

FILED
Court of Appeals
Division II
State of Washington
1/5/2018 3:59 PM

No. 49730-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LLEWELYNE HOLCOMB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT 1

 1. The prosecution misrepresents key facts in an effort to distract this Court based on immaterial or incorrect information 1

 2. The prosecution ignores the court’s clear obligation to seek alternative judicial officers when the judge’s unavailability delays a trial..... 4

 3. Prosecutorial delay and mismanagement also impermissibly denied Mr. Holcomb a speedy trial 10

 4. The court did not understand its discretion when imposing consecutive sentences for firearm enhancements 11

B. CONCLUSION 13

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007) 11, 12, 13

State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005)5, 6, 8, 10

State v. Grayson, 154 Wn.2d 333, 111P.3d 1183 (2005) 11

State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) 11

State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009).....5, 6, 7, 8, 9

Washington Court of Appeals Decisions

State v. Martin, 176 Wn. App. 1030, 2013 WL 5311270 (2013)
(unpublished) 7

Court Rules

CrR 3.3.....4, 5, 10, 11, 13

CrR 8.3..... 11

A. ARGUMENT.

1. The prosecution misrepresents key facts in an effort to distract this Court based on immaterial or incorrect information.

Throughout the response brief, the prosecution misstates or glosses over key facts underlying the continuances requested during the case, in an effort to mislead the court about the defense's efforts to obtain a trial as soon as possible. The prosecution also misrepresents facts surrounding the underlying incident, even though the incident itself is not particularly relevant to the legal issues raised on appeal. The prosecution's fast and loose factual representations are a cause for caution; its explanations of the record should not be relied on by this Court.

As one example, the prosecution repeatedly mentions a continuance requested by the defense on June 1, because counsel was involved in another trial, as if it were the same as the many months-long continuances that occurred in the case. *See* Response at 2, 13, 21, 24. But on June 1, defense counsel needed one day of additional time due to another trial. 6/1RP 2-3. He was ready in court the next day. 6/2RP 2. The court understood this delay's brevity, and set the case over from June 1 to June 2. The prosecution's numerous mentions of

this continuance as if it were the equal of all others misleads the court by omitting its exceedingly short duration.

In another example, the response brief repeatedly implies defense counsel sought a lengthy continuance to attend a “WACDL”¹ conference. *See, e.g.*, Response at 26 (“Defense counsel took more time for a WACDL conference”); *see also* Response at 11, 19, 23. But defense counsel’s unavailability for the conference was a one-day affair, making him unavailable on April 21st. 3/24RP 5.

The conference factored into trial setting only because on March 24th, the case was “set for trial,” but the court immediately announced, “I’m starting the Warren case.” 3/24RP 3. Because the court had this Warren case and another trial to follow, it told the parties it would set over Mr. Holcomb’s trial until June 1. 3/24RP 6.

The defense was anxious to proceed far more quickly, so tried to accommodate the court’s schedule while pressing for the soonest available date. 3/24RP 5. Counsel said to the court, “I know you have the recess coming up.” *Id.* And, “I know you normally set” trials to start on Thursday. *Id.* April 21st was the “first” Thursday after the court’s

¹ Defense counsel actually said he was attending a WDA conference. 3/24RP 5. WDA is the Washington Defender Association.

recess but counsel would be at “the WDA conference” that day. *Id.* He asked the court “to set this one on the 25th [of April],” the following Monday, so trial could begin if the court did not start another case. 3/24RP 6. But the court refused because it had prioritized another case. 3/24RP 6.

From the outset of the hearing, the court had already decided on March 24th, that it would not hear the case until other cases were resolved and thus set a five week continuance regardless of the one day of counsel’s unavailability, and without regard to the “brief” continuance the prosecutor also asked for to respond to a motion to suppress. 3/24RP 3.

On April 28th, the court made no mention of its availability because a new prosecutor appeared and admitted he had little contact with witnesses and had a “snafu” due to their unavailability. 4/28RP 2-4. The court continued the case to June 1st, just as it had desired to do on March 24th. 3/24RP 6.

On March 24 and each and every trial date afterward, Mr. Holcomb and his lawyer made clear objections to continuances. Counsel was ready even when the prosecution offered late discovery, insisting that, “We’re not asking to put off the case” even when it

needed to follow up with new discovery. 4/28RP 7. Counsel also warned the court that its postponements would trigger more delay due to the court's own recesses but the court paid no heed. *See* 3/24RP 5; 4/28RP 7; 6/2RP 5.

The tone, tenor, and content of the scheduling hearings show the insistence on proceeding to trial as soon as possible, once counsel had sufficient time to prepare initially after arraignment. The prosecution's brief focuses on the initial stages of the case, acting as if those early continuances undermine any later defense objections.

By March 3, 2016, discovery was complete and only minor preparation issues remained. CP 91-92. From that point forward, counsel consistently pressed for trial as soon as possible but both the court and prosecution obstructed or failed to try to accommodate despite the rules of CrR 3.3.

2. The prosecution ignores the court's clear obligation to seek alternative judicial officers when the judge's unavailability delays a trial.

Court congestion predicated on the judge's unavailability was a driving factor in both the reason for multiple continuances and the length of the continuances.

State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009), is binding Supreme Court authority dictating a trial court's responsibility when it is unavailable to preside over a trial under CrR 3.3 and it is cited repeatedly in the opening brief. Yet the prosecution's brief never discusses *Kenyon*.² The State ignores this precedent because it is unable to explain away the court's failure to comply with its clear obligations when judicial unavailability causes trial delay.

Kenyon holds that court congestion does not justify a delay beyond the speedy trial period. 167 Wn.2d at 137. If congestion arises, the court must make concerted efforts to find another judge, including a pro tem judge. *Id.* CrR 3.3 allows a judge to continue a case when prioritizing various trial cases only when the court first "carefully makes a record of the unavailability of judges and courtrooms and of the availability of judges pro tempore." *Id.*

No careful record or diligent search occurred here, even though the court continued the trial for lengthy periods of time due to other trials or unexplained recesses, and despite the defense's timely speedy trial objections. Only three times does the record show any claim by the

² The response brief contains a single "Cf" citation to *Kenyon*, as part of a string cite, but without any parenthetical explanation or even page citation to

court that it considered the availability of other judges: 3/24RP 6; 6/2RP 10; 6/23RP 4. Each time, the court merely said it had “made an inquiry” about another courtroom and “none are available.” *Id.* This does not satisfy the searching inquiry for other judges and careful on-the-record explanation mandated by *Kenyon*.

On March 24th, court congestion was the primary reason for the delay, although the prosecution also asked for a “brief” continuance to respond to a defense motion to suppress and because a witness was not available “today.” 3/24RP 3. The court had already ruled it would delay Mr. Holcomb’s trial due to another trial it prioritized. *Id.*; If judicial unavailability is the primary reason for a continuance beyond speedy trial time, this constitutes court congestion and the judge must diligently seek another judicial officer to preside under *Kenyon*. 137 Wn.2d at 137; *see State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005) (court congestion includes case continued so judge may attend conference).

The court gave no detail about efforts find another judge or pro tem officer as required. 3/24RP 6; *Kenyon*, 167 Wn.2d at 137; *Flinn*, 154 Wn.2d at 200; *see also State v. Martin*, 176 Wn. App. 1030, 2013

indicate the citation’s purpose. Response at 20.

WL 5311270, *2 (2013) (unpublished, cited as nonbinding authority under GR 14.1) (“Here, like *Kenyon*, the trial court improperly continued Martin’s trial beyond the time for trial when it cited courtroom congestion as the reason for the continuance without documenting sufficient details about the availability of pro tempore judges and unoccupied courtrooms.”).

In early June, the court ordered the prosecutor to start a different trial in its courtroom, thus purposefully rendering unavailable both the preassigned judge and the recently assigned prosecutor. 6/2RP 6-7.

In late June, the court knew it had a prescheduled recess lasting the first two weeks of July, and knew the trial could not be completed before that recess, yet it insisted on starting pretrial motions with the intent of delaying the trial for at least those two weeks due to the judge’s unavailability. 6/21RP 3-4; 6/23RP 4. The court did not make document any detailed effort to locate another judge who could hear Mr. Holcomb’s trial could proceed without delay, as *Kenyon* requires.

The court congestion-based delay triggered further trial postponement, because when the judge returned from recess in mid-July, the prosecutor was called to start a different trial and the court retracted its prior statement that Mr. Holcomb’s case would take

priority over this other trial. 6/29RP 273, 275; 7/18RP 7. This caused the court to postpone Mr. Holcomb's trial from July 18th until August 8th -- the length of this delay was not due to the prosecutor's other trial but because the court had one week of prescheduled recess in early August. Then the court's one week recess ended up being an entire month recess by the judge without any on-the-record explanation for the delay. 9/8RP 12.

The record contains scant mention of the court's scheduled recesses in for periods of time in April, May, July, and August, and no explanation for the month-long recess that occurred in August and early September.

Judicial conferences are not justifications to delay a trial beyond speedy trial. *Flinn*, 154 Wn.2d at 200-01. Judges being involved in trials are not justifications absent careful pursuit of available alternatives, documented on the record. *Kenyon*, 137 Wn.2d at 137, 139. There is no information that an emergency occurred or that the absolute unavailability of the judge was wholly unanticipated such that no alternative could have been arranged for this lengthy continuance.

On September 12, 2016, the court mentioned in passing, "I was out on medical for the entire month of August." 9/12RP 296. But the

court never implied this was an unanticipated emergency rather than a prescheduled matter, and at least the first week of it was prescheduled. *See* 7/22RP 284-85.

Once the judge's prescheduled August recess turned into one month of leave, the court was required to carefully review its options on-the-record, and ascertain whether a different judicial officer could preside. *See Kenyon*, 167 Wn.2d at 137. But Mr. Holcomb never even had an in-court hearing after July 22 until September 7, 2016. And the July 22 hearing was simply the prosecutor's request to take a deposition during a time where the case was officially "recessed until August 8th due to the prosecutor's July trial and the judge's August vacation. 7/22RP 284-85. But on August 8th, a different judge entered a continuance order setting the case over until September 7, 2016, without any in-court proceedings or explanation. CP 34.³

In sum, extensive delay occurred in this case due to judicial unavailability. When judicial unavailability arises, it is the court's duty to seek alternative judicial officers and to carefully place on the record

³ Appellate counsel filed a Statement of Arrangements attempting to obtain a record of any hearing that occurred on August 8, 2016, relating to this cause number but the superior court responded that no hearing occurred in any courtroom.

the extent of those efforts. *Kenyon*, 167 Wn.2d at 137. Judicial unavailability justifies trial delay only when these steps are satisfied and yield no possible alternative. *Id.*

Court congestion repeatedly delayed Mr. Holcomb's trial, despite his repeated insistence that his trial occur as soon as possible and defense counsel's readiness to proceed. The court's failure to afford Mr. Holcomb a speedy trial by finding judicial alternatives violated CrR 3.3.

3. Prosecutorial delay and mismanagement also impermissibly denied Mr. Holcomb a speedy trial.

A person accused of a crime "can be prejudiced by delay, no matter what the source." *Flinn*, 154 Wn.2d at 200. If delays are simply excused, the State lacks "inducement" to "remedy congestion." *Id.*

As set forth in detail in Appellant's Opening Brief, the prosecution mismanaged its witnesses and its evidence. When a new prosecutor took over the case in April 2016, he did not know the witnesses' schedules, or the various levels of importance of their expected testimony, and was unable to schedule needed witnesses for trial. 4/28RP 4-6. This new prosecutor then took other cases to trial,

even in the middle of Mr. Holcomb's litigation, despite having been told by the court that Mr. Holcomb's case must be his priority.

A prosecutor is not excused from delaying a case by insisting it needs unnecessary witnesses, or by failing to diligently learn when witnesses will have long-term unavailability. When Mr. Holcomb is forced to wait in jail for his trial, it is unacceptable to indefinitely delay the case due to the failure to diligently schedule witnesses. The available alternatives, such as lowering Mr. Holcomb's bail or stipulating about the substance of an unavailable witness's testimony, must be offered to avoid the outright dismissal that is now required under CrR 8.3 and CrR 3.3. As explained in detail in Mr. Holcomb's opening brief, both court delays and prosecutorial mismanagement significantly delayed Mr. Holcomb's trial, and require dismissal.

4. The court did not understand its discretion when imposing consecutive sentences for firearm enhancements.

When a judge does not understand her sentencing discretion, a new sentencing hearing is required. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017); *In re Mulholland*, 161 Wn.2d 322, 329-30, 166 P.3d 677 (2007); *see also State v. Grayson*, 154 Wn.2d 333, 342, 111P.3d 1183 (2005) (ordering new sentencing hearing when

you refused “categorically to impose an exceptional sentence below the standard range under any circumstances” involving drug treatment).

In *Houston-Sconiers*, the prosecution recommended a sentence based on consecutive firearm enhancements for two juveniles, while acknowledging this prison term seemed excessively long. The defense did not object to this sentence and the court imposed it. The Supreme Court ruled that juveniles are always entitled to have the court impose a lesser sentence based on the “mitigating circumstances of youth,” and ordered a new sentencing hearing even though the defense had not specifically objected to the sentence imposed. *Id.*

In *Mulholland* the defense asked the court to impose concurrent sentences for various serious violent offenses by treating them as same criminal conduct. 161 Wn.2d 326. However, these offenses could not meet the legal definition of same criminal conduct, because they had different victims. *Id.* The court said it lacked discretion to impose concurrent sentences. *Id.*

The Supreme Court disagreed. It ruled that the court could have imposed concurrent sentences under the exceptional sentence statute, even though the defense’s request was based on a different theory. *Id.* at 329-30. Because the court’s sentencing decision was based on a

misunderstanding of the scope of its discretion, the court ordered a new sentencing hearing. *Id.* at 333.

Similarly, the court voiced concern the standard range was disproportionate for Mr. Holcomb but believed it could not “do anything about” the consecutive firearm enhancements. 12/2RP 16- 17. The court did not understand its discretion, as explained in the Opening Brief. This error is particularly significant when the court indicates “some openness” toward a lesser sentence. *Mulholland*, 161 Wn.2d at 333. A new sentencing hearing should be ordered.

B. CONCLUSION.

For the above reasons and those in the opening brief, Mr. Holcomb’s convictions should be dismissed due to the speedy trial violation. Alternatively, a new sentencing hearing should be ordered.

DATED this 5th day of January 2018.

Respectfully submitted,



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DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
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LLEWELLYNE HOLCOMB,)	
)	
Appellant.)	

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WASHINGTON APPELLATE PROJECT

January 05, 2018 - 3:59 PM

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Filed with Court: Court of Appeals Division II
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Superior Court Case Number: 15-1-04002-4

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