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Division II
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NO. 50759-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN AMBLE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When negotiations over whether John Amble should engage in an anger management evaluation as part of his sentence broke down because Mr. Amble could not afford the evaluation, there were still 17 days left in the speedy trial period.

Rather preserve Mr. Amble's right to a speedy trial, the court granted the continuance requested by the government. The government made no legitimate showing a continuance beyond the maximum date allowed for trial under CrR 3.3(b)(2)(i) was justified. The court made no inquiry into whether the cases the prosecutor has an actual conflict during the speedy trial period and did not inquire into whether the government would actually have difficulty securing its witnesses. By failing to properly inquire into whether a continuance beyond the maximum allowed date was required, the court abused its discretion.

Mr. Amble objected at the time the continuance was granted and filed a written objection so that the court could correct its error. The decision to grant the government's continuance was manifestly unreasonable, and was granted on untenable grounds for untenable reasons. Because Mr. Amble's right to a speedy trial was violated, dismissal with prejudice is required.

B. ASSIGNMENT OF ERROR

Mr. Amble's right to a speedy trial was violated when the trial court continued his case beyond the 90-day maximum date allowed by CrR 3.3(b)(2)(i).

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. A trial court may not grant a continuance beyond speedy trial because of the difficulty of the government in preparing its case for trial. Without making further inquiry into why a continuance was required, did the court abuse its discretion in granting the government's request for a continuance beyond the maximum date allowed for trial by CrR 3.3(b)(2)(i)?

2. A trial court may not continue the trial date beyond CrR 3.3(b)(2)(i)'s 90-day speedy trial period for the purpose of accommodating the prosecutor's unavailability without making an inquiry into whether the prosecutor would actually be unavailable. Did the court err in continuing the trial date beyond the speedy trial period for this purpose, where no inquiry was made into whether the prosecutor would actually be unavailable or whether another prosecutor could try this case?

3. A trial court may not grant a continuance beyond CrR 3.3(b)(2)(i)'s 90-day speedy trial due to the unavailability of a witness unless the witness is actually unavailable. Did the court err in continuing the trial date beyond the maximum time allowed for trial when no inquiry was made as to whether the government's witnesses were actually available?

D. STATEMENT OF THE CASE

Most weekends, KH would be dropped off by her mother to stay at her grandparent's house. CP 32. KH was six years old on December 3, 2016, when she was disciplined by her grandfather, Mr. Amble. CP 32. Mr. Amble slapped KH on the face when she began screaming after being told she could not watch television. CP 32. This slap resulted in a mark that was apparent several days later. Mr. Amble did not deny he had disciplined his granddaughter. CP 32.

KH was interviewed by the police. KH told the police that when she got loud, "Grandpa smacked me and he didn't mean to get me there [point to above-left eye] and he did not mean to get me that hard." CP 33. When the interviewer asked how the smack felt, KH told the interviewer it "really, really hurt." CP 33.

Mr. Amble was arraigned on April 14, 2017. CP 38. He was out of custody. A trial date was set for June 26, 2017. CP 38. The last allowable date for trial was July 13, 2017. RP 48.

Mr. Amble attempted to enter into a diversion agreement where his successful completion would result in his being allowed to withdraw his plea to the charged assault of a child in the third degree. RP 9. On June 8, 2017, Mr. Amble informed the court he would not be able to attempt diversion because he did not have the ability to pay for the anger evaluation that the diversion would have required him to complete. RP 15. The trial date was maintained. RP 9.

Mr. Amble attempted to negotiate an agreed sentence recommendation on a plea to the charge. RP 22. On June 26, 2017, Mr. Amble attempted to plead guilty, with an expected agreed sentence recommendation. RP 22. Unfortunately, the prosecutor insisted that any agreed recommendation include an anger evaluation. RP 23. Because Mr. Amble lacked the funds to pay for an evaluation, the parties were unable to come to the court with an agreed recommendation. RP 25.

When plea negotiations broke down, 73 days had passed since Mr. Amble had been arraigned, leaving 17 days left in the time allowed for trial. CP 38, RP 44, 48. Mr. Amble asked that trial be set within that

time. RP 48. The government asked for a date outside the time allowed for trial. RP 48. The government claimed it would have a hard time getting ready for trial in that time and that it had two other cases set for trial in that time period. RP 45. The prosecutor also stated he had a four-day training program he was intending to attend, but this training did not commence until July 17, 2017, after Mr. Amble's speedy trial period would have expired. RP 48.

The court made no inquiry into whether the cases the prosecutor stated were set for trial would actually proceed or how long he would be in trial if they did go forward. The court also made no inquiry into witness availability. Instead, the court found good cause to continue Mr. Amble's case beyond the last date allowed for trial and set it on July 24, 2017, which was ten days beyond the speedy trial deadline. RP 48. The trial court's only state reason for granting the continuance was that good cause existed "because there was a meeting of the minds that there was to be a plea entered today, and that there was an agreement regarding that." RP 48. The court allowed the continuance because the requested continuance was "a matter of only ten days beyond his current right to a speedy trial." RP 48.

Mr. Amble renewed his objection in written form, in order to allow the court to correct its error. CP 36-37. He then moved to dismiss the case when it proceeded to trial on July 24, 2017. RP 57. Mr. Amble's motion was again denied. RP 61.

E. ARGUMENT

The trial court's error in setting Mr. Amber's case for trial beyond the maximum allowed date for trial requires reversal and dismissal with prejudice.

When plea negotiations between Mr. Amble and the government broke down, 17 days remained in which Mr. Amble could be brought to trial. RP 48. Rather than set a date within that time, the court allowed the matter to be continued to the government's requested date, ten days beyond the speedy trial period. RP 51. Because no good cause existed to satisfy the strict requirements of the speedy trial rule, Mr. Amber's right to a speedy trial was violated. CrR 3.3(f)(2). The charge must be dismissed with prejudice. CrR 3.3(h).

1. A person who is not held in custody must be brought to trial within 90 days of their arraignment.

The speedy trial rule requires that an accused who is not detained must be brought to trial within 90 days of arraignment. CrR 3.3(b)(2)(i); CrR 3.3(c)(1).

The purpose of the speedy trial rule is to protect the accused's constitutional right to a speedy trial. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). It is the responsibility of the court to ensure a trial in accordance with the speedy trial rules. CrR 3.3(a)(1); *Kenyon*, 167 Wn.2d at 136.

“This state has always been strict in its application of the speedy trial provisions of CrR 3.3.” *State v. Kokot*, 42 Wn. App. 733, 737, 713 P.2d 1121 (1986). Although the constitutional right to a speedy trial does not mandate a trial within 90 days, “[p]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.” *Kenyon*, 167 Wn.2d at 136 (*quoting State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976)).

It is only in rare circumstances that a trial may be continued beyond 90 days without the defendant's consent. Certain periods are excluded when computing the time for a speedy trial and justifiable continuances granted by the court may also be excluded. CrR 3.3(e)(3), (f). In addition, delays caused by “[u]navoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties” are excluded. CrR 3.3(e)(8). If any period of

time is excluded under CrR 3.3(e), the speedy trial period extends to “30 days after the end of that excluded period.” CrR 3.3(b)(5).

When a defendant objects to a continuance, the court may not continue the trial date unless it “is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(2). If the court determines that the time for trial has passed and the objection was properly raised, then the court has no discretion in deciding whether to dismiss the charges. *State v. Swenson*, 150 Wn.2d 181, 186-87, 75 P.3d 513 (2003).

A motion to continue must be made before the time for trial has expired. CrR 3.3(f)(2). Only in “exceptional circumstances” should the trial court grant a continuance that sets the case beyond the 90-day time limit of CrR 3.3. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). “The court must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(2). The court’s reasons for granting a continuance must be “convincing and valid.” *State v. Saunders*, 153 Wn. App. 209, 221, 220 P.3d 1238 (2009). The court’s decision must be manifestly reasonable and exercised on tenable grounds for tenable reasons. *Id.*

2. *Over Mr. Amber's objection, the trial court set trial for July 24, 2017, when the last allowable date for trial was July 13, 2017.*

On June 20, 2017, the parties announced to the court that they had reached a resolution of this case. RP 19. The matter was set for June 26, 2017, for plea and sentencing. RP 21. The trial date was struck. RP 21.

On June 26, 2017, it became apparent that Mr. Amble and the government had not been able to agree on a recommended sentence. RP 22. While the parties were able to agree on an amount of time Mr. Amble would serve, they failed to agree on whether he should have to complete an anger evaluation and comply with the recommendations of that evaluation. RP 23. Mr. Amber did not object to completing an evaluation but told the court he could not pay to have one done. RP 25.

After plea negotiations for an agreed sentence failed, the case was again set for trial. Mr. Amble made clear to the court the last day for a speedy trial was July 13, 2017. RP 44. Although 17 days remained in the speedy trial period, the government requested the case be set to July 24, 2017, ten days beyond the last allowable day. RP 48. The prosecution stated it could not go to trial in the speedy trial period because of other cases scheduled for trial. RP 45. No record exists as to

whether either of these cases actually proceeded. The prosecutor stated he could not go to trial until July 24th, because of training he was scheduled to complete, from July 17th until July 20th. RP 48. Mr. Amble objected and notified the court that the speedy trial period expired on July 13, 2017. RP 48.

The court found good cause to continue Mr. Amble's matter beyond the expiration of the time allowed for trial. RP 48. The court found good cause "because there was a meeting of the minds that there was to be a plea entered today, and that there was an agreement regarding that." RP 48. Mr. Amble renewed his objection in writing after the court continued his case so the court could correct its error. CP 36-37.

3. The trial court abused its discretion by continuing Mr. Amble's case beyond July 13, 2017.

When negotiations between Mr. Amble and the government broke down, it was clear this matter needed to be tried. At that time, the government had 17 days to get ready for trial. RP 44, 48.

The government provided little reason for why a continuance outside speedy trial was required. The prosecutor observed that it would be "an incredible quick turnaround" to start a trial within 17 days. RP 45. He then argued he had two other cases set for trial, no

inquiry was made into whether those cases could be continued or would actually be tried.¹ RP 45. The prosecutor was not otherwise unavailable until after speedy trial expired. RP 48. His only unavailability was for a training that was scheduled from July 17, 2017, until July 20, 2017. RP 48. And even if the prosecutor had actually been unavailable, no inquiry was made into whether this matter could have been reassigned to another attorney. *See State v. Heredia-Juarez*, 119 Wn. App. 150, 154, 17 P.3d 648 (2001). The trial court abused its discretion in failing to determine whether the prosecutor would actually be unavailable during the remainder of Mr. Amble’s speedy trial period. *Id.* at 154-56.

The circumstances here are similar to those in *State v. Kenyon*. In *Kenyon*, the Washington Supreme Court reversed Mr. Kenyon’s conviction for multiple firearm charges based on the trial court’s failure to articulate an adequate basis for granting a continuance beyond the speedy trial limits. *Kenyon*, 167 Wn.2d at 131-32, 138-39. The trial court continued a trial for “unavoidable or unforeseen circumstance” because the assigned judge was in a criminal trial and the second judge of the two judge county was on vacation, citing CrR 3.3(e)(8). *Id.* at

¹ It is not unreasonable to grant a continuance where the prosecutor is actually in trial. *See, e.g., State v. Stock*, 44 Wn. App. 467, 472-73, 722 P.2d 1330 (1986); *State v. Palmer*, 38 Wn.App. 160, 162-63, 684 P.2d 787 (1984).

134, 216 P.3d 1024. Reversal was required because the trial court did not document the availability of pro tempore judges and unoccupied courtrooms as CrR 3.3(f)(2) requires. *Id.* at 139.

Here, the prosecutor made statements about other trials he had pending, but provided no affirmative evidence these cases would actually go forward. RP 45. The trial court accepted the assertion without any further inquiry. RP 48. This Court should instead hold that this is insufficient basis to justify a continuance beyond the speedy trial period and is an untenable reason for violating Mr. Amble's right to a speedy trial. *Kenyon*, 167 Wn.2d at 139.

The prosecutor also argued he would have a hard time getting his witnesses together for a trial set within the speedy trial period. RP 45. Although the unavailability of a material government witness may be a valid ground for continuing a criminal trial, the record must show there is a valid reason for the witness's unavailability and the witness will become available within a reasonable time. *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936 (1993). But here, the trial court did not inquire into whether the witnesses who had been scheduled to testify were not available. *See, State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988).

Without an inquiry from the court, this is also an untenable justification for a continuance beyond the speedy trial period. Without an inquiry, there is no reason to believe the witnesses would not be available. The prosecutor's witnesses had already been contacted, as this matter had previously been set for trial on June 26, 2017. Because they had already made their availability known to the prosecutor for this time period, there is no reason to believe this was a barrier to ensuring Mr. Amble's speedy trial rights were enforced. To the extent this was grounds for granting a continuance beyond July 13, 2017, it was an abuse of discretion. *Nguyen*, 68 Wn. App. at 914; *Day*, 51 Wn. App. at 549.

Finally, the court found good cause to continue the case because there had been a breakdown in plea negotiations. RP48. CrR 3.3 does not, however, provide for an exception to the speedy trial rule to allow the government additional time because of a breakdown in negotiations. *See Saunders*, 153 Wn. App at 220. Instead, Washington's Supreme Court has been clear that unless the speedy trial rule is strictly applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved. *Kenyon*, 167 Wn.2d at 136.

In *Saunders*, this Court found CrR 3.3 was violated, again because the three of the trial court's granted continuances were manifestly unreasonable and exercised on untenable grounds and for untenable reasons. *Saunders*, 153 Wn. App at 221 (citing *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). In *Saunders*, the trial court granted continuances so that the parties could negotiate a settlement and then a final continuance at the prosecutor's request, without a clear explanation. *Id.* at 217-18. This Court found that granting a continuance for negotiation over Mr. Saunders' objection was manifestly unreasonable and exercised on untenable grounds and for untenable reasons. *Id.* at 221.

Here, the court granted the government's request for a continuance for similar reasons. Although 17 days remained before speedy trial expired, the trial court found good cause to continue this case. RP 48. While this brief has attempted to address some of the reasons why a continuance might have been granted, the trial court did not clearly articulate any reason for granting the continuance, other than that a continuance was justified "because there was a meeting of the minds that there was to be a plea entered today, and that there was an agreement regarding that." RP 48.

There is no provision in CrR 3.3(f)(2) that allows a continuance to be granted for this reason. Once the time for trial expires without a stated lawful basis for further continuances, CrR 3.3 requires dismissal and the trial court loses authority to try the case. *Saunders*, 153 Wn.App. at 220 (citing CrR 3.3(b), (f)(2), (g), (h)). Like *Saunders*, this Court should hold that the trial court decision to grant the government's requested continuance over Mr. Amble's objection was manifestly unreasonable and exercised on untenable grounds and for untenable reasons. *Saunders*, 153 Wn. App at 221. As such, this Court should hold the trial court abused its discretion in granting the government a continuance beyond July 13, 2017 and that dismissal is required. *Id.*; CrR 3.3(h).

4. Dismissal with prejudice is required.

When the accused is not brought to trial within the time limit provided by the speedy trial rule, the charge must be dismissed with prejudice. CrR 3.3(h). Mr. Amble's conviction must be reversed and the charge dismissed with prejudice.

F. CONCLUSION

Because Mr. Amble's right to a speedy trial was denied, Mr. Amble asks this Court to dismiss this case with prejudice.

DATED this 4th day of January 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 50759-5-II
)	
JOHN AMBLE,)	
)	
Appellant.)	

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