

No. 42179-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER ISRAEL SAUNDERS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-02525-3
The Honorable Bryan Chushcoff, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to designate the day the Information was filed as Christopher Saunders' constructive arraignment date.
2. The trial court erred in failing to set a trial date within Christopher Saunders' speedy trial period.
3. The trial court erred when it denied Christopher Saunders' motion to dismiss the case on speedy trial grounds.
4. Christopher Saunders received ineffective assistance of counsel when his trial attorney failed to object at the arraignment hearing to his untimely arraignment.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the State did not show that it exercised good faith and due diligence in bringing Christopher Saunders to Pierce County to face the charges filed against him there; where 69 days passed between the filing of the Information and the arraignment; and where 105 days passed between the filing of the Information and the first continuance hearing, did the trial court err when it found that Christopher Saunders' speedy arraignment and speedy trial rights were not violated, and when it denied Christopher Saunders' motion

to dismiss? (Assignments of Error Nos. 1, 2 & 3)

2. Was trial counsel ineffective when he failed to object at the arraignment hearing to Christopher Saunders' untimely arraignment, where arraignment was held 69 days after the Information was filed, and where Christopher Saunders was not outside the jurisdiction or reach of the Pierce County Prosecutor? (Assignment of Error 4)

III. STATEMENT OF THE CASE

Christopher Israel Saunders has a prior sex offense conviction that carries with it a lifetime registration requirement. (CP 121-22; 05/11/11 RP 193)¹ On December 30, 2009, he registered as transient with the Pierce County Sheriff's Department. (05/10/11 RP 111, 113-14; Exh. 8) Because he was transient, Saunders was required to report weekly. (05/10/11 RP 119) He complied with the weekly reporting requirement from December 23, 2009 through March 17, 2010. (05/10/11 RP 114-48; Exh. 8) But Saunders did not report as required on March 24, 2010 or

¹ The transcripts in this case will be referred to by the date of the proceeding followed by the page number. The transcript for the motion hearing held on December 16, 2010 (prepared by court reporter Lanre Adebayo) will be referred to as "12/16/10 MRP". The transcript for the continuance hearing held on December 16, 2010 (prepared by court reporter Kellie Smith) will be referred to as "12/16/10 CRP".

thereafter. (05/10/11 RP 148, 149)

Saunders was also on community custody supervision during that period of time. (05/10/11 RP 170) One of the conditions of his community custody was that he not consume alcohol or drugs. (05/10/11 RP 171) But a urine sample given by Saunders on March 18, 2010 showed the presence of methamphetamine. (05/10/11 RP 171-72) A Department of Corrections warrant was issued on March 22, 2010, and Saunders was arrested and booked into the Pierce County Jail on May 6, 2010. (CP 24, 74; 12/16/10 MRP 13; 05/10/11 RP 172, 174)

The following day, Saunders was released to DOC custody and transported to a DOC facility in Snohomish County. (CP 74; 12/16/10 MRP 13) Saunders was found to be in violation of his community custody requirements and was sentenced to 150 days of confinement in DOC custody. (CP 75)

On June 10, 2010, the Pierce County Prosecutor filed an Information charging Saunders with one count of failing to register as a sex offender (RCW 9A.44.130).² (CP 1) On June 11, 2010, the Prosecutor sought and obtained a bench warrant for Saunders'

² The State filed an Amended Information on January 3, 2011, which expanded the dates that the alleged offense occurred. (CP 78)

arrest. (CP 4, 27, 75; 12/16/10 MRP 13) The prosecuting attorney's office confirmed that the warrant had been entered into Washington State's legal information database, and that a hold had been placed on Saunders for transport back to Pierce County after completion of his sentence in Snohomish County DOC. (CP 75; 12/16/10 MRP 13-14)

Saunders was transported back to the Pierce County Jail on August 17, 2010. (CP 75) He was arraigned on the failing to register charge the next day. (08/18/10 RP 2; CP 75) The trial court scheduled a pretrial conference for August 31, 2010, and set October 11, 2010 as the date for trial. (08/18/10 RP 3; CP 75)

At a pretrial hearing held on September 23, 2010, defense counsel requested a trial continuance to allow him to prepare pretrial motions. (09/23/10 RP 3) Saunders voiced his personal objection to any continuance, and also informed the court that he believed his speedy arraignment and trial rights had been violated. (09/23/10 RP 2-3) The trial court nevertheless granted the continuance. (09/23/10 RP 4; CP 7)

On October 6, 2010, Saunders filed a self-prepared motion to dismiss, citing violations of the speedy trial court rules. (CP 8-20) Defense counsel filed a similar motion on October 13, 2010.

(CP 21-38) Saunders argued that the State did not use due diligence to bring Saunders to trial within the time periods required by CrR 3.3. (CP 8-12, 21-23; 12/16/10 MRP 10-11) The trial court disagreed and denied the motion. (12/16/10 MRP 28; CP 73, 74-77)

Several additional trial continuances were granted at the prosecutor's and defense counsel's request, but over Saunders' objection. (11/15/10 RP 2, 4-5; 12/07/10 RP 3-5; 12/13/10 RP 2, 4; 12/16/10 CRP 2-7; 01/03/11 RP 3-4, 7; 03/24/11 RP 2-3; 05/05/11 RP 2-3. 5; CP 47, 70, 71, 72, 79, 116, 117)

On May 9, 2011, nearly 11 months after the original Information was filed, Saunders' trial finally began. On the first day, Saunders sought and was granted permission to represent himself pro se. (05/09/11 RP 12-22) Saunders filed and argued another motion to dismiss because he believed the numerous continuances were unwarranted and violated his right to a speedy trial. (05/10/11 RP 50-55; CP 81-94) The trial court found good cause for all of the continuances, and denied Saunders' motion. (05/10/11 RP 65-67; CP 120)

A jury found Saunders guilty of failing to register as a sex offender. (05/11/11 RP 258) The trial court sentenced Saunders to

a standard range sentence of 57 months followed by a term of community custody, not to exceed 60 months total combined time. (CP 49, 51, 52; 05/13/11 RP 14, 18, 20) This appeal timely follows. (CP 161-63)

IV. ARGUMENT & AUTHORITIES

A. SAUNDERS' RIGHT TO A SPEEDY ARRAIGNMENT AND TRIAL WERE VIOLATED AND HIS CASE SHOULD HAVE BEEN DISMISSED

Washington's CrR 3.3(c) governs the time for arraignment and trial to ensure that criminal defendants are granted a speedy trial. State v. Huffmeyer, 145 Wn.2d 52, 56, 32 P.3d 996 (2001).³ The rule protects a defendant's constitutional right to a speedy trial, which is guaranteed by the Fifth and Sixth Amendments to the United States Constitution and Article 1, section 22 of the Washington State Constitution. State v. Mack, 89 Wn.2d 788, 791-92, 567 P.2d 44 (1978); State v. Detrick, 90 Wn. App. 939, 945, 954 P.2d 949 (1988).

It is the trial court's responsibility to ensure that trials are conducted in accordance with the speedy trial rules. CrR 3.3(a). State v. Raschka, 124 Wn. App. 103, 110, 100 P.3d 339 (2004).

³ A copy of CrR 3.3 is attached in Appendix A, and a copy of State v. Huffmeyer is attached in Appendix B.

However, the prosecutor also shares the responsibility for ensuring compliance with the speedy trial rules. State v. Carson, 128 Wn.2d 805, 815, 912 P.2d 1016 (1996). The application of the speedy trial rules to a set of facts is a question of law reviewed de novo. State v. Hardesty, 110 Wn. App. 702, 706, 42 P.3d 450 (2002).

Under the speedy trial rules, if a defendant is detained in jail or subject to conditions of release, he or she must be arraigned within 14 days after the date that the indictment or information is filed in superior court. CrR 3.3(c)(1). If the defendant is not released from jail pending trial, he or she must be brought to trial no later than 60 days after arraignment. CrR 3.3(c)(1). If the defendant is not detained in jail or subject to conditions of release, then the defendant must be arraigned no later than 14 days after the first appearance in superior court following the filing of the information or indictment. CrR 3.3(c)(1). If the defendant remains free from jail, he or she must be brought to trial within 90 days of arraignment. CrR 3.3(c)(1).

Here, the record shows that Saunders was being held in Washington DOC custody on a matter separate from the Pierce County failure to register case. When a person is being held in custody in another county on an unrelated charge, he or she is not

“detained in jail on the current charge” for the purposes of CrR 3.3(c)(1). Huffmeyer, 145 Wn.2d at 57. Therefore, the 90-day period between arraignment and trial applied in Saunders’ Pierce County case.

In this case, there was a 69-day delay between the filing of the Information and Saunders’ arraignment on August 18, 2010. But the criminal rules are construed so as to eliminate unnecessary delay in bringing a defendant who is amenable to process before the court to answer the charges filed against him. State v. Greenwood, 120 Wn.2d 585, 845 P.2d 971 (1993). A defendant who is within the state is “amenable to process” for the purposes of the speedy trial rule. Huffmeyer, 145 Wn.2d at 62 n. 4.

Where a “long and unnecessary delay occurs in bringing a defendant who is amenable to process before the court” to answer charges, the Striker rule applies. State v. Striker, 87 Wn.2d 870, 557 P.2d 847 (1976); Greenwood, 120 Wn.2d at 595. The Striker rule establishes a constructive arraignment date of 14 days after the information is filed. Greenwood, 120 Wn.2d at 599.

Under Striker, CrR 3.3's 90-day trial period is then deemed to commence on this constructive arraignment date, instead of when the defendant finally appears before the court to answer for

the charge. Greenwood, 120 Wn.2d at 599, Striker, 87 Wn.2d at 875. A defendant must then be brought to trial 90 days after this constructive arraignment date, or a total of 104 days after the date the information was filed. Huffmeyer, 145 Wn.2d at 57-58; Greenwood, 120 Wn.2d at 599.

However, the Striker rule does not require the court to establish a constructive arraignment date in cases where the state acted with good faith and due diligence in attempting to bring the defendant before the court. Greenwood, 120 Wn.2d at 601. Whether the state acted with good faith or due diligence necessarily turns on the facts of each case. Greenwood, 120 Wn.2d at 601.

For example, in Huffmeyer, the defendant was being held in the King County Jail when prosecutors filed an information in a Kitsap County court. 145 Wn.2d at 55. A warrant issued by the Kitsap County Superior Court was returned with a notation that Huffmeyer was in custody in the King County Jail. 145 Wn.2d at 55. Huffmeyer pleaded guilty to the King County charges, and was sentenced nearly four months later to time-served. He was then transported back to Kitsap County, where he was finally arraigned 121 days after pleading guilty on the King County charge. 145 Wn.2d at 55. Our Supreme Court affirmed the trial court's

dismissal of the charges, stating:

[W]here a defendant is being held on charges in another county, due diligence requires the state to make efforts to bring the defendant to trial once the exclusions of CrR 3.3 no longer apply. In Huffmeyer's case, when informed of his location, prosecutors should have at least inquired as to when he would be available for trial in Kitsap County. Further, prosecutors should have contacted King County to inquire as to the progression of Huffmeyer's trial and his availability after the guilty plea. Instead they allowed him to remain in the King County jail for 121 days before bringing him to trial.

Huffmeyer, 145 Wn.2d at 63.

Conversely, in State v. Swenson, charges were filed in Jefferson County while the defendant was in the custody of DOC. 150 Wn.2d 181, 191, 75 P.3d 513 (2003). DOC could not immediately transport Swenson to Jefferson County because it had a conflicting transport order from King County. The Jefferson County prosecutor had contacted King County and was told that Swenson would remain there until his King County matter was resolved. The prosecutor then routinely called DOC and King County to confirm Swenson's whereabouts so that he could be transported to Jefferson County as soon as possible. As soon as Swenson was available, a second transport order was issued and he was brought to Jefferson County for arraignment. 150 Wn.2d at

191. The Supreme Court affirmed the trial court's finding that the State demonstrated good faith and diligent effort to locate and obtain Swenson for trial, noting that "[the] State knew precisely where Swenson was located and repeatedly checked on his availability for transport to Jefferson County." 150 Wn.2d at 191-92.

In this case, as in Huffmeyer, the prosecutor obtained a bench warrant and hold on Saunders on the same date the Information was filed. But the prosecutor made no subsequent efforts to determine whether and when Saunders could be transported to Pierce County for trial. Like Huffmeyer, the prosecutor failed to subsequently contact Snohomish County DOC regarding the progression of Saunders' proceedings and his availability for trial after the DOC violation proceeding was completed. Like the prosecutor in Huffmeyer, the Pierce County Prosecutor did not demonstrate good faith and diligent effort to locate and obtain Saunders for trial.

In calculating whether the number of days between the information and trial falls within the 104-day limit, the trial court must also consider whether any days are excluded under CrR 3.3(g). Huffmeyer, 145 Wn.2d at 58. The purpose of CrR 3.3(g)(6)

is to exclude those periods of time “when the defendant is beyond the jurisdictional reach of the State.” State v. Chhom, 162 Wn.2d 451, 460, 173 P.3d 234 (2007).

CrR 3.3(g)(2) deducts from speedy trial calculation “[p]reliminary proceedings and trial on another charge.” CrR 3.3(g)(2). In Huffmeyer, the Court found that “the term ‘trial’ as used in CrR 3.3(g)(2) ends when the defendant enters a guilty plea. The time between Huffmeyer’s plea and his sentencing cannot be excluded under this exception[.]” 145 Wn.2d at 62. Similarly, time spent in DOC custody relating to an alleged or actual violation of community custody is also not a “trial.” Thus, because Saunders was not in “trial” and not “beyond the jurisdictional reach of the State,” the time Saunders spent in DOC custody is not excluded from the speedy trial calculations.

In this case, 105 days passed between the filing of the Information on June 10, 2010 and the first continuance hearing on September 23, 2010. None of that time is excluded under CrR 3.3’s speedy trial exclusionary rules. The State failed to exercise good faith and due diligence in bringing Saunders to trial. Consequently, Saunders’ speedy trial protections were violated when the 104-day time limit imposed by CrR 3.3 and the Striker

rule were exceeded.

A defendant who has not been brought to trial within the time limits of CrR 3.3(b) is not required to show actual prejudice. Instead, failure to comply with the speedy trial rules requires dismissal, regardless of whether the defendant can show prejudice. Raschka, 124 Wn. App. at 112. The trial court therefore erred when it denied Saunders' motion to dismiss based on the violation of his speedy trial rights. Saunders' conviction should be reversed and dismissed.

B. TRIAL COUNSEL'S FAILURE TO OBJECT AT THE ARRAIGNMENT HEARING TO SAUNDERS' UNTIMELY ARRAIGNMENT WAS INEFFECTIVE AND PREJUDICIAL

Effective assistance of counsel is guaranteed by both the United States and Washington State constitutions. U.S. Const. Amd. 5; Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that

there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. Both prongs of the Strickland test are met here.

A Striker objection must generally be brought to the trial court's attention at the time of arraignment or else be deemed waived. Greenwood, 120 Wn.2d at 605. Trial counsel failed to raise such an objection at Saunders' arraignment hearing on August 18, 2010, and trial counsel also failed to bring any subsequent motions to dismiss until after Saunders himself identified the issue, and briefed and filed his own pro se motion to dismiss. (CP 8-20, 21-38) If this Court finds that Saunders' right to object is waived, then counsel's failure to raise the issue at arraignment was ineffective.

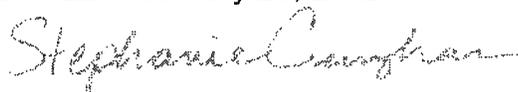
As argued above, the 69-day delay in arraignment was an

obvious violation of the Striker rule and of Saunders' speedy arraignment right, and the initial trial date set at the arraignment hearing was beyond the 104-day speedy trial limit. If counsel had objected at arraignment, his motion would have been well taken and the issue properly addressed. Trial counsel's representation was therefore deficient and prejudicial, and Saunders' conviction should be reversed.

V. CONCLUSION

Because Saunders' constitutionally protected speedy arraignment and trial rights were violated, and because his trial counsel was ineffective for failing to bring a timely challenge at arraignment, Saunders' conviction for failing to register as a sex offender should be reversed and dismissed.

DATED: February 29, 2012



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Christopher I. Saunders

CERTIFICATE OF MAILING

I certify that on 02/29/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Christopher I. Saunders, DOC# 712811, Monroe Correctional Complex, P.O. Box 777, Monroe, WA 98272-0777.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX A

Superior Court Criminal Rule 3.3

Superior Court Criminal Rules, CrR 3.3

RULE 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 filed 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 excludes 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.

APPENDIX B

State v. Huffmeyer, 145 Wn.2d 52, 32 P.3d 996 (2001)

Supreme Court of Washington,
En Banc.
STATE of Washington, Petitioner,
v.
Chad T. HUFFMEYER, Respondent.

No. 70194-6.
Argued Jan. 9, 2001.
Decided Oct. 18, 2001.

Defendant who was in custody in another county was charged with possessing stolen firearms. The Superior Court, Kitsap County, M. Karlynn Haberly, J., dismissed charges against defendant on speedy-trial grounds. State appealed. The Court of Appeals, 102 Wash.App. 121, 5 P.3d 1289, affirmed. State appealed. The Supreme Court, Bridge, J., held that: (1) time between guilty plea and sentencing in other county could not be deducted from speedy-trial period on firearms charge, and (2) state did not exercise good faith and due diligence in bringing defendant to trial.

Affirmed.

****996** Kitsap County Pros. Atty., Randall Sutton, Fort Orchard, for Petitioner.

***54** Melissa A. Hemstreet, Port Orchard, for Respondent.

****997** Pamela B. Loginsky, Wash. Ass'n of Pros. Atty., Olympia, amicus curiae on behalf of Washington Ass'n of Prosecuting Attorney.

BRIDGE, J.

The trial court dismissed criminal charges against Chad T. Huffmeyer because the State had failed to bring him to trial within 104 days of the information as required by CrR 3.3(c)(1) and *State v. Striker*, 87 Wash.2d 870, 557 P.2d 847 (1976). We are asked to determine whether CrR 3.3(g)(2)'s exclusion from speedy trial calculation of the period during trial on another matter includes the period between a guilty plea and sentencing. We hold that it does not. We are also asked to determine whether the State exercised good faith and due diligence in attempting ***55** to promptly bring Huffmeyer before the court. We hold that the State did not.

FACTS

On September 17, 1997 the State filed an information in King County charging Huffmeyer with one count of first degree robbery. The King County Superior Court issued a warrant and upon completion of a two-month sentence in Whatcom County, Huffmeyer was transported to King County. On November 5, 1997, the King County Superior Court arraigned Huffmeyer on the King County charges and, for the duration of that case, he was held in the King County jail.

On December 5, 1997, the State filed an information in the action at issue in Kitsap County, charging Huffmeyer with possession of a stolen firearm. On that day, the Kitsap County Superior Court issued a warrant for Huffmeyer's arrest. The warrant was returned to the court on December 8 with a notation that Huffmeyer was in custody in the King County jail. The State did not take any additional steps to bring Huffmeyer to trial in Kitsap County at that time.

In the King County action, Huffmeyer pleaded guilty to an amended information charging one count of second degree robbery on April 27, 1998. On August 14, 1998, the King County court sentenced Huffmeyer to 12 months in the King County jail with credit for time served. At the conclusion of his sentencing, Huffmeyer was transported to Kitsap County on the warrant issued there.

On August 26, 1998, 121 days after the King County guilty plea, Huffmeyer was arraigned in the Kitsap County action. The trial court granted Huffmeyer's motion to dismiss the charges with prejudice on speedy trial grounds because he had not been brought before the court within the 104-day speedy trial limit under CrR 3.3(c)(1) and *Striker*, 87 Wash.2d 870, 557 P.2d 847. The court also found that the State had not acted with good faith and due diligence to bring Huffmeyer *56 to trial because although the return of the warrant had informed the State of Huffmeyer's location, no timely action had been taken to bring him to trial in Kitsap County.

The Court of Appeals affirmed the trial court's dismissal of the Kitsap County charge. *State v. Huffmeyer*, 102 Wash.App. 121, 5 P.3d 1289 (2000). The court first determined, by remanding the question to the trial court, that the earliest Huffmeyer would have learned of the Kitsap County charges against him would have been on August 17, 1998, just before he was transported to Kitsap County. *Huffmeyer*, 102 Wash.App. at 123, 5 P.3d 1289. The Court of Appeals concluded that the exclusionary period under CrR 3.3(g)(2) ended when the guilty plea was entered. *Id.* at 125, 5 P.3d 1289. In addition, since Huffmeyer had not been promptly notified of the Kitsap County charges, by doing nothing to bring Huffmeyer to trial during the 121-day delay between the King County guilty plea and sentencing, the Kitsap County prosecutor had not shown good faith and due diligence as required by this court's holding in *Striker*. *Id.*; *Striker*, 87 Wash.2d at 870, 557 P.2d 847. The Court of Appeals affirmed the trial court's dismissal of the charge against Huffmeyer on speedy trial grounds.

ANALYSIS

Washington's CrR 3.3(c) governs the time for arraignment and trial to ensure that criminal defendants are granted a speedy trial. If a defendant is detained in jail or **998 subject to conditions of release, he or she must be arraigned within 14 days after the date that the indictment or information is filed in superior court. CrR 3.3(c)(1). If the defendant is not released from jail pending trial, he or she must be brought to trial no later than 60 days after arraignment. *Id.* If the defendant is not detained in jail or subject to conditions for release, then the defendant must be arraigned no later than 14 days after the first appearance in superior court following the filing of the information or indictment. *Id.* If the defendant remains free from jail, he or she must be brought to trial within 90 days of arraignment.*57 *Id.* When a person is being held in custody in another county on an unrelated charge, he or she is not "detained in jail on the current charge" for the purposes of CrR 3.3(c)(1). *Huffmeyer*, 102 Wash.App. at 123, 5 P.3d 1289 (citing *State v. Thompson*, 57 Wash.App. 688, 690, 790 P.2d 180 (1990), *aff'd sub nom. State v. Greenwood*, 120 Wash.2d 585, 845 P.2d 971 (1993)); *see also State v. Pacheco*, 107 Wash.2d 59, 65-66, 726 P.2d 981 (1986). Therefore, the 90-day period between arraignment and trial applies in Huffmeyer's Kitsap County case.

CrR 3.3 does not address any time requirements for initially bringing defendants who are not detained on the current charge before the court. *Greenwood*, 120 Wash.2d at 589, 845 P.2d 971. In *Striker*, this court filled that gap. *Striker*, 87 Wash.2d at 877, 557 P.2d 847. The prosecutor in *Striker* filed informations charging both defendants with grand larceny and securities fraud, but the defendants were not promptly arraigned. *Id.* at 871, 557 P.2d 847. The trial court rejected the defendants' motions to dismiss under the belief that the only applicable date for calculating time for trial was the date of first appearance before the court. *Id.* This court disagreed, stating that the intent and spirit of the criminal rules required that if the defendant was amenable to process, he or she must be brought to trial "within the time specified in CrR 3.3, after the information or indictment is filed." *Id.* at 877, 557 P.2d 847. If a long period of delay has occurred between filing and bringing the defendant to court, "through no fault or connivance of the defendant," the gap in CrR 3.3 must be filled by the court. *Id.* at 872, 557 P.2d 847.

In *Greenwood*, this court clarified the *Striker* rule:

[W]here a long and unnecessary delay occurs in bringing a defendant who is amenable to process before the court, CrR 3.3's 90-day trial period is deemed to commence at the time the *information was filed*, instead of when the defendant finally appeared before the court to answer for the charge.

Greenwood, 120 Wash.2d at 591, 845 P.2d 971 (emphasis added). *Striker* thus established a constructive arraignment date 14 days after the information was filed where unnecessary delays have occurred. *Id.* at 599, 845 P.2d 971. The defendant must be brought to *58 trial 90 days after this constructive arraignment date, or a total of 104 days after the date the information was filed. *Id.*

However, the *Greenwood* court also noted that *Striker* should not impose an undue burden on law enforcement. *Id.* at 601, 845 P.2d 971. Only *unnecessary* delay triggers the *Striker* rule. *Id.* The *Greenwood* court held that the *Striker* rule does not require the court to establish a constructive arraignment date in cases where the state acted with good faith and due diligence in attempting to bring the defendant before the court. *Id.* Whether the state acted with good faith or due diligence necessarily turns on the facts of each case. *Id.*

In calculating whether the number of days between the information and trial falls within the 104-day limit, the trial court must also consider whether any days are excluded under CrR 3.3(g). Specifically, CrR 3.3(g)(2) deducts from speedy trial calculation “[p]reliminary proceedings and trial on another charge.” CrR 3.3(g)(2). However, this court has never directly addressed whether the term “trial,” as used in this exclusionary rule, includes the time between a guilty plea and sentencing.^{FN1}

FN1. Although the parties in *Greenwood* agreed that *Greenwood*'s time for trial calculation “began on the day the defendant pleaded guilty to the assault charge,” this court has never specifically addressed the issue. *Greenwood*, 120 Wash.2d at 609, 845 P.2d 971.

****999** Therefore, we must decide here whether the 121-day period between Huffmeyer's guilty plea and his sentencing is excluded from the speedy trial calculation under CrR 3.3(g)(2). If the 121 days are not excluded, we must determine whether the Kitsap County prosecutor acted with good faith and due diligence in attempting to bring Huffmeyer before the court.

I

Two hundred and sixty-four days elapsed from the filing of the Kitsap County information to the Kitsap County arraignment. Those days that occurred before Huffmeyer's King County guilty plea are excluded from speedy trial ***59** calculation of the Kitsap County action under CrR 3.3(g)(2). However, 121 days remained during almost all of which Huffmeyer awaited sentencing in King County. If the time between the guilty plea and sentencing is not excluded from the speedy trial calculation, then the 121-day time between the guilty plea and the arraignment in Kitsap County extends beyond CrR 3.3's 104-day speedy trial limit.^{FN2}

FN2. The Court of Appeals noted that there was a conflict in case law regarding whether a showing of good faith and due diligence is required *before* the exclusion in CrR 3.3(g)(2) can be given effect. *Huffmeyer*, 102 Wash.App. at 125, 5 P.3d 1289. The Court of Appeals found it unnecessary to reach this question because it concluded that CrR 3.3(g)(2)'s exclusionary period ends upon the guilty plea. *Id.*

The State relies on *State v. Pizzuto*, 55 Wash.App. 421, 778 P.2d 42 (1989), to support its proposition that the term “trial” in CrR 3.3(g)(2) includes the time between a guilty plea and sentencing.^{FN3} In *Pizzuto*, the defendant was apprehended in Montana and was held on arrest warrants from both Washington and Idaho. *Id.* at 423, 778 P.2d 42. Washington agreed to subordinate its extradition request to Idaho's but placed a hold on Pizzuto that would be activated if the defendant were released from custody or found not guilty. *Id.* at 424-25, 778 P.2d 42. Pizzuto was sentenced to death in Idaho. *Id.* at 425, 778 P.2d 42. After sentencing, Washington officials inquired as to when Pizzuto would be available for trial in Washington. *Id.* Idaho officials replied that his presence was required there until posttrial motions were heard. *Id.* Washington kept in continued communication with Idaho officials until Pizzuto was transferred to King County to face charges for crimes that occurred in Washington. *Id.*

FN3. Pet. for Review at 9-10.

Pizzuto claimed that the state breached the speedy trial requirements by agreeing to allow Idaho to proceed with its trial and by failing to bring him before a Washington court within speedy trial limits. *Id.* The state responded that the delay was justified under CrR 3.3(g)(2). *Id.* at 425-26, 778 P.2d 42. Noting that no contrary authority existed, Division One of the Court of Appeals interpreted “trial” as used in CrR 3.3(g)(2) to “encompass sentencing and posttrial motions regardless of the order in which they occur.” *Id.* at 427, 778 P.2d 42.

***60** The *Pizzuto* court gave several reasons for interpreting the term “trial” to include sentencing and posttrial

motions. First, this interpretation would allow one jurisdiction to complete its prosecution before another jurisdiction is required to begin, assuring that the defendant can be physically present for both criminal proceedings. *Id.* This interpretation would also allow the second jurisdiction to await the results of the first trial and motions before deciding how to proceed. *Id.* Moreover, the *Pizzuto* court recognized that an interpretation of the rule that requires a defendant to be available to a second jurisdiction for trial on any day on which he is not physically in the courtroom in the first jurisdiction would prove awkward and would impose an undue burden on the state to transport the defendant between jurisdictions. *Id.* at 427-28, 778 P.2d 42. In *Pizzuto*'s case, transporting the defendant to King County to be arraigned during his sentencing in Idaho would have triggered Washington's 60-day speedy trial rule and could have prejudiced the defendant's ability to defend himself in both proceedings. *Id.* at 428, 778 P.2d 42.

Although it managed to distinguish both cases, the *Pizzuto* court admitted that the holdings of *State v. Alexis*, 91 Wash.2d 492, **1000 496, 588 P.2d 1171 (1979) and *Pacheco*, 107 Wash.2d at 65, 726 P.2d 981, could "create uncertainty" as to the validity of this interpretation of CrR 3.3(g)(2). *Pizzuto*, 55 Wash.App. at 428, 778 P.2d 42. The *Pacheco* court followed the *Alexis* court's holding that "where a defendant is in jail awaiting sentencing on another charge and is amenable to process, the State must prove that it acted with good faith and due diligence to bring the defendant to trial after the filing of the information." *Pacheco*, 107 Wash.2d at 65, 726 P.2d 981 (emphasis added) (citing *Alexis*, 91 Wash.2d at 496, 588 P.2d 1171). The *Pizzuto* court distinguished *Alexis* by reasoning that the *Alexis* court did not specifically discuss the applicability of the CrR 3.3(g)(2) exclusion or the definition of the term "trial"; instead it considered the "unavailability" of defendant under former CrR 3.3(f). *Pizzuto*, 55 Wash.App. at 428, 778 P.2d 42. Consequently, the *Pizzuto* court reasoned that neither *Alexis* nor *Pacheco* precluded *61 its interpretation of the term "trial" in CrR 3.3(g)(2). *Id.* at 428-29, 778 P.2d 42. The *Pizzuto* court concluded that the entire period during which the Idaho proceedings were conducted, including the time for posttrial motions and sentencing, was excluded from calculation of the Washington speedy trial period. *Id.* at 430, 778 P.2d 42.

[1][2] We disagree with the *Pizzuto* court's interpretation of CrR 3.3(g)(2) and instead follow the *Alexis* court in holding that where a defendant is in jail awaiting sentencing on one charge, the state must act with good faith and due diligence to bring the defendant before the court on additional unrelated charges. We therefore interpret CrR 3.3(g)(2)'s exclusion of "[p]reliminary proceedings and trial" to end upon a guilty plea.

Huffmeyer is correct in his assertion that the language and structure of the criminal rules themselves distinguish "sentencing" from "trial." For example, CrR 4 addresses "Procedures Prior to Trial," CrR 6 addresses "Procedures at Trial," and CrR 7 addresses "Procedures Following Conviction," which includes rule 7.2 entitled "Sentencing." Therefore, it is evident from the structure of the rules that they contemplate a distinction among pretrial, trial, and sentencing procedures. According to this scheme, sentencing is not included in the definition of "trial." In addition, the language of CrR 3.4(a) recognizes this distinction. The rule reads:

The defendant shall be present at the arraignment, at every stage of the trial including the empanelling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

CrR 3.4(a). By not including sentencing as an element within the term "trial," the language of this rule supports the conclusion that the criminal rules contemplate that trial ends with the guilty plea or conviction.

The *Pizzuto* court raised concerns that such a limited interpretation of the CrR 3.3(g)(2) exclusion might unduly *62 burden the state to transport defendants between jurisdictions. *Pizzuto*, 55 Wash.App. at 427-28, 778 P.2d 42. However, the result of our interpretation is not an absolute requirement that a defendant awaiting sentencing be available for transport on every day that he or she is not in court for posttrial proceedings. The state can also exclude days from the speedy trial calculation by showing that it acted with good faith and due diligence in attempting to bring the defendant before the court.

Therefore, we hold that the term "trial" as used in CrR 3.3(g)(2) ends when the defendant enters a guilty plea. The time between Huffmeyer's plea and his sentencing cannot be excluded under this exception and the 121-day delay between the filing of the information and the arraignment cannot be reduced. We must now consider whether any days can be excluded under *Striker* where the state acted with good faith and due diligence to bring the

defendant before the court.

II

[3][4][5] Because the delay in bringing Huffmeyer before the court after his guilty plea exceeded the 104-day limit under *Striker*, we must determine if that delay can be excused because it was necessary or because the ****1001** State acted with good faith and due diligence to bring the defendant, who was amenable to process,^{FN4} before the court. See *Greenwood*, 120 Wash.2d at 591, 845 P.2d 971. This good faith and due diligence standard ensures that a defendant will be brought before the court in a timely manner to answer a charge, while also acknowledging that some periods of delay may be unavoidable. ***63** Without such an exception, there would be an unacceptable burden on law enforcement, which could often lead to unjustified dismissals. *Id.* at 601, 845 P.2d 971.

FN4. As the *Greenwood* court stated it, the *Striker* rule applies only to defendants who are amenable to process. *Greenwood*, 120 Wash.2d at 591, 845 P.2d 971 (“[W]here a long and unnecessary delay occurs in bringing a defendant who is amenable to process before the court, CrR 3.3’s 90-day trial period is deemed to commence at the time the information was filed....”). “Amenable to process” means being liable or subject to law. *State v. Stewart*, 130 Wash.2d 351, 361, 922 P.2d 1356 (1996). Because Washington courts have jurisdiction over in-state defendants, a defendant within the state is amenable to process. See *State v. Hudson*, 79 Wash.App. 193, 196, 900 P.2d 1130 (1995), *aff’d*, 130 Wash.2d 48, 921 P.2d 538 (1996).

[6] By its own terms, due diligence requires the expenditure of at least a minimal amount of effort to bring a defendant before the court in a timely manner. This court has held that the state failed to exercise good faith and due diligence where it made “absolutely no effort” to locate the defendant during the six months immediately following the filing of the information. *Alexus*, 91 Wash.2d at 496, 588 P.2d 1171. Similarly, in *State v. Peterson*, 90 Wash.2d 423, 425, 585 P.2d 66 (1978), the defendant pleaded guilty to a federal charge and was confined in a federal penitentiary for a full year before any action was taken on charges filed against him in Snohomish County. During that year, the state made no effort to locate or determine the availability of the defendant. *Id.* at 426, 585 P.2d 66. However, the *Peterson* court noted that, in determining whether the state acted reasonably, the time necessary for transporting the defendant and delays caused by the alternate jurisdiction are important factors to be considered. *Id.* at 428, 585 P.2d 66 (quoting *State v. Hattori*, 19 Wash.App. 74, 78-79, 573 P.2d 829 (1978)).

[7][8] Washington courts have consistently held that due diligence requires that the state do something to locate the defendant and bring him or her to trial once proceedings in alternate jurisdictions are complete. Similarly, where a defendant is being held on charges in another county, due diligence requires the state to make efforts to bring the defendant to trial once the exclusions of CrR 3.3 no longer apply. In Huffmeyer’s case, when informed of his location, prosecutors should have at least inquired as to when he would be available for trial in Kitsap County. Further, prosecutors should have contacted King County to inquire as to the progression of Huffmeyer’s trial and his availability after the guilty plea. Instead they allowed him to remain in the King County jail for 121 days before bringing him to trial. This is not to say that speedy sentencing requirements or other concerns could never prevent a defendant’s ***64** transfer before sentencing is complete. We agree that factors like the time necessary for transport and delay caused by the alternate jurisdiction are relevant. However, due diligence requires the state to do something to ensure that the defendant is brought before the court in a timely manner. We agree with the Court of Appeals that the State has “ ‘failed to put forth any argument that it acted in good faith and with due diligence’ ” to bring Huffmeyer to court after his guilty plea. *Huffmeyer*, 102 Wash.App. at 127, 5 P.3d 1289 (quoting *Greenwood*, 120 Wash.2d at 609, 845 P.2d 971).

Before issuing a decision, the Court of Appeals asked the trial court to determine whether Huffmeyer had any knowledge of the Kitsap County charges while he was awaiting sentencing in King County. The trial court responded that the earliest Huffmeyer could have become aware of the Kitsap County charges against him was August 17, 1998, just before his transfer. The Court of Appeals therefore implied that had the defendant been informed that charges were filed against him in Kitsap County, the due diligence requirement might have been satisfied. We see no need to decide to what extent a defendant might be responsible for demanding his own speedy trial. The *Striker* court imposed a due diligence requirement *on the state*. The Kitsap County prosecutor allowed the defendant to remain in the King ****1002** County jail for 121 days without even inquiring as to his availability for trial. Therefore, we hold that the *Striker* due diligence requirement was not satisfied in this case.

CONCLUSION

Washington's CrR 3.3 and the *Striker* rule combine to require the state to bring a defendant before the court within 104 days of the filing of the information or indictment. Days can be deducted from this speedy trial calculation if one of CrR 3.3(g)'s exclusionary rules applies or if the state acted with good faith and due diligence to bring the defendant before the court. We hold that the term "trial on another charge" in CrR 3.3(g)(2)'s exclusion does not include*65 the period between the guilty plea and sentencing. That period could not be deducted from Huffmeyer's speedy trial calculation. In addition, the State did nothing to bring Huffmeyer before the court in Kitsap County during the 121 days between Huffmeyer's guilty plea and his arraignment in Kitsap County. The State did not exercise due diligence in attempting to bring Huffmeyer before the court. Therefore, we affirm the Court of Appeals' and the trial court's dismissal of the charges against Huffmeyer.

ALEXANDER, C.J., SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, CHAMBERS, OWENS, JJ., concur.

Wash.,2001.
State v. Huffmeyer
145 Wash.2d 52, 32 P.3d 996

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