

FILED
COURT OF APPEALS
DIVISION II

No. 39811-7-II

10 SEP 14 PM 12:48

STATE OF WASHINGTON

BY *GW*
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

COREY THOMAS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF RESPONDENT

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PM 9/13/10

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A. INTRODUCTION

More than 14 months after this Court remanded Corey Thomas's case for a new trial that trial had still not occurred. Instead, largely due to "court congestion" or the unavailability of a court to hear the matter, the case was repeatedly continued over Mr. Thomas's objection. Finally, the Honorable Rosanne Buckner dismissed the case finding numerous continuances for court congestion had been granted in the absence of any specific finding of which courts.

Against the clear weight of authority, the State now appeals contending the trial court lacked the authority to dismiss the case. The State also contends that routine court congestion is a permissible basis upon which to grant a continuance under the CrR 3.3.

B. ISSUE PRESENTED

The Supreme Court has concluded that where a trial court continues a criminal trial or finds a period excluded from the time for trial under CrR 3.3 based upon court congestion the trial court must first conduct a searching examination on the record of the availability of other courtrooms and pro tem judges. Mr. Thomas's case was continued for more than four months based upon the lack

of a courtroom. Where those continuances were granted without any effort to document the availability of courtrooms, did the trial court properly dismiss Mr. Thomas's case?

C. STATEMENT OF CASE

Mr. Thomas was originally charged four crimes in September 2005. CP 114. In 2006, a jury convicted Mr. Thomas of two of the offenses as charged and of a lesser included misdemeanor on one of the remaining counts. Id. This Court reversed all three convictions in April 2008 and remanded the case for a new trial.

The first hearing in Pierce County Superior Court following remand occurred on May 22, 2008. CP 114. After four continuances, the parties again appeared in Superior Court on April 22, 2009, at which time the State asked for yet another continuance stating the case was being reassigned to new prosecutor. 3RP 3. Defense counsel objected, noting she did not believe the State had even contacted the alleged victim in the eleven months following the first hearing. Id. at 4-5. The court granted the continuance to June 15, 2009. CP 66, 115. The order granting the continuance reset the time for trial as July 8, 2009. CP 66.

On June 15, 2009, citing "no courtrooms available." the court continued the case to June 16, 2009. CP 71, 116. On June 16,

2009, again citing “no courtrooms available.” the court continued the case to June 17, 2009. CP 72, 116.

On June 17, 2009, because there were apparently no courtrooms available, and due to apparent belief none would be available in the near future, the State requested a continuance because one of its witnesses would be unavailable the following week. CP 116-17; 4RP 14. Mr. Thomas objected. CP 117. Based upon the witness’s unavailability for a period then seven days in the future, the court granted the continuance. CP 117. The continuance order again noted “no courtrooms today.” CP 73, 117.

On June 29, 2009, the court yet again continued the matter, this time to July 6, 2009, citing “no courtrooms available. CP 74, 117. Again, Mr. Thomas objected to the court’s reliance upon court congestion to continue the matter. CP 117. The trial expiration date was reset as August 6, 2009. Id.

On July 6, 2009, the court again continued the case, to August 13, 2009, once again citing “no courtrooms available.” CP 75, 117. Yet again, Mr. Thomas objected. CP 117. The trial expiration date was reset to September 12, 2009. Id.

On August 13, 2009, because defense counsel was then in another trial, the court again continued the matter over Mr. Thomas's objection. CP 118.

On August 18, 2009, Mr. Thomas filed a motion to dismiss his case. CP 118.

Two days later, finding "no courtrooms available," the court again continued Mr. Thomas's case. CP 118.

Finally, on August 24, 2009, the case was assigned to Honorable Rosanne Buckner for trial. CP 118.

Upon seeing the repeated excuse of court congestion as a basis for the continuance, Judge Buckner reviewed the record to determine if, at the time the continuances were granted, the court had made a record of the availability of courtrooms and pro tem judges. CP 120. Finding none, Judge Buckner dismissed the case pursuant to the CrR 3.3(h). CP 120-21.

D. ARGUMENT

THE TRIAL COURT PROPERLY CONCLUDED
THAT MR. THOMAS'S CASE HAD BEEN
IMPROPERLY CONTINUED BASED UPON COURT
CONGESTION

1. Court congestion may only justify a continuance where the trial court documents its careful examination of the availability of courtrooms and judges in the county. CrR 3.3 requires an -out-of-custody defendant be brought to trial within 90 days of arraignment. The rule then allows for excluded periods for which the time for trial automatically extends 30 days beyond the expiration of the excluded period. CrR 3.3(b). Excluded periods includes time for continuances as well as delay required by unforeseen circumstances. CrR 3.3(e). If the provisions of the rule are not satisfied, the trial court must dismiss the case with prejudice. CrR. 3.3(h)

While a trial court may find an attorney's need for additional preparation and scheduling conflicts are valid reasons for continuances beyond the time for trial period, court congestion is not. State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005) (citing State v. Mack, 89 Wash.2d 788, 794, 576 P.2d 44 (1978)). Delay based upon court congestion is "contrary to the public

interest in prompt resolution of cases, and excusing such delays removes the inducement for the State to remedy congestion.”

Flinn, 154 W.2d at 200. Despite amendments to the time for trial rule over the years, courts continue to require:

When the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms.

Id. (citing State v. Kokot, 42 Wn.App. 733, 736-37, 713 P.2d 1121 (1986)).

The Supreme Court has recently applied this same requirement to the post-2003 rule, the present version of the rule, holding:

simply because the rule now allows “unavoidable or unforeseen circumstances” to be excluded in computing the time for trial does not mean judges no longer have to document the details of unavailable judges and courtrooms.

State v. Kenyon, 167 Wn.2d 130, 139, 216 P.3d 1024 (2009). Thus the rule remains, that whenever court congestion is cited as the basis for a continuance the trial court must document the details of that congestion on the record.

Undeterred by the clear holding of Kenyon, the State, in an effort at judicial archeology, asserts the unbroken line of cases leading to Kenyon is somehow based on a misbegotten premise.¹ Thus, the State theorizes, under the 2003 amendment of CrR 3.3, the detailed examination of courtroom availability is no longer a prerequisite to granting an extension based solely upon court congestion. Brief of Appellant at 11. Specifically, the State contends that an on-the-record examination of courtroom availability is required only where the trial actually occurs outside of the time for trial. Brief of Appellant at 12-20. The State contends that because the time for trial never expired in this case there was never a requirement to carefully examine courtroom availability on the record.

First, the relevant date here is either April 22, 2009, or June 15, 2009. On the former date Mr. Thomas noted his first objection. CP 66; 3RP 4-5. On the later the court on its own motion extended the time for trial based upon the lack of a courtroom. CP 71; 3RP 8. On each of these days the time remaining for trial was 30 days (May 22, 2009 or July 15, 2009), the trial did not commence until

¹ In the end, even if the State is correct in distinguishing every contrary case, the State leaves itself with nothing to fill the void. Simply establishing that a court need not engage in a searching review on the record does not establish that it was error for the trial court here to do so.

August 20, 2009. Therefore, the actual date of trial was outside the time for trial. See e.g., State v. Saunders, 153 Wn.App. 209, 220, 216, 220 P.3d 1238 (2009).

As a practical matter, under the current rule a trial date will never, or at best rarely, occur beyond the time for trial. Prior to 2003, CrR 3.3 established a fixed time for trial, and every continuance of the trial date was necessarily to a date beyond the time for trial. By contrast, under the current rule a properly granted continuance is an excluded period, and the time for trial automatically extends 30 days beyond the date of the continuance. CrR 3.3(e)(3). Under this rule, the date of a continuance will be definition be at least 30 days prior to the time for trial. Moreover, the rule allows a 28-day cure period if a case is set outside the time for trial. CrR 3.3(g). Because it is difficult to imagine a trial actually occurring outside the time limit, by the State's logic court congestion could allow repeated continuance which could conceivably extend the time for trial indefinitely and yet never violate the rule. And, the State contends, this indefinite delay can occur without the need to engage in the searching review of courtroom availability.

The State's argument reduces CrR 3.3 to a rule of form rather than function. In any event, Kenyon makes clear that an excluded period under the current rule has the same effect as a continuance under the prior rule; to reset the time for trial outside the preexisting limit. Kenyon, 167 Wn.2d at 139. Plainly then, an excluded period premised upon court congestion is no different than a continuance under the old rule. In each instance, court congestion may only justify a delay if the trial court first conducts a searching examination on the record of the availability of courtrooms and pro tem judges. Id.

That is precisely the conclusion Judge Buckner reached. And based upon her review of the record there was no documentation of the availability of courtrooms or judges. Indeed, the orders continuing the trial date are devoid of any such determination. See CP 66, 71-76. Nor does the record of proceedings indicate any such examination occurred. Because the duty to ensure compliance with CrR 3.3 fell squarely upon Judge Buckner, in the absence of any record of the nature or the "congestion" she properly dismissed the case.

2. Because CrR 3.3 requires a trial court to ensure a defendant receives a timely trial, Judge Buckner properly dismissed the case. “[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.” Kenyon, 167 Wn.2d at 136 (quoting State v. Striker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976)). Thus, the limitations of CrR 3.3 are intended to protect a defendant's constitutional right to a speedy trial. Id.

Under CrR 3.3(a)(1) the trial court has the ultimate responsibility of ensuring compliance with the limits of the rule. Kenyon, 167 Wn.2d at 136.

Under CrR 3.3(h), the trial court must dismiss charges when the applicable speedy trial period has expired without a trial

Saunders, 153 Wn.App. at 216. A defendant's personal objection, even when contrary to the actions of defense counsel, is sufficient to preserve a claim that the time for trial Id. at 217.

Nonetheless, the State argues the trial court wrongly considered Mr. Thomas's personal objections to the repeated continuances of his case. But, the initial objection was raised by defense counsel. 3RP 4-5. At subsequent hearings, defense counsel noted Mr. Thomas's objections. That is consistent with

defense counsel ethical obligations to comply with a clients' wishes with respect to delay of trial. Saunders, 153 Wn.App. at 217-18 (citing inter alia. RPC 1.2(a)). The trial court did nothing more than exercise its duty when it recognized that the excluded periods which extended the time for trial from May 22, 2010, were not properly justified in the record. Having found Mr. Thomas had not been afforded a timely trial as required by CrR 3.3 the court had no choice but to dismiss the case. Kenyon, 167 Wn.2d at 136; Saunders, 153 Wn.App. at 216; CrR 3.1

4. The trial court's findings are verities on appeal.

Unchallenged findings are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). By failing to specifically assign error to those findings which it contends are erroneous the State has failed to comply with the requirements of RAP 10.3(h). Thus, the State has not properly challenged the findings and they are verities.

Aside from its failure to specially assign error to the findings it disputes, the State offers no argument as to why the court's findings were erroneous. For example, the State includes Finding

of Fact VIII among those it believes to be erroneous. Brief of Respondent at 1.

Finding of Fact VIII provides:

On April 22, 2009 case continued to June 15, 2009 and court found” [sic] is required in administration of justice, pursuant to CrR 3.1(f)(2) and the defendant will not be prejudiced in the his or her defense. Reason given “defense counsel is in trial on another case; this case is being reassigned to a new DPA.” The defendant indicated “objects” on the defendant’s signature line, but the order indicated the State, the defendant, and the court. Time for trial expiration date at that time was listed as July 8, 2009. The court order indicated that there were 30 days remaining for the time for trial. Case age was listed as being 148 and 365+ days.

CP 115-16. The State makes no effort to identify a single fact contained in Finding of Fact VIII that is not supported by substantial evidence. There is not a single fact contained in Finding of Fact VII which does not appear on the face of the April 22, 2009 order.

Compare CP 66. The same is true of each of the remaining findings. Compare CP 116-18 (Findings of Fact X, XII, XIII, XIV, XV, XVI) CP 70, 73-85.

In fact, the State acknowledges it has not challenged the sufficiency of those findings. Corrected Opening Brief of Appellant at 1, n.1. Instead, the State contends it is challenging the “inherent conclusion that the defendant was entitled to make objections pro

se.” Id. First, there is no such inherent conclusion in any of the findings. As is clear, they accurately reflect the orders entered without reaching any conclusion inherent or otherwise as to the propriety of the objections raised. Second, this Court’s recent decision in Saunders makes clear that a court cannot disregard the speedy trial objections of a defendant, even where defense counsel does not voice those objections or in fact asks for the continuance. 153 Wn.App. at 217-18. Thus, even if there were an inherent conclusion in the challenged finding, that conclusion would be correct.

Because the State has not properly challenged the findings, they are verities on appeal.

E. CONCLUSION

Because the trial court properly dismissed Mr. Thomas’s case this Court should affirm that order.

Respectfully submitted this 13th day of September, 2010.



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DIVISION TWO**

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BY _____
DEPUTY

STATE OF WASHINGTON

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DIVISION II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

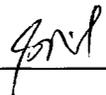
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SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF SEPTEMBER, 2010.

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