counsel): As I say, Mr. Dunkerly filled me in on part of it. I've got his file. I can have a chance to look at the court file –

THE COURT: Yep.

MS. CLARK: - and meet with Mr. Sims and we should be ready to speak more intelligently on that next Friday.

THE COURT: I understand. And it's the State's position and I believe it's the court's position that speedy trial begins anew with the change of counsel.

MR. JACKSON (Deputy Prosecutor): And, Your Honor, there is a finding of facts, conclusions of law regarding the motions heard earlier today that I gave to Mr. Dunkerly. He read through it. He found two typos. And I fixed those typos.

However, he thought I put May – thought I put April where I should have put May, which is correct.

But I also needed to correct it as the 8th as opposed to the 28th, because today's the 8th, not the 28th.

THE COURT: Okay.

MR. JACKSON: - I've corrected those here.

He doesn't realize that I did that.

And then also I indicated here that the speedy trial issue was raised in court, and I have written down April 15th, but actually that was the arraignment date. April 28th was the day that the speedy trial issue was first raised.

And that should be reflected in the court file.

THE COURT: Okay.

MR. JACKSON: So with that caveat, Mr. Dunkerly signed off, and he had two points that – as to paragraph No. 3, he's objecting, assuming that the State will supplement the record with written documents that will confirm the dates that are mentioned in paragraph 3, which I mentioned earlier today, and the State believes it can do that.

And then also it's Defense position that the earlier dismissal without prejudice was with prejudice. So – he already made that motion.

THE COURT: Okay.

MR. JACKSON: That argument earlier today.

THE COURT: And I wouldn't expect Ms. Clark to do anything with that, and I'll –

MR. JACKSON: I wouldn't – and I'm not –

THE COURT: - I'll sign off on it, and we'll just et you a copy.

MR. JACKSON: All right. And there's a spot for Mr. Sims to sign if he cares to or not.

THE COURT: Mr. Sims, do you want to sign off on that?

MS. CLARK: I – he hasn't had a chance to review it. I would ask if the Court's inclined to enter it with the signature of counsel.

THE COURT: I will do that. And we'll get you a copy and than Mr. Sims can – well, of course, be entitled to copies of all of this later.

MS. CLARK: I feel pretty confident with my conversation with Mr. Dunkerly and indicating that Mr. Sims is standing by his right to speedy trial and objects to starting speedy

trial over with new counsel, but we can address that further next week.

THE COURT: Yeah, we had to wrap some things up first and then – okay.

MR. JACKSON: And, Your Honor –

THE DEFENDANT: (Speaking with Ms. Clark)

MS. CLARK (to defendant:) We'll talk more about that.

MR. JACKSON: No matter what happens there's still going to be a trial, presumably, set sometime in the relatively near future, within sixty days, at least, and I know that the State has a number of issues with either trial settings and/or witnesses who are potentially not available on certain dates.

I know that the court has June 22nd as a possible date, and that would be within the sixty, and I just wanted to let defendant counsel know that might be a date I'd be asking for. I have no idea if that's the date that (inaudible) –

THE COURT: I have June 22nd and –

MR. JACKSON: I'm not –

THE COURT: - June 29th –

MR. JACKSON: - suggesting the defense –

THE COURT: - within speedy trial.

MS. CLARK: June 22nd and – and June –

THE COURT: June 29th.

MS. CLARK: - June 29th.

THE COURT: Yeah.

MS. CLARK: I will certainly review my calendar and meet with my client and we can make a decision then.

Judge Nichols is looking for me –

THE COURT: Yep.

MS. CLARK: - in about two minutes.

THE COURT: I understand. That's – we're finished.

MS. CLARK: So – (To defendant:) I'll be over to talk to you next week.

JUDICIAL ASSISTANT: Thank you, Suzan.

THE COURT: And whatever bail that was set was – will remain the same.

-(RP 100, L15 – 104, L25)

There are a couple of areas that are brought to light by this discussion. First of all the actual trial was held on June 23, 2009. The discussion among the parties clearly indicates that they wanted to keep it within the new speedy trial after the assignment of new attorney. Further, it is obvious that the new defense attorney had no objections to the Findings of Fact and Conclusions of Law (CP 66) that were being entered by the State. In fact, it's obvious from the transcript that the court was leaving this entire discussion open to the new defense attorney in case there were any difficulties, problems, or further clarifications that needed

to be made. In other words, the Judge was not forestalling the defense from re-raising this issue if it felt that it was important to do so.

The decision to grant or deny a motion for a continuance rests within the trial court's sound discretion. State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). Thus, we will not disturb the trial court's decision unless the defendant demonstrates that the trial court's exercise of its discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Flinn, 154 Wn.2d at 199. The defendant challenging a decision to grant a continuance must show prejudice and abuse of discretion. State v. Torres, 111 Wn. App. 323, 330, 44 P.3d 903 (2002).

The defendant received a timely trial. When he arrived in our jurisdiction, the court granted orders continuing the trial under CrR 3.3. Continuances were agreed to by counsel, who was not ready for trial. His attorney withdrew, and that started the speedy trial clock anew. See State v. Thomas, 95 Wn. App. 730, 738, 976 P.2d 1264 (1999) The defendant's argument that such a continuance was unnecessary is largely irrelevant, given that bringing a motion for continuance on behalf of a party waives that party's objection to the requested delay. CrR 3.3(f)(2). A trial court does not abuse its discretion by granting a continuance to allow defense counsel more time to prepare for trial, even over the defendant's objection,

to ensure effective representation and a fair trial. State v. Williams, 104 Wn. App. 516, 523, 17 P.3d 648 (2001). The defendant has not demonstrated, nor has he even alluded to a reason why these continuances were an abuse of discretion or prejudicial to him.

The application of CrR 3.3 to the facts of this case is a question of law that the Appellate Court reviews de novo. State v. Hardesty, 110 Wn. App. 702, 706, 42 P.3d 450 (2002), rev'd on other grounds, 149 Wn.2d 230, 66 P.3d 621 (2003). The Court reads the rule to avoid unnecessary dismissal with prejudice, whenever possible. Id.

CrR 3.3

(c) Commencement date

(1) Initial commencement date: The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of commencement date: On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(ii) Failure to appear: The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(vii) Disqualification of counsel: The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(2) Resetting of trial date: When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. Amend. VI. The right to a speedy trial is triggered by filing charges or arresting the defendant, whichever comes first. State v. Iniguez, 143 Wn. App. 845, 855, 180 P.3d 855, review granted, 164 Wn.2d 1025 (2008). To determine whether a defendant's fundamental right to a speedy trial has been violated, courts consider four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant. 3 The primary burden is on the courts and the prosecutors to assure that cases are brought to trial. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

The first factor involves a threshold determination of whether the delay is sufficient to trigger judicial examination of the claim. A delay long enough to be considered presumptively prejudicial triggers an inquiry into the remaining Barker factors. The federal courts have held that

generally post accusation delay of more than one year is “presumptively prejudicial.” United States v. Mendoza, 530 F.3d 758, 762 (9th Cir. 2008).

The second factor, the reason for the delay, requires an inquiry into the government's efforts to pursue the defendant. “The government has ‘some obligation’ to pursue a defendant and bring him to trial.” If the government pursues the defendant with reasonable diligence, the speedy trial claim fails unless the defendant can demonstrate specific prejudice. Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

The time limits set forth under CrR 3.3 are procedural rules and do not create constitutional rights. State v. Mack, 89 Wn.2d 788, 791, 576 P.2d 44 (1978). Thus, without more, the defendants' CrR 3.3 objection cannot be automatically deemed a Sixth Amendment challenge to his speedy trial rights. He must therefore demonstrate that the Sixth Amendment violation claimed for the first time on appeal is a manifest error affecting a constitutional right. The State submits that he failed to do so because there is no record from which the Sixth Amendment violation can be established.

A CrR 3.3 objection involves a determination of whether the defendant was arraigned and brought to trial within the time periods

provided by the rules. But as discussed above, evaluation of a Sixth Amendment speedy trial claim involves a four part factual inquiry into the reasons for the delay and resulting prejudice. Here, there was no such inquiry because the claim was not made.

The State submits that the defendant received a fair trial within his speedy trial time. There has been no showing made by the defense that this prejudiced his ability to present a defense or has prevented him from making sure that the jury clearly understood his position. This does not appear to be a constitutional issue under the Sixth Amendment being raised here, but rather the speedy trial rule under 3.3 and how it's interpreted in our state. The man cannot be brought to trial until he is within our jurisdiction. To acquire him for our jurisdiction when he's in federal authority requires detainers and basically waiting for the federal authorities to make their decision as to when they are going to turn him over to us. In fact, once Clark County did receive him and Mr. Dunkerly has brought the motions on behalf of the defendant it became obvious that he was stuck in a conundrum. Mr. Dunkerly had non-refundable tickets for a vacation scheduled around June 1. He indicated to the court that he was willing to waive this matter over his client's objection so that it could be postponed even further. (RP 91, L16 – 92, L8). It's at that point too that the prosecutor indicates that the chief detective in the matter is out of

commission on the week of June 8 when Mr. Dunkerly was purportedly thinking of setting it. And the court also indicated that it wasn't available the week of the 8th because it had prior settings on a homicide case. (RP 92).

The discussion among the parties continued with the court asking if Mr. Dunkerly could possibly be able to come back the evening of June 1st and they could start the trial on Tuesday, June 2. Mr. Dunkerly didn't think this was possible and thus left the court in a strange position:

THE COURT: So, Mr. Dunkerly, are you back on the 2nd, did you say?

MR. DUNKERLY: Yes, I'm back on the 2nd, I come home the night of the 2nd.

THE COURT: Can you change it to the night of the 1st and we'll just start this on Tuesday?

MR. DUNKERLY: Well, they're supposed to be – it's – they're supposed to be like non-refundable and non-changeable. I mean, I went the least expensive way to go for the tickets.

And I don't – I don't know that when I'll be gone from May 20th until then that I – I'm sorry, I – I mean, that's just where I'm at.

I – I think, though, that the – you know –

THE COURT: Then – then – then my choice is to appoint new counsel.

MR. DUNKERLY: I don't know, well –

THE COURT: And then we start speedy trial all over again, your having preserved your arguments on this, but if you're unable to try this case with anything other than Monday – and I certainly can't put you in that position –

MR. DUNKERLY: Uh-huh.

THE COURT: So my choice, then, is to appoint new counsel.

JUDICIAL ASSISTANT: Do you want me to try –

MR. DUNKERLY: That's – that's the court's call. I leave it – I'll leave that to the court. I – I – yeah, I'll leave that to the -

THE COURT: So what do you –

MR. DUNKERLY: - Court.

THE COURT: Do you want to chat with your – your client a –

MR. DUNKERLY: Okay.

THE COURT: - little bit?

MR. DUNKERLY: Okay. I'll –

THE COURT: About preserving where we are right now –

MR. DUNKERLY: Okay.

THE COURT: - and then perhaps with that, those – preserving those issues, waiving speedy trial so that you would be available.

So if you want to take about five with your client, I'll allow you to do so.

MR. DUNKERLY: Okay, that's fine, thank you, Your Honor.

-(RP 93, L10 – 95, L6)

The defense attorney takes some time then to talk to his client and his client indicates to him that he would like new counsel appointed.

MR. DUNKERLY: (Taping in progress)... he is unwilling to waive –

THE COURT: Okay.

MR. DUNKERLY: -- and he would like new counsel appointed. So, anyway, and that's correct, Mr. Sims, right?

THE DEFENDANT: Yeah.

THE COURT: Okay. So Ms. Clark is someone that – someone who is in our group and I will appoint her.

I have an in-custody docket starting at 2, so I'm going to set this over to 2:00, try and reach her, and then we can reset trial dates.

MR. DUNKERLY: Okay. Thank you, Your Honor.

-(RP 95, L9-22)

The State submits that the defendant at this point was making an informed decision after listening to what had been discussed in court and that decision was that he wanted a new attorney and the court accommodated his request. When Ms. Clark then came on board, she was in the position, as explained earlier, of coming into the case and having

just talked to Mr. Dunkerly about it, but not having necessarily reviewed all the files. Trial then was set in June and the State submits that there has been no violation of any of the speedy trial rights of this defendant, nor is there any indication of any prejudice to him or that he did not receive a fair trial with adequate defense.

III. CONCLUSION

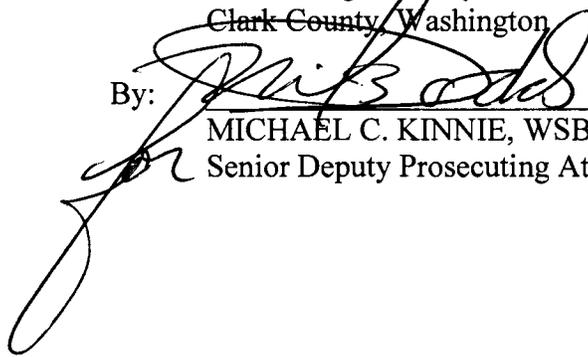
The trial court should be affirmed in all respects.

DATED this 19th day of August, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


10785
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

FILED

MAY 08 2009
3:20

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JERRY SIMS,
Respondent

FINDINGS OF FACT AND CONCLUSIONS
REGARDING DEFENSE MOTION FOR
DISMISSAL RE: SPEEDY TRIAL & PRIOR
DISMISSAL.

No. 09-1-00035-2

THIS MATTER having come before Judge Diane Woolard on May 8, 2009 upon the motion for a dismissal by the Defense, the Court having heard the oral arguments of counsel, the State of Washington represented by Deputy Prosecuting Attorney Scott Jackson and the Defendant, represented by Defense Attorney Ed Dunkerly, as well as having read the memorandums filed by each party, and having been fully advised in the premises, the Court enters the following:

FINDINGS OF FACT

1. Defendant was charge with a count of Rape in the Second Degree, a count of Rape of a Child in the Third Degree and a count of Delivery of a Narcotic with Sexual Motivation on March 13, 2008 for acts alleged to have occurred on or about January 31 and February 1 of 2008, on Cause No. 08-1-00412-1.

2. A warrant was authorized for defendant's arrest on March 18 on these underlining charges.

3. Defendant was in Federal Custody from February 4, 2008 through April 3, 2009, per Federal Probation Officer Todd Wilson, Vancouver, Washington office, for probation violations

FINDINGS OF FACT AND CONCLUSIONS OF
LAW - 1

CLARK COUNTY PROSECUTING ATTORNEY
CHILD ABUSE INTERVENTION CENTER
PO BOX 61992
VANCOUVER, WASHINGTON 98666
(360) 397-6002 (OFFICE)
(360) 397-6003 (FAX)

39
MM

1
2 relating to a Federal conviction for Armed Robbery. These violations included a 12 month
3 sentence given on April 22, 2008 for a "dirty UA".

4 4. An application and order for Writ of Habeas Corpus ad Prosequendum was filed and
5 granted on April 4, 2008, to secure defendant's presence in Clark County to face the above-
6 referenced charges, with the agreement that defendant would be returned to Federal custody
7 upon the completion of the matter charged under 08-1-00412-1.

8 5. Also on April 4, 2008, defendant filed a Notice of Imprisonment and Request for
9 Speedy Trial, noting that he was a federal prisoner at that time.

10 6. In response to the Writ, defendant was brought to Clark County for proceedings
11 under 08-1-00412-1 and he made his first appearance on July 3, 2008.

12 7. Trial was set for September 2, 2008.

13 8. On August 29, 2008, Judge Barbara Johnson dismissed the matter without prejudice,
14 following a written motion by the State for a dismissal without prejudice. Defendant and his
15 counsel at the time did not object and signed the document dismissing the case without
16 prejudice.

17 9. On January 8, 2009, the same charges were refiled in Clark County Superior Court
18 and a new cause number was issued, 09-1-00035-2.

19 10. A summons to appear for First Appearance on the matter on February 10, 2009 was
20 sent to the last three known addresses of defendant by the State.

21 11. Defendant failed to appear on February 10, 2009 and a warrant was authorized.

22 12. Thereafter, the State learned defendant was still in Federal custody and attempts
23 were made to return defendant to Clark County.

24 13. Defendant was released from Federal custody on April 3, 2009. He went into
25 custody in Oregon, on the hold from Clark County, and he was returned to Clark County,
26 making a First Appearance on April 8, 2009.

27 14. Defendant was assigned counsel, Neil Cane, on April 8, 2009.

28 15. Neil Cane was removed as counsel on April 10, 2009 and Ed Dunkerly was
29 substituted in, because the current matter appears to be a Three Strikes case and Mr. Cane is
not on the approved list of attorneys in Clark County to handle such cases.

16. Defendant is arraigned on the new cause number on April 15, 2009 and a trial date
of June 8, 2009 is set. Defendant does not object to arraignment.

17. On April 24, 2009, defendant objects to the trial date being outside of speedy trial
calculations.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW - 2

CLARK COUNTY PROSECUTING ATTORNEY
CHILD ABUSE INTERVENTION CENTER
PO BOX 61992
VANCOUVER, WASHINGTON 98666
(360) 397-6002 (OFFICE)
(360) 397-6003 (FAX)

1 28 S)
2 18. On April 15, 2009, the speedy trial issue is raised to the court and the matter is reset
3 to May 11, 2009, as there were concerns that speedy trial might run on May 15, 2009.

4 S) 19. On ~~April 28~~ ^{May 8}, the court hears speedy trial arguments. Defense counsel puts on the
5 record that he just finished reading discovery for the first time on ~~April 28~~ ^{May 7} and that he is not
6 prepared for trial. S)

7 20. Finding that there was still remaining time in speedy trial calculations and defense is
8 unprepared, the court resets the trial date to June 1, 2009.

9 21. Defense counsel indicated that he would not be available on June 1, 2009 due to
10 prepaid vacation plans from May 20th through June 2, 2009.

11 22. Defendant will not waive speedy trial.

12 23. New counsel is appointed.

13 Based upon the above foregoing the Court makes the following:

14 **CONCLUSIONS OF LAW**

- 15
- 16 1. The defendant was in the custody of the Federal prison system from before the time
17 of the original filing of these charges in 2008, through April 3, 2009, and such time is
18 an excluded period for speedy trial calculations. CrR 3.3(e)(6).
 - 19 2. The substitution of counsel on April 10, 2009 reset the commencement date to that
20 date, giving 60 days for trial setting. CrR 3.3(c)(2)(vii).
 - 21 3. In case a higher court should disagree with conclusion number 2, the court sets trial
22 by June 2, 2009, which would be the last day of speedy trial based on conclusion 1
23 above, setting it for June 1, 2009.
 - 24 4. Following defense counsel Dunkerly's assertions that he is currently not ready for
25 trial and that he will be on vacation from May 20th through June 2, 2009, and that he
26 won't have enough time to prepare this trial even if it is set for June 2, new counsel
27 is appointed. Following CrR(c)(2)(vii).
 - 28 5. The dismissal on August 28, 2008 was made by the State under CrR 8.3(a) and the
29 request was for dismissal without prejudice. Notice was given to defendant and no
objection was made. This court is not going to overrule the earlier court's decision.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

DONE in Open Court this 8 day of May, 2009.

Diene Woolard

THE HONORABLE DIANE WOOLARD
Judge of the Superior Court

Presented By:

Scott Jackson

SCOTT JACKSON, WSBA #16330
Deputy Prosecuting Attorney

JERRY SIMS
Defendant

Ed Dunkerly

ED DUNKERLY
Attorney for Defendant

8227
obj to P 3 - assume state
will support rule
obj to AS - defn position
is that state move
for do need into pre-judice

