

NO. 40221-1

COURT OF APPEALS  
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.

PONZI WILLIAM, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Judge Hogan

No. 08-1-04333-1

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**BRIEF OF RESPONDENT**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Where defendant did not object to a court date set outside of time for trial, failed to appear for the court date and did not appear before the court for five more years, did defendant waive any time for trial argument? ..... 1

B. STATEMENT OF THE CASE. .... 1

C. ARGUMENT.....5

    1. DEFENDANT WAIVED ANY TIME FOR TRIAL ARGUMENT BY ABSCONDING FROM THE COURT'S JURISDICTION FOR FIVE YEARS AND FOR FAILING TO OBJECT IN A TIMELY MATTER. ....5

D. CONCLUSION. .... 13

## Table of Authorities

### State Cases

<i>City of Seattle v. Guay</i> , 150 Wn.2d 288, 295, 76 P.3d 231 (2003).....	7
<i>State v. Carson</i> , 128 Wn.2d 805, 912 P.2d 1016 (1996).....	11
<i>State v. Fladebom</i> 113 Wn.2d 388, 394, 779 P.2d 707 (1989).....	11
<i>State v. Hamilton</i> , 121 Wn. App. 633, 641, 90 P.3d 69 (2004).....	5, 7
<i>State v. Jenkins</i> , 76 Wn. App. 378, 884 P.2d 1356 (1994).....	9, 10

### Rules and Regulations

CrRLJ 3.3.....	4, 5
CrRLJ 3.3 (2003 and 2008).....	8, 10, 11
CrRLJ 3.3(b)(1)(i)(2008).....	6
CrRLJ 3.3(c)(1) (2001 and 2003).....	5
CrRLJ 3.3(d)(1).....	10
CrRLJ 3.3(d)(2) (2003).....	6
CrRLJ 3.3(d)(3) (2008).....	6, 8
CrRLJ 3.3(f)(1) (2003).....	5, 8, 9

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

1. Where defendant did not object to a court date set outside of time for trial, failed to appear for the court date and did not appear before the court for five more years, did defendant waive any time for trial argument?

B. STATEMENT OF THE CASE.

On July 23, 2001, the Tacoma City Attorney's Office charged and arraigned PONZI BERNARD WILLIAM, hereinafter "the defendant," with three charges of sexual assault and three charges of harassment. Administrative Record, 16-19 (State's Response to Motion to Dismiss). The victim was a 13 year old girl, J.P.<sup>1</sup> RP 114-15, 119-10, 177-78. The court set bail and the defendant was taken into custody. Administrative Record, 16-19 (State's Response to Motion to Dismiss). On September 12, 2001, (51 days after arraignment) the City dismissed the charges against the defendant for lack of jurisdiction. Administrative Record, 16-19 (State's Response to Motion to Dismiss). On March 3, 2003, the Pierce County Prosecutor's Office charged the defendant with three counts of communication with a minor for immoral purposes from the same

transaction or set of circumstances as those that made up the charges the City had originally filed. Administrative Record, 6-8 (Complaint).

On April 2, 2003, the defendant was arraigned on these charges in Pierce County District Court. Administrative Record, 23-31 (Docket). At that arraignment, the court set a pretrial conference for May 27, 2003, (55 days later); the defendant did not object to setting this date.

Administrative Record, 23-31 (Docket). The defendant failed to appear at the pretrial conference, and a warrant was issued for the defendant's arrest. Administrative Record, 23-31 (Docket). The defendant set a quash date of June 20, 2003, but he failed to appear on that date and the warrant remained outstanding for almost five years. Administrative Record, 23-31 (Docket). The defendant appeared in custody at a bail return hearing on February 19, 2008. Administrative Record, 23-31 (Docket). The court set a pre-trial conference for March 18, 2008 (28 days later); the defendant did not object to this date being set. Administrative Record, 23-31 (Docket).

On March 18, 2008, the defendant appeared at the pre-trial conference and informed the court he intended to move to dismiss the case for violations of his speedy trial rights under CrRLJ 3.3. Administrative Record, 23-31 (Docket), 9-15 (Defense Motion to Dismiss). The court set

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<sup>1</sup> The substantive facts are laid out in the State's response brief below. CP 68-91.

a hearing date of April 14, 2008, to hear the motion. Administrative Record, 23-31 (Docket). On April 14, 2008, the defendant moved to continue the hearing to gather more information for the motion; the court granted the motion and scheduled the motion to be heard on May 9, 2008, the day of a readiness hearing that had previously been set in this case. Administrative Record, 23-31 (Docket).

On May 9, 2008, the court heard argument regarding the defendant's motion to dismiss. Administrative Record, 23-31 (Docket). The court ruled that the State had 90 days of trial beginning on February 19, 2008, because the defendant failed to appear to court on May 27, 2003, and did not re-appear until February 19, 2008. RP 20-21. The court also ruled that the defendant failed to preserve any speedy trial objection when he failed to object at the April 2, 2003, arraignment to the court setting a pre-trial conference for May 27, 2003. RP 20-21. On May 14, 2009, the defendant signed a speedy trial waiver to extend the time for speedy trial to July 9, 2008. Administrative Record, 23-31 (Docket).

After continuances by the State and the defense, the matter proceeded to jury trial on August 20, 2009. Administrative Record, 23-31 (Docket). The jury returned a verdict of guilty on all three charges. RP 225-226; Administrative Record, 23-31 (Docket). The court sentenced the defendant to serve 365 days in custody on count 1, with 105 days

suspended, credit for one day served. RP 237; Administrative Record, 23-31 (Docket). On counts 2 and 3, it ordered the defendant to serve 365 days, with no time suspended. RP 237-238; Administrative Record, 23-31 (Docket). The defendant was ordered to pay legal financial obligations and to register as a sex offender as required by RCW 43.43.754. RP 239; Administrative Record, 23-31 (Docket).

Defendant filed a timely notice of appeal. Administrative Record, 23-31 (Docket). Defendant raised five issues in his appeal: 1) that defendant's case should have been dismissed under former CrRLJ 3.3 when the time for trial had expired, 2) ineffective assistance of counsel, 3) prosecutorial misconduct, 4) sufficiency of the evidence, and 5) cumulative error. CP 19-67. The Superior Court affirmed defendant's convictions and found against defendant on all issues. CP 92-94. Specifically, the court found that defendant had failed to object to the pretrial hearing being outside the speedy trial limits within the period of time prescribed by CrRLJ 3.3, and then had failed to appear for the pretrial hearing. CP 92-94.

Defendant filed a motion for discretionary review with this Court which abandoned the other issues argued down below, including the double jeopardy claim, and only sought review as to whether defendant

was entitled to dismissal under former CrRLJ 3.3. A commissioner of this court issued a decision granting review. The State now files this response.

C. ARGUMENT.

1. DEFENDANT WAIVED ANY TIME FOR TRIAL ARGUMENT BY ABSCONDING FROM THE COURT'S JURISDICTION FOR FIVE YEARS AND FOR FAILING TO OBJECT IN A TIMELY MATTER.

In 2001, a defendant not released from jail pending trial had to be brought to trial not later than 60 days after the date of arraignment if in custody, and not later than 90 days after arraignment if not held in custody. CrRLJ 3.3(c)(1) (2001 and 2003). When a defendant is arraigned on charges in one court, and those charges are later dismissed and re-filed in another court, the time for trial in the new court is counted from the date of the re-arraignment and is equal to the amount of time for trial that existed at the time of the dismissal. *See State v. Hamilton*, 121 Wn. App. 633, 641, 90 P.3d 69 (2004). CrRLJ 3.3(f)(1) (2003) read,

The court shall, within 15 days of the defendant's arraignment, *or at the pretrial hearing*, set a date for trial which is within the time limits prescribed by this rule, and notify the lawyer for each party of the date set.... A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those limits.... **Failure of a**

**party, for any reason, to make such a motion shall be a waiver of the objection that a trial commenced on such a date...is not within the time limits prescribed by this rule.**

(emphasis added). By the time the defendant reappeared to court in 2008, CrRLJ 3.3(d)(3) (2008) stated,

A party who objects to the date set on the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice [of the trial date] is mailed or otherwise given, move that the court set a trial date within those limits.... **A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such date, is not within the time limits prescribed by this rule.**

(emphasis added). CrRLJ 3.3(d)(2) (2003) read,

When a person who has already been arraigned fails to appear for any trial or pretrial proceeding at which the defendant's presence is required, the defendant shall be brought to trial not later than 60 days after the date upon which the defendant is present in the county where the criminal charge is pending and the defendant's presence has been made known to the court on the record, if the defendant is thereafter detained in jail.

Under CrRLJ 3.3(b)(1)(i)(2008), "a defendant who is detained in jail shall be brought to trial within...60 days after the commencement date specified in this rule." In 2008, if a defendant failed to "appear for any proceeding at which the defendant's presence was required, then the new commencement date [was] the date of the defendant's next appearance."

A trial court's order on a motion to dismiss for speedy trial purposes is reviewed for manifest abuse of discretion, which occurs where the court applies the wrong legal principle, or where the decision is manifestly unreasonable, or is based on untenable grounds or reasons. *City of Seattle v. Guay*, 150 Wn.2d 288, 295, 76 P.3d 231 (2003). "Application of a court rule to a specific set of facts is an issue of law [reviewed] de novo." *Hamilton*, 121 Wn. App. at 637.

In the present case, the defendant's time for trial rights were not violated because his failure to appear to the May 27, 2003, pretrial conference reset his time for trial calculations. The defendant was arraigned in Tacoma Municipal Court, and he appeared for trial on September 12, 2001, 51 days after his arraignment. Administrative Record, 16-19 (State's Response to Motion to Dismiss). The City dismissed the charges at that time. Administrative Record, 16-19 (State's Response to Motion to Dismiss). When the Pierce County District Court re-arraigned the defendant on March 3, 2003, and released him from custody, there were thus thirty-nine days left to bring the defendant to trial (nine from the previous case in which he was held in custody and 30 more because he was released from custody after arraignment in the Pierce County Case). Administrative Record, 23-31 (Docket). When the

defendant failed to appear to pretrial conference on May 27, 2003, the time for trial reset, and when he reappeared on February 19, 2008, the court ordered bail and was thus required to bring him to trial within 60 days of that date. *See* CrRLJ 3.3 (2003 and 2008). A March 18, 2008, pretrial conference was scheduled at the February 19, 2008 hearing, and the defendant thereafter executed a speedy trial waiver and agreed to trial continuances until he was brought to trial on August 20, 2008.<sup>2</sup>

Even though the pretrial conference was set out more than thirty-nine days after the defendant's re-arraignment in Pierce County District Court, the defendant waived any objection by failing to file his motion to dismiss within 10 days of that setting. The defendant had 10 days from receiving notice of an untimely trial to raise a time for trial exception. *See* CrRLJ 3.3(d)(3)(2008); CrRLJ 3.3(f)(1)(2003). Defendant was re-arraigned on March 3, 2003, and a pretrial was set more than thirty-nine days after that re-arraignment. Administrative Record, 23-31 (Docket). Of necessity, and mandated by the court rule, any trial would be after the pretrial, and would be set at the pre-trial according to the rule so the defendant knew the trial would be set beyond the thirty-nine days

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<sup>2</sup> Appellant does not allege his speedy trial rights were violated after the February 19, 2008, hearing, so an analysis of the speedy trial waivers and continuances after that point is not germane to this appeal.

remaining for trial. *See* CrRLJ 3.3(f)(1)(2003). The defendant did not object at arraignment or even 10 days after arraignment, however. Administrative Record, 23-31 (Docket). In fact, defendant did not return to court until five years later. Administrative Record, 23-31 (Docket). When he appeared before the court for an in-custody warrant quash on February 19, 2008, he again failed to object or file a motion to dismiss. Administrative Record, 23-31 (Docket). Defendant's motion to dismiss was finally filed on May 2, 2008, which was 1,857 days after his re-arraignment in Pierce County District Court, and 73 days after his in-custody warrant quash held on February 19, 2008. Administrative Record, 23-31 (Docket), 9-15 (Defense Motion to Dismiss).

Defendant's case differs from *State v. Jenkins*, 76 Wn. App. 378, 884 P.2d 1356 (1994). In *Jenkins*, the defendant's case resulted in a mistrial and no new court dates were set. *Id.* at 380. The defense counsel in that case kept asking the prosecutor if the case was going to be retried and a date was finally set to schedule a trial date. *Id.* However, the scheduling hearing was held after time for trial had expired. *Id.* The case focused on whether the court had discretion to grant a retroactive five day extension of the trial date. *Id.* at 382. The court held that the court could not grant a five day extension of the trial date until a trial date had been set. *Id.* The court also found that the State failed to act by failing to make

a decision about whether they would be proceeding with the defendant's case and that as such, the court could not act to protect defendant's rights defense counsel was not required to object because no trial date had been set. *Id.* at 383.

In the instant case, the court had set a pre-trial date as is standard procedure<sup>3</sup>. Defendant signed for the date and did not object to the pre-trial date. Unlike *Jenkins* where no future dates were set after the mistrial, defendant's case was proceeding under normal procedure with future dates set. The State had clearly made the decision to proceed with defendant's case, and CrRLJ 3.3 clearly indicates that a trial date shall be set at either the arraignment or the pre-trial hearing. CrRLJ 3.3(d)(1). Defendant here did not have to bring himself to trial, the court had set a future appearance date at his arraignment and the case was proceeding with a trial date having to be set at the pre-trial conference per the court rule. In addition, unlike *Jenkins*, defendant here did not appear for the pre-trial date and then abscond for five years. Such a situation is not contemplated by *Jenkins*. Defendant's case was proceeding and had dates set. This case is distinguishable from *Jenkins*.

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<sup>3</sup> A trial date was not set at the same time. From the records from defendant's arraignment and warrant quash, it appears that setting a pre-trial conference and not a trial is the practice in Pierce County District Court.

Finally, the defendant should not be heard to complain that he was not brought to trial in a speedy manner when he failed to appear before the Pierce County District court for nearly five years after his re-arraignment. Defendant has not cited any statutes or case law that would allow for a defendant to determine on his own that his time for trial has expired and to then be legally authorized to fail to appear to court. The time for trial rules could not reasonably have been designed to require dismissal when the defendant willfully absents himself from court. The time for trial rules, “were promulgated to give the defendant a prompt trial once prosecution is initiated. ‘They were not designed to be a trap for the unwary.’” *State v. Carson*, 128 Wn.2d 805, 912 P.2d 1016 (1996)(quoting *State v. Fladebom* 113 Wn.2d 388, 394, 779 P.2d 707 (1989)). As such, there is some responsibility placed on defendant to object. Defendant did not do so until five years later. Defendant’s time for trial argument was moot as his absence reset the time for trial and is what also caused the delay in proceedings.

Defendant’s argument is inconsistent with the court rules and would lead to absurd results. Under defendant’s argument, he had no affirmative duty to object, despite the clear language of CrRLJ 3.3. Even

though the rule imposes upon defendant a duty to object or have the argument waived, defendant's argument is that defendant should be able to interpret the rules, determine that his case should have been dismissed, and not be obligated to show up to a court date. The rule does not state that defendant does not have to show up for hearings. The rule states defendant has to object to a date that is set outside the speedy trial time and if he does not offer a timely objection, then defendant had waived any argument to that date. Defendant waived his argument and then absconded from the court for five years. The trial court did not error in denying the motion to dismiss.

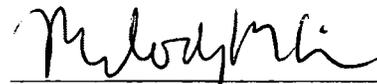
Defendant's motion to dismiss was untimely and moot as defendant himself had reset the time for trial clock by knowingly violating a court order to appear. The trial court did not err in denying the defendant's motion to dismiss under these circumstances, and the Superior Court did not error in affirming the trial court.

D. CONCLUSION.

The State respectfully requests that this Court affirm defendant's conviction. The decision of the Superior Court should be upheld.

DATED: December 16, 2010.

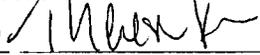
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Certificate of Service:

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.

12/16/10   
Date Signature