

NO. 41857-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. MacNEVEN,

Appellant.

11 OCT -7 PM 12:15
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY MURPHY

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Lisa Sutton, the Honorable Carol Murphy, and the
Honorable Gary Tabor, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's failure to proceed to trial in a timely manner violated Robert MacNeven's right to a speedy trial under CrR 3.3.

2. Trial counsel's failure to preserve Mr. MacNeven's objection to a trial held outside of the sixty day speedy trial time period constituted ineffective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CrR 3.3 requires that an incarcerated defendant must be brought to trial within 60 days of his arraignment or the matter must be dismissed with prejudice. Was Mr. MacNeven's right to a speedy trial violated when the court continued the matter beyond the speedy trial period, without agreement by Mr. MacNeven himself? Assignment of Error No. 1.

2. Whether Mr. MacNeven was denied his State and Federal constitutional right to effective counsel when his trial counsel failed to ascertain whether Mr. MacNeven was in agreement with the second continuance and failure to preserve Mr. MacNeven's objection to the first continuance? Assignment of Error No. 2.

C. STATEMENT OF THE CASE

1. Procedural facts:

The Thurston County Prosecuting Attorney charged Robert MacNeven with one count of violation of a post conviction no contact order,

contrary to RCW 26.50.110(5). Clerk's Papers [CP] 7. The information alleges the following:

COUNT 01 – VIOLATION OF POST CONVICTION NO CONTACT ORDER/DOMESTIC VIOLENCE—THIRD OR SUBSEQUENT VIOLATION OF ANY SIMILAR ORDER, RCW 26.50.110(5), RCW 10.99.020 and RCW 10.99.050—CLASS C FELONY:

In that the defendant, ROBERT LEON MACNEVEN, in the State of Washington, on or about October 30, 2010, with knowledge that the Grays Harbor County Superior Court had previously issued a no contact order pursuant to Chapter 10.99 RCW in Grays Harbor County on February 9, 2009, Cause No. 08-1-00403-4, did violate the order while the order was in effect by knowingly violating the restraint provisions therein pertaining to Corrine Sansom, a family or household member, pursuant to RCW 10.99.020; and furthermore, the defendant has at least two previous convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99 RCW, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

CP 7.

Mr. MacNeven was arraigned on November 16, 2010. 11/16/10 Report of Proceedings [RP] at 3.¹ At the hearing, a status hearing was set for January 12, 2011, and trial was set for the week of January 18, 2011. 11/16/10 RP at 3. Mr. MacNeven was detained at the time of arraignment and remained detained. His speedy trial period was set to expire sixty days

¹The verbatim report of proceedings consists of eight volumes of transcripts from November 1, 2010, through March 1, 2011. The proceedings

after arraignment, on January 17, 2011. Supplemental Clerk's Paper at ____.
(November 16, 2010 Order Setting Trial Date).

The matter came on for a status hearing before the Honorable Lisa Sutton on January 12, 2011. Mr. MacNeven was represented by Deborah Murphy. At the hearing, the State requested a continuance of the trial until January 31, 2011, arguing that neither counsel had been available for an ER 404(b) motion hearing scheduled for January 10, 2011, and that the hearing needed be reset. 1/12/11 RP at 3. The State requested that the ER 404(b) motion hearing be rescheduled for January 24, 2011. 1/12/11 RP at 3. Ms. Murphy agreed with the request for continuance, stating that Mr. MacNeven "is opposed to continuing any trial date at all, and I believe that it actually would be in his best interest and that it should be continued in spite of his opposition." 1/12/11 RP at 4.

The court found good cause and continued the trial date from January 18 to January 31. 1/12/11 RP at 4. The court entered an order resetting the trial for January 31, 2011. CP 20. Mr. MacNeven refused to sign the order. CP 20.

are referred to herein by the date of proceeding followed by the page number,
e.g. "2/16/11 RP __."

On January 28, 2011, Ms. Murphy requested the trial be continued to the week of February 7, 2011. 1/28/11 RP at 4.

The case was confirmed for trial on February 2, 2011. On February 9 the State moved to continue the trial again. 2/9/11 RP at 4. Defense counsel stated that she had no objection and represented that Mr. MacNeven “would be willing to sign a waiver.” 2/9/11 RP at 4. Ms. Murphy stated:

I know he was asking for a continuance at our last hearing so he could retain counsel, but that was not granted. So I’m not going to object to this continuance.

2/9/11 RP at 4.

Defense counsel also stated:

I would have to go down and talk to him, frankly, to be sure. I have gotten mixed messages. At first, he objected to continuing, and, at our last hearing, he was actually asking for a continuance to retain counsel. So I would really have to go talk to him to clarify his position.

2/9/11 RP at 6.

Thurston County Superior Court Judge Carol Murphy found good cause to continue the trial, finding that the primary case was proceeding that day and therefore Mr. MacNeven’s case, which was scheduled as a “secondary case,” could not go forward that day. 2/9/11 RP at 6. The court

entered an order finding good cause to continue the trial date and set the matter for a status conference on February 16, 2011. CP 24.

Trial commenced on February 16, 2011, and was completed in one day. The jury found Mr. MacNeven guilty of violation of a protection order, and by Special Verdict found that he had twice been previously convicted of violation of the provisions of a court order, and that Mr. MacNeven and Corrine Sansom were members of the same family or household. CP 63, 64, 65. The court sentenced Mr. MacNeven to a standard range sentence. CP 74.

Timely notice of appeal was filed on March 11, 2011. Mr. MacNeven appeals based upon violation of his speedy trial rights. CP 82-92.

2. Testimony at trial:

Olympia Police Officer Jason Watkins was dispatched to an apartment at 2212 9th Avenue SW, Unit 3A in Olympia, Washington on October 30, 2010, following an anonymous report of domestic violence. 2/16/11 RP at 9. Officer Watkins and two other Olympia police officers arrived at the apartment shortly before 10:00 p.m. and determined that a truck parked in the garage area of the apartment belonged to Corrine Sansom. 2/16/11 RP at 10. Officer Watkins knocked on the apartment door and a man opened and walked through a gate in a privacy fence located to the left of the

apartment door. 2/16/11 RP at 10. Officer Watkins asked the man if Corrine Sansom was at home, and he said yes. 2/16/11 RP at 12. The man then walked back through the gate into a fenced yard and into the apartment and Officer Watkins and followed him. 2/16/11 RP at 12, 13. Inside the apartment, Officer Watkins called out for Ms. Sansom, and she responded from a back portion of the apartment. 2/16/11 RP at 13. Officer Watkins identified Ms. Sansom as the person he talked to in the apartment. 2/16/11 RP at 14. The two other officers had entered the living room and were with the man. 2/16/11 RP at 15. Officer Watkins stated that he overheard the man denying that he was Robert MacNeven. 2/16/11 RP at 16. Officer Watkins traded places with one of the officers in the living room. He testified that the man acknowledged that he was Robert MacNeven and that he lived with Ms. Sansom in the apartment. 2/16/11 RP at 16, 23.

A domestic violence no contact order was entered in Grays Harbor County Superior Court Cause No. 08-1-403-4 on February 9, 2009, listing the protected party as Corrine Sansom and the defendant as Robert MacNeven. 2/16/11 RP at 17, 19. Exhibit 1. The order is set to expire February 9, 2014. 2/16/11 RP at 19.

The State introduced a certified copy of a Felony Judgment and

Sentence dated August 9, 2009, showing that an individual named Robert L. MacNeven with the date of birth August 24, 1963, was convicted of felony violation of a domestic violence no-contact order. Exhibit 4. The State also introduced a certified copy of a Judgment and Sentence in Port Townsend No. 3306, showing an individual named Robert L. MacNeven, born August 24, 1963, was convicted of violation of a protection order entered May 28, 2003. 2/16/11 RP at 22. Exhibit 5.

Exhibits 1, 4, and 5 were admitted without objection. 2/16/11 RP at 5.

Mr. MacNeven's counsel rested without calling any witnesses. 2/16/11 RP at 31.

D. ARGUMENT

1. THE TRIAL COURT WAS REQUIRED TO DISMISS MR. MACNEVEN'S MATTER DUE TO THE VIOLATION OF HIS RIGHT TO A SPEEDY TRIAL.

Criminal Rule 3.3 requires that a defendant who is in custody be brought to trial within 60 days, or the trial court must dismiss the charge. Mr. MacNeven was incarcerated prior to trial and was therefore required to be brought to trial within the 60-day period.

CrR 3.3(b)(1) specifies: "A defendant who is detained in jail shall be

brought to trial within the longer of (i) 60 days after the commencement date specified in this rule, or (ii) the time specified in subsection (b)(5).” The speedy trial period excludes continuances based "on motion of the court or a party" where the continuance "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(e)(2); (f)(1), (2).

CrR 3.3 ensures that criminal defendants are granted a speedy trial by governing the time for arraignment and trial. *State v. Huffmeyer*, 145 Wn.2d 52, 56, 32 P.3d 996 (2001). Although the rule is “not a constitutional mandate,” its purpose is to protect the constitutional right to a speedy trial. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). The State is primarily responsible for seeing that the defendant is tried in a timely manner, although the trial court is ultimately responsible for enforcing the speedy trial rule. *State v. Ross*, 98 Wn.App. 1, 4, 981 P.2d 888 (1999). The trial court may continue the trial date either upon written agreement of the parties or when required in the administration of justice, and when the defendant will not be substantially prejudiced in the presentation of the defense. CrR 3.3(h); *State v. Silva*, 107 Wn.App. 605, 611-12, 27 P.3d 663 (2001).

The party who moves for continuance “waives that party's objection to

the requested delay," and therefore a motion for continuance made by defense counsel is generally presumed to waive objection on behalf of the defendant. CrR 3.3(f)(2); *State v. Vicuna*, 119 Wn.App. 26, 33, 79 P.3d 1 (2003), rev. denied 52 Wn.2d 1008 (2004). Here, defense counsel did not move for the first and third continuances, but stated that she did not oppose the State's motions for continuance. Mr. MacNeven did not waive his right to speedy trial.

Mr. MacNeven was arrested and detained pending trial. An information was filed on November 3, 2010, and arraignment took place November 16, 2010. CP 7. On January 12, 2011, six days before trial was scheduled to commence, the State appeared and stated that it needed to request a continuance. 1/12/11 RP 3. Defense counsel stated that she was aware that Mr. MacNeven was opposed to the motion to continue the trial, but nevertheless supported the continuance over his objection. *Id.* at 4. Mr. MacNeven refused to sign the Order of Trial Continuance, which set the trial for January 31. CP 20. On January 28, the case was continued at the request of the defense, to the week of February 7. 1/28/11 RP at 3. The matter was not on the regular criminal calendar and Mr. MacNeven was not present for the hearing. *Id.* Ms. Murphy, however, represented that Mr.

MacNeven was in favor of resetting the trial date so that he could retain counsel. *Id.*

On February 9, the State requested another continuance. Again, Mr. MacNeven was not present. Ms. Murphy initially stated that she had no objection to the request and stated that Mr. MacNeven would be willing to sign a waiver of speedy trial. 2/9/11 RP at 4. Inexplicably, shortly after representing that her client was in favor of the continuance and that he would sign a waiver, Ms. Murphy stated that she was not sure of Mr. MacNeven's position, stating:

I would have to go down and talk to him, frankly, to be sure. I have gotten mixed messages. At first, he objected to continuing, and, at our last hearing, he was actually asking for a continuance to retain counsel. So I would really have to go talk to him to clarify his position.

2/9/11 RP at 6.

Mr. MacNeven's right to a speedy trial is not waived by his attorney's unilateral decision to agree to the State's requests for continuances, absent the consent of Mr. MacNeven. Mr. MacNeven contends that the trial court abused its discretion in granting the State's motion for a continuance of trial from January 18 to January 31, 2011, over his objection and reflected in his refusal to sign the Order, and the continuance from February 9 to February

16, 2011, a hearing for which he was inexplicably not present to voice his objection.

In *State v. Saunders*, 153 Wn.App. 209, 217, 220 P.3d 1238 (2009), the Court of Appeals dismissed a conviction for a CrR 3.3 violation despite defense counsel's agreement to continuances beyond the speedy trial period. Two continuances were requested by defense counsel for the purpose of investigation or preparation for trial, two were agreed motions purportedly for the purpose of negotiations, and two were requested by the State without adequate explanation - but Saunders personally objected to all six, refused to sign each and every continuance form, and moved to dismiss *pro se*. *Id.* at 212-15. Because he "consistently resisted extending time for trial," the Court found he did not waive his objection. *Id.* at 220.

Here, Mr. MacNeven refused to sign the January 12 order granting a continuance, and he was not present to note his objection to the continuance on February 9. CrR 3.3, which requires a defendant who is detained in jail be brought to trial not later than 60 days after arraignment, is a fundamental, as opposed to a procedural, right. The right to a speedy trial is protected by both the federal and state constitutions,² and has long been protected by court

² The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."

rule, such as CrR 3.3. Mr. MacNeven's rights to speedy trial were waived by his counsel, over his explicit objection on January 12, a contention plainly supported by the record. 1/12/11 RP 4; CP 20. Even more egregiously, his counsel was clearly innocent of any knowledge regarding Mr. MacNeven's position regarding speedy trial on February 2, first stating that he would waive speedy trial, then admitting she did not know his position and ventured that she should go down to the jail to check with him. 2/9/11 at 6. In any case, Mr. MacNeven made it clear he was opposed to the continuance on January 12 and that he wanted to proceed to trial immediately. To the extent that there is any conflict between these competing concerns, Mr. MacNeven maintains that his willingness to forego some measure of his rights under the Sixth Amendment should permit the full exercise of his right to a speedy trial.

Mr. MacNeven need not prove actual prejudice for reversal to be required. The trial court bears the ultimate responsibility to ensure that trial is held within the speedy trial period. CrR 3.3(a)(1); *State v. Raschka*, 124 Wn. App. 103, 110, 100 P.3d 339 (2004). On appeal, “[f]ailure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the

Art.1, § 22 of the Washington constitution provides, in relevant part: “ ... the accused shall have the right to ... have a speedy public trial by impartial jury ... ”

defendant can show prejudice.” *Raschka*, 124 Wn. App. at 112.

This Court must reverse and order dismissal of the charges against Mr. MacNeven with prejudice. Where the trial court violates a defendant’s speedy trial rights and the defendant is convicted, the appellate court must reverse the conviction and order dismissal. *Kenyon*, 167 Wn.2d at 139; *Saunders*, 153 Wn. App. at 211. See CrR 3.3(g) (although court may “cure” late trial within five days of expiration of speedy trial period, it may only do so “upon a finding on the record or in writing that the defendant will not be substantially prejudiced”); *State v. Warren*, 96 Wn.App. 306, 979 P.2d 915 (1999) (reversing trial court and dismissing convictions where court, in ordering two-day continuance, did not make detailed explanation on the record as to why each superior court department was unavailable).

The appellant submits that this Court should not reverse the conviction with an order to the superior court to determine prejudice retrospectively. See *Raschka*, 124 Wn. App. at 112 . In *Kenyon*, a case in which the trial court ordered a continuance based on court congestion, the Supreme Court found that “the record here contains no information regarding the number or availability of unoccupied courtrooms nor the availability of visiting judges or pro tems to hear criminal cases in the unoccupied

courtrooms.” 167 Wn. 2d at 138. But the *Kenyon* Court did not remand the case to the trial court to correct the omission in the record and make retrospective findings regarding the availability of courtrooms and other judges as of the date the continuance was granted. *Id.* at 139. Instead the Supreme Court reversed the convictions and dismissed all charges. *Id.*; Here, Judge Murphy made no finding regarding the availability of other courtrooms on February 9, but merely found that the court could “not conduct two trials at the same time” and that the “primary case” was proceeding. 2/9/11 RP at 6. See, *Kenyon*, 167 Wn.2d at 137. The court made no finding of that no prejudice would inure to Mr. MacNeven due to the continuance, a requirement under Rule 3.3(g).

2. **DEFENSE COUNSEL’S FAILURE TO COMPLY WITH CrR 3.3 DENIED MR. MACNEVEN HIS RIGHT TO EFFECTIVE COUNSEL**

A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22.

Counsel’s critical role in the adversarial system protects the defendant’s fundamental right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). “[T]he

very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. *Kimmelman v. Morris*, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Under *Strickland*, the appellate court must determine (1) was the attorney’s performance below objective standards of reasonable representation, and, if so, (2) did counsel’s deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226. Ineffective assistance of counsel claims are reviewed *de novo*. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). There is a presumption that counsel’s assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986). The appellate court will find prejudice under the second prong if the defendant demonstrates “counsel’s errors were so serious as to deprive the defendant of a fair trial.”

Strickland, 466 U.S. at 687.

Here, trial counsel was ineffective by failing to ascertain Mr. MacNeven's position regarding the request for continuance on February 9, failure to ensure Mr. MacNeven was present in court on that date, and failure to argue and preserve Mr. MacNeven's right to a speedy trial by filing a written objection to the trial date of February 16. As noted in § 1 of this brief, a defendant detained in jail shall presumptively be brought to trial within 60 days unless there is an allowable excluded period. CrR 3.3(b)(1)(i) and (b)(5). The 60-day window commences with arraignment. CrR 3.3(c)(1). Defense counsel made no objection to the resetting of a trial date, which is required within 10 days of receiving notice of the new date. CrR 3.3(d)(3). Moreover, there is no evidence that she notified her client of this Court Rule and his ability to file a *pro se* objection. Even more alarming, counsel was utterly unaware of Mr. MacNeven's position regarding the second continuance, initially stating that he would waive speedy trial, and then within minutes backtracking on that representation, admitting that he gave "mixed messages" and that she needed to check with him.

Defense counsel should have respected Mr. MacNeven's right to be tried within 60 days and either filed an objection to the reset trial date within

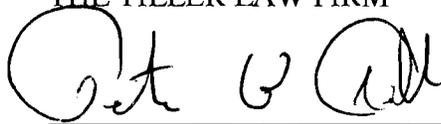
the 10 days required by the rule or advised him of his ability to do so. Had defense counsel done so, Mr. MacNeven's right to object to the trial date would have been preserved and he would likely have been successful on challenging his delayed trial date and won a dismissal with prejudice. Defense counsel's failure to do so fell below the standard required by effective counsel and Mr. MacNeven was prejudiced thereby.

F. CONCLUSION

Based on the above, Mr. MacNeven respectfully requests this court reverse and dismiss his conviction.

DATED: October 6, 2011.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Robert MacNeven

CERTIFICATE OF SERVICE

The undersigned certifies that on October 6, 2011, that this Opening Brief was mailed by U.S. mail, postage prepaid, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, Mr. Jon Tunheim, Thurston County Prosecutor's Office, 2000 Lakeridge Dr. SW, Bldg. 2, Olympia, WA 98502, and to appellant, Mr. Robert L. MacNeven, DOC # 327732, W.C.C., P.O. Box 900, Shelton, WA 98584, true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of

STATE OF WASHINGTON
BY W. Tiller
11 OCT -7 PM 12:15
COURT OF APPEALS

perjury of the laws of the State of Washington. Signed at Centralia,
Washington on October 6, 2011.

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written in a cursive style. The signature is positioned above a horizontal line.

PETER B. TILLER

APPENDIX A

COURT RULES

RULE CrR 3.3

TIME FOR TRIAL

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) Precedence Over Civil Cases. Criminal trials shall take precedence over civil trials.

(3) Definitions. For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed.

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately file in the superior court.

(iii) "Appearance" means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrR 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excluded any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) Reporting of Dismissals and Untimely Trials. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g)

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5)

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(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.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(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.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review

or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

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

(d) Trial Settings and Notice---Objections---Loss of Right to Object.

(1) Initial Setting of Trial Date. The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(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.

(3) Objection to Trial Setting. 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 time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days

for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT L. MacNEVEN,

Appellant.

COURT OF APPEALS NO.
41857-6-II

THURSTON COUNTY NO.
10-1-01647-7

AMENDED CERTIFICATE OF
MAILING AND BY E-MAIL

The undersigned attorney for the Appellant hereby certifies that one copy of the Supplemental Designation of Clerk’s Papers was e-mailed by first class mail to the Court of Appeals, Division 2, and the original Supplemental Designation of Clerk’s Papers were mailed to Clerk of the Court of Thurston County Superior Court, and copies were mailed to Robert MacNeven, Appellant, and Jon Tunheim, Thurston County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on October 10, 2011, at the Centralia, Washington post office addressed as follows (**this has been amended to show the correct address for Robert MacNeven**):

Mr. Jon Tunheim
Thurston County
Deputy Prosecuting Attorney
2000 Lakeridge Dr. SW, Bldg. 2
Olympia, WA 98502

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

AMENDED CERTIFICATE OF 1
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ATTORNEYS AT LAW
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2000 Lakeridge Drive SW
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Mr. Robert L. MacNeven
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Mr. Robert L. MacNeven
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Montesano, WA 98563

Dated: October 10, 2011.

THE TILLER LAW FIRM

Peter B. Tiller

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

AMENDED CERTIFICATE OF MAILING/E-MAIL 2

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10/10/2011 12:13 PM

IN THE COURT OF APPEALS
STATE OF WASHINGTON
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10-1-01647-7

SECOND AMENDED
CERTIFICATE OF MAILING
AND BY E-MAIL

The undersigned attorney for the Appellant hereby certifies that one copy of the Opening Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Robert MacNeven, Appellant, and Jon Tunheim, Thurston County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on October 6, 2011, at the Centralia, Washington post office addressed as follows (**this has been amended to show the correct address for Robert MacNeven**):

Mr. Jon Tunheim
Thurston County
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2000 Lakeridge Dr. SW, Bldg. 2
Olympia, WA 98502

Mr. David Ponzoha
Clerk of the Court
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950 Broadway, Ste.300
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AMENDED CERTIFICATE OF MAILING/E-MAIL 1

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Dated: October 10, 2011.

THE TILLER LAW FIRM

Peter B. Tiller

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

AMENDED CERTIFICATE OF 2
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