

No. 45063-1-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Jeremy Frieday,
Appellant.

Clark County Superior Court Cause No. 13-1-00476-3
The Honorable Judge Robert Lewis

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Frieday was denied his right to a speedy trial under CrR 3.3.
2. The trial judge erred by continuing the trial beyond Mr. Frieday's speedy trial expiration date.
3. The trial judge applied the wrong legal standard by ruling that a faxed subpoena had been properly served.
4. The trial judge applied the wrong legal standard by finding good cause in the absence of evidence that Officer Martin had been properly served with a subpoena.
5. The trial court erred by adopting Finding of Fact No. 1.1. CP 3-4.
6. The trial court erred by adopting Conclusion of Law No. 2.2. CP 3-4.
7. The trial court erred by adopting Conclusion of Law No. 2.3. CP 3-4.

ISSUE 1: A court may not continue a case beyond the expiration of speedy trial based on witness unavailability, where the state has not attempted to serve the witness with a subpoena. Here, the court continued Mr. Frieday's trial beyond speedy trial based on the unavailability of witness Martin, who had not been properly subpoenaed. Did the court violate Mr. Frieday's CrR 3.3 right to a speedy trial?

8. Mr. Frieday's convictions for attempting to elude, driving while suspended, and reckless driving violated his Fourteenth Amendment right to due process.
9. The state introduced insufficient evidence to prove beyond a reasonable doubt that Mr. Frieday was the driver of the car pursued by Officer Martin.
10. The trial court erred by adopting Conclusion of Law No. 1.3. CP 6.

ISSUE 2: Convictions for driving offenses require proof that the accused person drove a motor vehicle. Here, the state

failed to prove that Mr. Frieday was the person who drove the vehicle pursued by police on December 2, 2012. Was there insufficient evidence to convict Mr. Frieday of attempting to elude, driving while suspended, and reckless driving??

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On December 2 2012, Officer Donahue saw a green Honda with a headlight out. He turned and followed the car. RP 80, 83, 85. The car stopped, but pulled away as the officer walked up. RP 86, 88. Donahue didn't see the driver's face, but could tell that he had dark brownish hair and was white. RP 88-89, 107. Donahue gave chase. RP 89. The car went over the speed limit and through a red light and a stop sign. RP 90-92, 110. There was no traffic in the area noted by the officer. RP 109.

Donahue stopped his pursuit. RP 92. He heard over the radio that another officer had found the car without any occupants in a driveway. RP 94. He went to the house, knocked on the door, and then used his siren speaker to call to anyone inside the house. RP 95. When they got no response, the officers sought a warrant for the car and towed it to the police station. RP 97-98. There were three or four other cars in the driveway. RP 108.

Inside the car was a bill of sale stating that Jeremy Frieday had purchased the car. The driveway the car was in was at Mr. Frieday's address. RP 96, 98, 115. A different officer had stopped Mr. Frieday in the same green Honda in August of 2012. RP 111-113.

The state charged Jeremy Frieday with attempting to elude, reckless driving, and driving with a suspended license. CP 1-2.

Mr. Frieday was arraigned on April 1, 2013. The court set bail at \$20,000, and Mr. Frieday remained in custody. The court noted his commencement date as April 1, 2013. The court scheduled trial for May 28, 2013, which it noted was the 57th day after the commencement date. RP 2; Clerk's Minutes filed 4/1/13, Supp. CP.

On May 23, 2013, the state filed a motion to continue the trial. CP 30-33. Corporal Martin was not available for trial on the set date, and the stated asserted he was a material witness. RP 5-6. Mr. Frieday objected and pointed out that the witness that the state was claiming was not available had not even been served. RP 2-9; CP 34-40. The state acknowledged that they had not served the witness. RP 5-6. The court granted the continuance and set a new trial date of June 24, 2013.¹ RP 10; CP 33.

¹ The defense also moved, unsuccessfully, for reconsideration. CP 5-6, 3-5, 34-61.

At a second hearing on the issue, after the case had been continued, the state explained their general procedure: the prosecutor's office faxes a subpoena to a general number at the police department. RP 17. A "coordinator" then addresses the subpoena, including contacting the prosecutor's office by email if the officer has a scheduling conflict. RP 17-18. The state's attorney acknowledged that he did not know if the subpoena had actually been given to Martin. RP 21. The prosecutor did not assert that he had received a waiver of personal service from Corporal Martin. RP 12-33.

Mr. Frieday filed a motion to dismiss all three charges based on the fact that no one had seen Mr. Frieday driving the car on the day of the incident. CP 26-30. After a hearing, the court denied the motion. RP 34-45; CP 5-6.

Trial began on June 24, 2013. The state did not call Corporal Martin as a witness. RP 52-131.

After the state rested, the defense moved to dismiss all counts. Mr. Frieday's attorney argued that the state had not provided sufficient evidence that Mr. Frieday was the driver of the car on December 2, 2012. RP 127. The court denied the motion. RP 129.

The jury convicted Mr. Frieday on all three charges. After sentencing, Mr. Frieday timely appealed. CP 7-20, 20-22, 129-139.

ARGUMENT

I. THE COURT VIOLATED MR. FRIEDAY’S RIGHT TO A SPEEDY TRIAL.

A. Standard of Review.

The application of the speedy trial rule to a specific set of facts is a question of law reviewed *de novo*. *State v. Chavez-Romero*, 170 Wn. App. 568, 577, 285 P.3d 195 (2012) *review denied*, 176 Wn.2d 1023, 299 P.3d 1171 (2013). Denial of a motion to dismiss for speedy trial purposes is reviewed for abuse of discretion. *Id.* A court necessarily abuses its discretion when it fails to apply the correct legal standard. *Hidalgo v. Barker*, 176 Wn. App. 527, 309 P.3d 687 (2013).

B. The court applied the wrong legal standard and abused its discretion by continuing trial beyond the speedy trial period.

An accused person must be brought to trial within sixty days of arraignment if the defendant is in custody. CrR 3.3(b)(1). The court may continue the trial date if “required in the administration of justice.” CrR 3.3(f)(2). The continuance period is excluded from the speedy trial clock. CrR 3.3(e)(3).

A court may grant a continuance based on witness unavailability if the party seeking the continuance has exercised due diligence in securing the witness's attendance. *City of Seattle v. Clewis*, 159 Wn. App. 842, 847, 247 P.3d 449 (2011). The state has not exercised due diligence if it fails to properly subpoena the witness prior to arguing that his/her unavailability requires a continuance. *Id.*; *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989); *State v. Adamski*, 111 Wn.2d 574, 577, 761 P.2d 621 (1988).

A subpoena must be served by personal service. CR 45(b). A subpoena that has not been properly served is a nullity. *Adamski*, 111 Wn.2d at 578-579. Private arrangements for other means of service cannot "substitute for the official rules of the court." *Id.*

Mr. Frieday's commencement date was April 1, 2013; his speedy trial period expired on May 31, 2013. Over objection, the trial court continued the case beyond May 31, and trial didn't start until June 24, 2013. RP 2, 7, 10, 52; CP 3-4, 33. The validity of this continuance depends on whether or not the prosecution exercised due diligence in securing Officer Martin's attendance.² *Clewis*, 159 Wn. App. at 847.

The prosecutor failed to properly serve Martin. The record indicates that the prosecutor's office faxed the subpoena to the police

department coordinator. CP 54-61. Although Martin may have had actual notice of the trial date, nothing in the record shows that he was personally served with a subpoena. Ex. 1 admitted 6/10/13, Supp. CP.

The court's findings do not reflect otherwise. CP 3-4. Instead of finding that Martin was personally served, the court found that he "received notice of his subpoena." CP 4. Receiving notice of a subpoena is not the same as receiving the subpoena, by personal service or otherwise. And providing such notice does not qualify as due diligence. *Adamski*, 111 Wn.2d at 577-579.

Furthermore, the finding that Martin received notice "of his subpoena" is unsupported by the record.³ Instead, the documents submitted by the parties show only that he was "not available for court on 5/28/13." Ex. 1, Supp CP. Nothing shows that he was ever made aware a subpoena had been issued. CP 54-61; Ex. 1, Supp. CP. At most, the record establishes that he may have known of the trial date.

Martin's unavailability was not a proper basis for continuing the case past Mr. Frieday's speedy trial expiration date. *Adamski*, 111 Wn.2d at 577-579. The trial court should not have granted the continuance. *Id.*

² Indeed, when trial was held on June 24, Martin did not testify. RP (6/24/13).

³ Likewise unsupported is the finding that he received notice on May 14th. The subpoena was faxed to the coordinator on May 10. CP 54-61. The May 14 notice of unavailability does not indicate when he actually found out about the court date. Ex. 1, Supp. CP.

Furthermore, the trial court misapplied the law. The court apparently believed that the private arrangements involving the police department coordinator could substitute for personal service upon the officer. RP 20-21. This is incorrect. *Adamski*, 111 Wn.2d at 579. Such arrangements cannot substitute for the official rules of the court. *Id.*

Mr. Frieday's trial started after the expiration of his speedy trial period. Accordingly, his convictions must be reversed and the charges dismissed with prejudice.

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. FRIEDAY OF ATTEMPTING TO ELUDE, DRIVING WHILE SUSPENDED, AND RECKLESS DRIVING.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. No rational trier of fact could have found Mr. Frieday guilty of the charged crimes beyond a reasonable doubt.

1. The evidence did not prove that Mr. Frieday was the driver of the green Honda.

The three offenses with which the state charged Mr. Frieday all required proof that he was the driver of the car pursued by police on December 2, 2012. CP 1-2. The state produced insufficient evidence to prove that he was the driver.

Neither of the officers testified that they'd seen him driving on December 2. RP 78-115. Instead, Officer Donohue testified that the driver was a white⁴ male with "darkish brown hair." RP 89. Even when considered with the other evidence presented by the state, this does not prove that Mr. Frieday was the driver. Nothing in the record rules out the possibility that he loaned the car to a housemate on the date in question.

No rational jury could have found beyond a reasonable doubt that Mr. Frieday drove the green Honda on December 2, 2012. *Chouinard*, 169 Wn. App. at 899. The court must reverse his convictions and dismiss the case. *Id.*

2. The prosecution failed to prove recklessness.

To prove eluding, the state is required to establish that the accused person drove in a "reckless manner," defined as a "rash or headless manner, indifferent to the consequences." RCW 46.61.024; CP 120. To prove reckless driving the state must show that the accused person drove

“in willful or wanton disregard for the safety of persons or property.” RCW 46.61.500; CP 1-2. The “willful or wanton” standard is more onerous than the “reckless manner” standard. *State v. Ridgley*, 141 Wn. App. 771, 782, 174 P.3d 105 (2007). Proof of willful or wanton driving will establish driving in a reckless manner. *Id.*

In this case, the prosecution did not meet either standard. Officer Donahue did not testify that the driver directly put any people or property at risk. RP 78-110. He believed the driver went faster than the 25 mph speed limit, but did not say how much faster. RP 90. He himself drove 40-50 mph to catch up, and was able to catch up at that speed. RP 90. Although the driver went through a red light, he stopped at the light before entering the intersection. RP 90-91. Donahue did not say there were other cars in the area, and called traffic “light”. RP 90-91.

He did not testify that any of the other cars had to brake, change lanes, or swerve to avoid the driver. Nor did he indicate that any of the cars were placed at risk when the driver crossed the intersection. RP 90-91.

Although he indicated the driver went through a stop sign without slowing, he didn’t testify that the maneuver put anyone or anything at risk.

⁴ He apparently determined the driver’s race from a glimpse of his hand on the steering wheel. RP 89. He later acknowledged that the driver “[l]ooked white,” but did not say “definitively” that he was white, because he “never saw him.” RP 108.

RP 92. Nor did he describe the layout, indicate whether the intersection involved a four-way stop, or testify about the visibility in either direction for a driver approaching the intersection. RP 92.

The driver committed several driving infractions. This does not by itself prove a willful or wanton disregard for the safety of persons or property. Nor does it prove driving in a reckless manner.

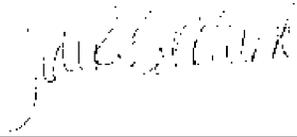
The evidence was insufficient for conviction on counts one and three. The convictions must be reversed and the charges dismissed with prejudice. *Chouinard*, 169 Wn. App. at 899.

CONCLUSION

Mr. Frieday's convictions must be reversed and the charges dismissed with prejudice. The trial court violated his right to speedy trial by continuing the case beyond the speedy trial expiration date. Furthermore, the evidence was insufficient to prove that Mr. Frieday was the driver of the green Honda, or that he drove in a reckless manner or with willful or wanton disregard for the safety of persons or property.

Respectfully submitted on January 27, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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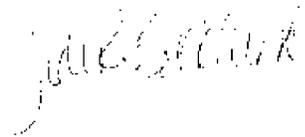
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 27, 2014.



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BACKLUND & MISTRY

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