

NO. 49106-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAMES OTIS WRIGHT, JR.,

Appellant.

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Appeal from Thurston County Superior Court  
Honorable Gary R. Tabor  
No. 16-1-00211-4

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REPLY BRIEF OF APPELLANT

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## I. REPLY

### A. The “Motion for Continuance of Trial” cited by Respondent was entirely invalid and therefore Appellant’s speedy trial right was violated.

Respondent argues on p. 8 of their Brief that the prosecutor’s April 12<sup>th</sup> “Motion for Continuance of Trial” (CP 56) due to an officer’s scheduled vacation constituted “good cause” to continue beyond the speedy trial deadline. The motion was granted over Appellant’s objection (CP 58). Respondent argues this order complied with CrR 3.3(f)(2), which allows a court to continue a trial on the motion of any party.

However, this April 12<sup>th</sup> motion to continue was entirely invalid because it was based on incorrect dates, making the then-set trial date of April 25<sup>th</sup> *already beyond* speedy trial deadlines:

The Motion argued that the trial needed be continued beyond April 25<sup>th</sup>, which was already past the *court-ordered* last allowable date for trial: April 23<sup>rd</sup>. This April 23<sup>rd</sup> deadline was clearly and explicitly ordered in the April 6<sup>th</sup> “Trial Confirmation Order.” Respondent argues that (1) this April 23<sup>rd</sup> deadline was voided on April 11<sup>th</sup> (the date trial was supposed to start originally) because (emphasis added) “Wright joined the **motion to continue** from April 11 to April 25” (Respondent’s Brief (“RB”) p. 7) and (2) a second contested continuance was granted on April 12<sup>th</sup>. The first continuance on April 11<sup>th</sup> was invalid, among other reasons, for the lack of Defendant’s signed approval. The second continuance is irrelevant because it was a continuance from an already untimely date, and improper, because

there was no allegation of the officer's unavailability for the last *timely* date of trial.

Contrary to the Respondent's assertion, the April 11<sup>th</sup> continuance was not agreed, and was also improper: there is no written motion in the record, nor any CrR 3.3(f) order stating that the trial had been continued beyond speedy. The only evidence in the record is the two-sentence handwritten order on April 11<sup>th</sup> stating that trial was "to start April 25<sup>th</sup>"(CP 54-55) and then Clerk's notes for April 11, 2017, stating that the "Mr. Juris and Mr. Foley presented motion to continue trial." This is neither a proper CrR 3.3(f)(2) motion nor order:

- (1) The fact that the State submitted a written Motion for Continuance of Trial on April 12<sup>th</sup>, one day after, verifies that no such motion had previously been brought.
- (2) Thurston County Superior Court clearly has form orders for criminal trial continuances that contain the CrR 3.3 language, as evidenced throughout the record.
- (3) Third, and most importantly, even if the language "Mr. Juris and Mr. Foley presented motion to continue trial" reflects the clerk's conclusion that defendant agreed, then CrR 3.3(f)(1) **mandated** the defendant's signature. An oral 'agreement' reflected only in clerk's notes, and only between the attorneys, is not sufficient.

Therefore, the argument of Respondent that the Clerk's notes and two-sentence handwritten order somehow 'constituted' a proper CrR 3.3(f)(2) motion is incorrect.

Moreover, not only was April 25<sup>th</sup> already beyond the speedy trial deadline, but the April 12<sup>th</sup> Motion for Continuance of Trial stated that the officer's vacation did not start *until* April 25<sup>th</sup>. This means the officer *could* have been available April 23<sup>rd</sup>, the true, court-ordered last-allowable date for trial.

Respondent appears to argue that much could have been going on orally at these hearings that “would not necessarily be reflected in the written orders,” and that Appellant failed to provide transcripts of these pretrial motions. RB, p. 9. However, when the orders, motions, and Clerk's notes in a trial record all explicitly reflect that a blatant violation had occurred, it is not Appellant's responsibility to provide anything further to this Court. Nothing in the oral record could have cured the invalidity of these motions and orders.

**B. Respondent is incorrect that there was “forcible compulsion.”**

Respondent argues that the victim ‘overcame resistance’ constituting “forcible compulsion” pursuant to RCW 9A.44.100 because she “flailed at him” and “pushed him.” RB, p. 12. However, the record does not indicate that the victim “flailed at him;” t only mention of “flailing” is “I just started flailing” and “I just was freaking out and flailing”. RP 87-88. The only mention of “pushing” is an unfinished statement: “I just remember sort of screaming and pushing at -- I must have been facing him.” RP 88.

In fact, in the same breath the victim stated “so he wasn't continuing to hold.” RP 88.

Therefore, not only is there no record of resistant flailing or pushing, but the victim outright said that Appellant “wasn’t continuing to hold.” This is not “overcoming resistance.” This is, in fact, the “instantaneous” touching set forth in *Ritola*, which the Court of Appeals said *did not* constitute forcible compulsion which overcame resistance.

**C. Respondent is incorrect that there was sexual contact.**

At trial, the following exchange occurred between defense counsel and victim:

Q. Did you have any sexual contact? A yes or no question, ma'am.

A. No.

Respondent argues that “it is clear, however, that [the victim] did not understand what [defense counsel] was getting at [...]” RB, p. 13.

The evidence at trial was clear that Appellant did not cause the victim to have sexual contact with him. The victim affirmed this in her own words above. Respondent appears to argue that the facts in this case are similar to the defendant in *Brooks* who masturbated onto an infant, rather than the “instantaneous” touching and letting-go of a breast in *Ritola*. This is a gross misrepresentation. The facts are *very* similar to *Ritola*, and therefore Appellant did not commit Indecent Liberties-Forcible Compulsion.

**D. Respondent is incorrect that Appellant was afforded effective assistance of counsel.**

First, the assistance was ineffective because Appellant’s speedy trial rights were violated as set forth *supra*.

Second, the record is clear that defense counsel's trial strategy was no strategy at all. The last-minute, essentially *Knapstad* motion of defense counsel easily could have been brought weeks before. Respondent's argument that "had defense counsel brought a *Knapstad* motion, the trial court would certainly have denied it," *supports* Appellant's argument that the strategy of defense counsel in bringing such a motion at the end of trial fell below reasonable standards of representations.

Defense counsel's participation in the trial was minimal at best, and everything in the record before the trial was either "over Appellant's objection" or violative of CrR 3.3.

## II. CONCLUSION

Appellant's constitutional right to a speedy trial was violated and this matter should be dismissed with prejudice. This court should also find insufficient evidence was presented to support a verdict of guilt as to Indecent Liberties-Forcible Compulsion.

In the alternative, this court should find that Appellant was afforded ineffective assistance of counsel and remand the matter for a new trial.

Respectfully submitted this 9th day of March, 2017.

*/s/ Edward Penoyar*

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CERTIFICATE OF SERVICE

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DATED this 9th day of March, 2017, South Bend, Washington.

/s/ Tamron Clevenger  
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**EDWARD PENOYAR ATTORNEY AT LAW**  
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