

**FILED**

JUL 27 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 28462-0-III**

**STATE OF WASHINGTON  
COURT OF APPEALS - DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JOSE G. CHAVEZ-ROMERO,**

**Appellant.**

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**APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

**SHAWN P. SANT  
Prosecuting Attorney**

by: **Frank W. Jenny, #11591  
Deputy Prosecuting Attorney**

**1016 North Fourth Avenue  
Pasco, WA 99301  
Phone: (509) 545-3543**

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**II. COUNTERSTATEMENT OF FACTS**

The State accepts and relies upon the defendant's statement of facts and requests it be incorporated herein. Additional facts will be developed from the record as they relate to individual issues.

**III. ARGUMENT**

**A. DEFENDANT RECEIVED A TIMELY TRIAL UNDER CrR 3.3 AND A SPEEDY TRIAL IN ACCORDANCE WITH THE STATE AND FEDERAL CONSTITUTIONS.**

Defendant was present in custody for arraignment on March 3, 2009; a plea of not guilty was entered and trial was set for April 29, 2009 (the 57th day following arraignment). (CP 145). Thus, the 90th day after arraignment was Monday, June 1, 2009. The State indicated at the pre-trial hearing on April 21, 2009, that, "I'm also going to ask the Court to release the defendant today on his personal recognizance. He has no prior criminal history. There is a no-contact order in effect and then I'm going to ask for a new trial date that would coincide with the 90-day speedy trial." (RP

4/21/09, Page 2, lines 8-13). Defense counsel stated, “[J]ust so the record’s clear, my client is requesting at this time not to be PRed, because he does not want to be taken into immigration’s custody until he has dealt with this case.” (RP 4/21/09, Page 3 lines 23-25, page 4 line 1). The trial court granted the State’s request to release the defendant on his own recognizance over his objection. (RP 4/21/09 RP, Page 4 lines 6-7). The trial court also reset the trial date to May 13, 2009. (RP 4/21/09, Page 3 lines 13-14).

Defendant did not appear for his next pre-trial hearing on April 28, 2009. (RP 4/28/09, Page 3 lines 8-9). Defense counsel stated her client was not available to appear because he was in custody of the Immigration and Customs Enforcement (ICE) authorities. (RP 4/28/09, Page 4 lines 1-6). The trial court struck the trial date and issued a bench warrant, but stated to defense counsel, “[I]f you are able to get your client here next week, have it put on the docket next week[.]” (RP 4/28/09, Page 4 line 25, Page 5 line 1).

Defendant made a brief court appearance without counsel on May 15, 2009 (two days after the previously scheduled trial date), following his arrest on the bench warrant. (RP 5/15/09). The matter was continued to the following Tuesday, May 19, 2009, so

that the defendant could confer with his attorney. (RP 5/15/09, Page 4 lines 11-12). The court set bail at \$25,000, but stated bail could be readdressed the following Tuesday after defendant spoke with his attorney. (RP 5/15/09 RP, Page 4 lines 17-20). At that point, there were still 15 days remaining in the original 90-day period following arraignment.

At the hearing on May 19, 2009, the prosecutor suggested dates of June 2 for a suppression hearing, June 30 for pre-trial hearing, and July 15 for trial. (RP 5/19/09, Page 5 lines 3-8). Defense counsel did not object to these dates, and in fact stated, "And that's fine, your Honor." (RP 5/19/09, Page 5 line 9). Defense counsel did not request any change in the bail and stated only, "I will add at this point a motion to dismiss on violation of speedy trial to the motions currently scheduled on June 2<sup>nd</sup> at 1:30." (RP 5/19/09 RP, Page 5 14-16).

On June 30, 2009, the trial court continued the trial date an additional week, based on good cause, from July 15 to July 22, 2009. (CP 115). No error is assigned to this particular continuance. Trial commenced as scheduled on July 22, 2009. (RP 7/22/09).

CrR 3.3 generally provides that a defendant shall be brought to trial within 60 days of arraignment if held in custody on the charge for which he or she was arraigned or within 90 days of such arraignment if released on that charge. CrR 3.3(b)(1)&(2). If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days. CrR 3.3(b)(3). If a defendant is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. CrR 3.3(b)(4). A failure to appear for a mandatory court hearing results in a resetting of the commencement date to the date of the defendant's next appearance. CrR 3.3(c)(2)(ii). The time during which a defendant is detained in a federal jail is excluded from the time-for-trial calculation. CrR 3.3(e)(6).

If defendant was detained in a federal jail (as his attorney represented to the court), that time was excluded from the time-for-trial calculation. CrR 3.3(e)(6). If he was not, then the time for trial was tolled by defendant's failure to appear on April 28, 2009. CrR 3.3(c)(2)(ii). While CrR 3.3(c)(2)(ii) does not refer to the circumstances addressed by CrR 3.3(e)(6), it would apply even to a negligent or inadvertent failure to appear. See State v. George, 160 Wn.2d 727, 739, 158 P.3d 1169 (2007).

Defendant does not argue that the trial court failed to comply with the express language of CrR 3.3. Rather, he is asking this court to engraft upon CrR 3.3 an additional requirement that a defendant not be released upon his or her own recognizance if there is a possibility the defendant will be taken into custody of the immigration authorities. However, the current version of CrR 3.3, which became effective on September 1, 2003, is not subject to expansion through judicial interpretation. CrR 3.3(a)(4) provides:

*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 [dealing with time for arraignment], the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

This provision was explained in part B(1) of the 2003 Final Report of the Time for Trial Task Force, which remains posted on the Washington State Courts website:

Task Force members are concerned over the degree to which the time-for-trial standards have become less governed by the express language of the rule and more governed by judicial opinions. To address this concern, the task force has tried to fashion a rule that is simpler, has fewer ambiguities, and covers more of the field of time-for-trial issues, with the hope that a reader of the rule will have a better understanding of the overall picture than currently exists. The Task Force also recommends adopting a

provision in CrR 3.3 expressly stating that the rule is intended to cover all the reasons why a case should be dismissed under the rule. Courts should not read into the rule any other reasons beyond those that are expressly stated in the rule. Any other reason should be analyzed under the corresponding constitutional provisions (Wash. Const. Art. I, § 22, and U.S. Const., Amend. 6).

Thus, any proposed enlargement of CrR 3.3 must be addressed through the rule-making process and not by judicial construction.

Cases cited by defendant do not require any contrary conclusion. The Washington case law he cites addressing the relationship between CrR 3.3 and the Interstate Agreement on Detainers (IAD) dealt with the prior version of CrR 3.3. At one time, the IAD and CrR 3.3 were interrelated in the context of an untried Washington defendant who was incarcerated out-of-state. State v. Welker, 157 Wn.2d 557, 564-65, 141 P.3d 8 (2006). The IAD provides a procedure by which an incarcerated defendant having “entered upon a term of imprisonment” can require that he be brought to trial. RCW 9.100.010. (art. III of IAD). The prosecutor must first file a detainer with the authorities holding a prisoner, asking that he be held for them. Prison authorities must notify the prisoner, who then must request he brought back for trial. Upon receiving the prisoner’s request, the prosecutor has 180 days to

bring him to trial. Id.; Welker, 157 Wn.2d at 563-64. The IAD does not impose an obligation on the prosecutor to file a detainer. State v. Anderson, 121 Wn.2d 852, 861, 855 P.2d 671 (1993); Welker, 157 Wn.2d at 565.

Prior to significant amendments in 2003, former CrR 3.3 imposed an implied duty on prosecutors to exercise good faith and due diligence to bring a defendant to trial. Anderson, 121 Wn.2d at 857-58. As a result, prosecutors were expected to utilize the IAD in order to obtain a defendant who was incarcerated out-of-state. Id. at 864; Welker, 157 Wn.2d at 564-65. However, there was no obligation to extradite defendants who were at large in other jurisdictions and, thus, not amenable to process. State v. Stewart, 130 Wn.2d 351, 361-63, 922 P.2d 1356 (1996); State v. Hudson, 130 Wn.2d 48, 57, 921 P.2d 538 (1996).

Significant amendments to CrR 3.3 on September 1, 2003, eliminated the implied obligation to act diligently to bring an offender to trial. George, 160 Wn.2d at 737-38. Those amendments applied to all cases pending as of September 1, 2003. State v. Olmos, 129 Wn. App. 750, 756-57, 120 P.3d 139 (2005). Accordingly, the Washington cases on which defendant relies do not survive the 2003 revision of CrR 3.3. Unlike the prior

version of CR 3.3, the current rule does not create an obligation to act diligently to bring an offender to trial and is not subject to judicial expansion.

Also inapposite are cases from other jurisdictions cited by defendant. United States v. Cepeda-Luna, 989 F.2d 353 (9th Cir. 1993), dealt with the federal Speedy Trial Act (18 U.S.C. § 3161 et seq.), which provides the allowable time for trial for criminal cases in the federal courts. A provision of that act requires indictment within 30 days of arrest. However, the court held the provision does not apply to civil deportation arrests. Id. at 355-57. Since the defendant in Cepeda-Luna was arrested and held by immigration authorities and not in connection with possible criminal charges, he was not entitled to indictment within 30 days. The court concluded: “Applying the Speedy Trial Act in cases such as this would do nothing more than punish criminal authorities for the delays of civilian immigration officials.” Id. at 358.

The Cepeda-Luna court did observe in dicta that it is conceivable the federal Speedy Trial Act would be applied to a civil detention that was a mere ruse to detain a defendant for later criminal prosecution. Id. at 357. This dicta appears to assume the federal Speedy Trial Act could be subject to expansion by judicial

construction. As noted above, the same is not true of the current version of CrR 3.3. See CrR 3.3(a)(4).

United States v. Stolica, 2010 WL 345968 (S.D. Ill. 2010) is likewise of no assistance to defendant. There the court found no basis for finding the defendant's arrest by ICE officials was a ruse to hold the defendant for criminal prosecution, and thus no basis for applying the federal Speedy Trial Act to that arrest. The court observed:

It is apparent from the testimony of ICE Agent Wagner that he had his own independent and lawful basis for detaining Defendant. The fact that the Government also sought to indict Defendant does not create wrongful collusion, as two different government agencies, such as ICE and the U.S. Attorney's Office, can proceed simultaneously with their own business regarding an alien, such as Defendant. That ICE Agent Davis was under some real-life budgetary constraints concerning the detainment of Defendant, in that he could be subsequently passed off to another agency in order to free up room for the detainment of other aliens when needed, is also not indicative of collusion. It merely supplies context and provides an explanation for Agent Davis' continued inquiries as to when the Government intended to file an indictment against Defendant.

In the instant case, two separate sovereigns were proceeding simultaneously with their own business regarding defendant. There is no evidence of collusion between them. Even if there was collusion, nothing in CrR 3.3 addresses that scenario

and that rule is not subject to judicial expansion.

In State v. Sanchez, 110 Ohio St. 3d 274, 853 N.E.2d 283 (2006), the court dealt with an Ohio statute requiring trial within 90 days if the defendant is held solely on that charge and 270 days if released or also held on other charges. The defendant was incarcerated in the county jail awaiting trial on the current charge when ICE served the sheriff with a detainer regarding the defendant. The issue was whether the detainer was another charge that would cause the longer time frame to apply. The court held it was not, stating:

A detainer serves to advise another law enforcement agency that the Department [of Homeland Security] seeks custody of an alien presently in custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations where gaining immediate physical custody is either impractical or impossible.

Id. at 286 (quoting Section 287.7(a), Title 8, C.F.R.). The court continued:

It can be seen from this provision that a detainer does not “hold” the accused. Instead, it declares the government’s intention to seek custody in the future and requests notification before the accused is released from his or her present confinement.

Id.

State v. Montes-Mata, 41 Kan. App. 2d 1078, 208 P.3d 770 (2009) applied a similar Kansas time-for-trial statute. The court merely followed the reasoning of Sanchez in finding a defendant was held exclusively on his state charge despite an immigration detainer for the defendant sent by ICE to the sheriff's office. Id. at 773-74.

In the instant case, unlike in Sanchez and Montes-Mata, ICE did not merely file a detainer; according to the declaration of defendant's own attorney, he was taken into federal custody after his release on his own recognizance on the pending state charge.

Defense counsel stated:

The defendant objected to being released on his personal recognizance; explained to the court that he had an immigration detainer and would be unavailable for court an undermined time period if he were to be released; . . . The court noted the defendant's objections; released the defendant on his personal recognizance; . . . On April 28, 2009, the defendant did not appear because he was in the custody of ICE. . . . The court issued a bench warrant. On May 19, 2009, the defendant appeared in court after being served the bench warrant while in ICE detention.

(CP 125-26). In presenting the motion to dismiss, defense counsel did not present any testimony or other evidence and stood on the written materials. (RP 6/2/09, Page 31 lines 15-19). Accordingly,

both the facts and the legal issue are entirely different than in Sanchez and Montes-Mata.

As noted above, CrR 3.3(a)(4) requires that when the trial is timely under the language of CrR 3.3, the charge shall not be dismissed “unless the defendant’s constitutional right to speedy trial was violated.” Here, there was clearly no constitutional violation.

The speedy trial clause in Article I, Section 22 of the Washington Constitution is given the same interpretation as the comparable provision in the Sixth Amendment to the United States Constitution. State v. Iniguez, 167 Wn.2d 273, 281-90, 217 P.3d 768 (2009). The United States Supreme Court has identified four factors that should be balanced in determining whether a defendant has been denied his right to a speedy trial. See Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); United States v. Grimmond, 137 F.3d 823, 827 (4th Cir. 1998). These factors are (1) whether the delay was uncommonly long; (2) the reasons for the delay; (3) whether and when the defendant asserted the right to a speedy trial; and (4) whether prejudice resulted to the defendant. Barker, 407 U.S. at 530; Grimmond, 137 F.3d at 827.

The first factor also acts as a threshold requirement. Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992); Grimmond, 137 F.3d at 837. If the delay is not uncommonly long, the inquiry ends there. See Doggett, 505 U.S. at 652 (stating that “by definition, [a defendant] cannot complain that the government has denied him a ‘speedy’ trial if it has, in fact, prosecuted his case with reasonable promptness”); Barker, 407 U.S. at 530 (noting that “[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance”); Grimmond, 137 F.3d at 827 (same).

There is no formulaic presumption of prejudice upon the passing of a certain period of time. Iniguez, 167 Wn.2d at 292. However, a leading treatise on criminal procedure provides general guidance as to when pre-trial delay may be considered uncommonly long, and thus, presumptively prejudicial. In WAYNE R. LAFAVE, JEROLD H. ISREAL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE § 18.2(b) (3d ed. updated 2010), the authors note a survey of cases in a 1980 law review article found:

any delay of eight months or longer is “presumptively

prejudicial.” . . . Furthermore, there is apparent consensus that delay of less than five months is . . . insufficiently “prejudicial” to trigger further constitutional inquiry. . . . There is judicial disagreement as to the six to seven month range, the majority holding a delay of this length “presumptively prejudicial.”

Id. (quoting Joseph, *Speedy Trial Rights in Application*, 48 Fordham L.Rev. 611, 623 n.71 (1980)). The authors conclude by stating that “[w]hile some courts still follow the eight-month mark or even something shorter, most have settled on a somewhat longer period, such as nine months or, more commonly, a time ‘approaching’, at, or slightly (or even more than slightly) beyond one year.” Id. (footnotes omitted).

Here, defendant was first arrested on February 22, 2009. (CP 28; RP 7/22/09, Page 27 lines 13-14). He was brought to trial just five months later on July 22, 2009. (RP 7/22/09). By general consensus, the pre-trial delay was insufficiently prejudicial to warrant further constitutional inquiry. Moreover, the amount of time did not even come close to equaling the eight months to one year required under the modern trend. The inquiry should end with the length of the delay; there is no necessity for examination of the other factors.

Besides the sheer amount of time that has elapsed, other things that may be considered in the threshold determination include the complexity of the charges and whether the case depends on eyewitness testimony; exceptionally complicated charges may justify longer pre-trial delay, while an earlier trial date may be required if the case involves the testimony of eyewitnesses whose memories could fade or who could become unavailable with the passage of time. See Iniguez, 167 Wn.2d at 292. While the charge was not particularly complex, the case did not turn on eyewitness testimony:

During Officer Cano's interview at the Franklin County Jail, Mr. Chavez-Romero stated that he and M.L. have been boyfriend and girlfriend for about two months. He stated that he asked M.L. how old she was when they first met. Mr. Chavez-Romero stated that M.L. told him she was 15 years of age and was going to be 16 years of age soon. Mr. Chavez-Romero stated that he knew it was a serious thing but that is the reason why he asked for permission so he would not get into trouble. Mr. Chavez-Romero stated that even with the age difference he still loved her. Officer Cano asked Mr. Chavez-Romero how many times he had sex with M.L. Mr. Chavez-Romero refused to answer the question and stated it was a question that M.L. should answer.

(CP 28). The instant case is the complete antithesis of a rape or robbery committed by a stranger, where the case would depend on identifications by eyewitnesses who had never seen the perpetrator

before. It was not disputed that defendant had been in a dating relationship with the victim and no issue existed as to the accuracy of his identification. The pre-trial delay was not presumptively prejudicial.

Even if the delay was presumptively prejudicial, that would not establish a constitutional violation; it would merely get the defendant “in the courthouse door” to have the four Barker factors and any other relevant factors considered and balanced. See Iniguez, 167 Wn.2d at 283, 292-93. No one factor by itself is necessary or sufficient. Id. at 283.

The first factor, the length of the delay, is treated differently at this stage than in the presumptive prejudice determination. Id. at 293. What is important here is the extent to which the delay stretches beyond the bare minimum needed to trigger the analysis.

Id. As the United States Supreme Court has explained:

The first of these [Barker factors, whether the delay was uncommonly long,] is actually a double enquiry. Simply to trigger a speedy trial analysis, an accused must allege the interval between accusation and trial has crossed the threshold dividing ordinary from “presumptively prejudicial” delay. . . . If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. This latter enquiry is significant to the speedy trial analysis

because . . . the presumption that pretrial delay has prejudiced the accused intensifies over time.

Doggett, 506 U.S. at 651-52. In the instant case, if the delay crossed the threshold from ordinary to presumptively prejudicial, it did so just barely. There was no time over which the prejudice could have intensified. In Iniguez, the court found this factor did not weigh heavily against the State where the defendant was first brought to trial eight and one-half months after his arrest. Iniguez, 167 Wn.2d at 293. The court noted the same would be true even if the analysis was based on the date of Iniguez' second trial, which began 10 months after his arrest. Id. at 293-94 n.9. Here, the first factor certainly favors the State.

The reasons for the delay also favor the State. While some delay may have resulted from defendant being taken into federal custody, two governmental entities may simultaneously have legitimate business with a defendant. See United States v. Stolica, supra (a case upon which defendant himself relies). In any event, as previously noted, defendant was released on his own recognizance on April 21, 2009, and was back in Franklin County on May 15, 2009. (RP 4/21/09; RP 5/15/09). Thus, no more than three weeks are attributable to defendant's incarceration in the

federal jail. The rest of the delay resulted from normal pre-trial proceedings. On April 21, 2009, defense counsel stated, “[W]e’ve been moving as fast as possible to finish our investigation so that this trial can go forward,” although the defense investigator did not even have witness interviews set up until the following week. (RP 4/21/09, Page 2 lines 23-25, Page 3 lines 1-4). At the hearing on May 19, 2009, defense counsel did not object to the trial being set into July, 2009, and indicated she wished to prepare motions to be heard on a date prior to the trial. (RP 5/19/09, Page 5).

The first thing that could remotely be considered a speedy trial demand by defendant was the statement by his counsel on April 21, 2009, that “he’s anxious to get this trial completed so the decision can be made by the jury.” (RP 4/21/09, Page 2 lines 21-22). His trial began exactly three months later on July 22, 2009. (RP 7/22/09). In Grimmond, this factor did not weigh heavily against the prosecution where the defendant made a speedy trial demand four months before the start of his trial. Grimmond, 137 F.3d at 829. The same is true here. Defendant demanded a prompt trial on April 21, 2009, and got exactly that.

“The fourth factor, prejudice, is often the most important.” State v. Newcomer, 48 Wn. App. 83, 90, 737 P.2d 1285 (1987).

While “oppressive” pre-trial incarceration and “anxiety and concern” of the defendant are also considered, the most serious form of prejudice is that which impairs the defense at trial. Id.

While prejudice resulting from “anxiety and concern” to the defendant is not brushed aside lightly, “considerable anxiety normally attends the initiation and pendency of criminal charges; hence only undue pressures are considered.” United States v. Casas, 425 F.3d 23, 35 (1st Cir. 2005) (quoting United States v. Henson, 945 F.2d 430, 438 (1st Cir. 1991)). A defendant “must show that ‘the alleged anxiety and concern had a specific impact on [his] health or personal or business affairs.’” Hartridge v. United States, 896 A.2d 198 (D.C. App. 2006), cert. denied, 127 S. Ct. 1503, 167 L. Ed. 2d 242, 75 USLW 3473 (2007) (quoting Hammond v. United States, 880 A.2d 1066, 1087 (D.C. 2005)). Defendant makes no attempt to allege any particularized harm.

Lengthy detention is not necessarily “[ ]sufficient to establish a constitutional level of prejudice.” United States v. Santiago-Becerril, 13 F.3d 11, 23 (1st Cir. 1997) (finding fifteen months’ pretrial detention insufficient to establish prejudice); see also Barker, 407 U.S. at 533-34 (finding that “prejudice was minimal” despite five-year delay because defendant was only held in pre-trial

detention for ten months). In Casas, while the court expressed great concern that the defendants were detained for forty-one months awaiting trial, it found “other counterbalancing factors outweigh the deficiency and prevent constitutional error.” The court stated *inter alia*, “Appellants have not alleged that the conditions of their confinement were unduly oppressive, and the time served was credited against the sentences they received upon conviction.” Casas, 425 F.3d at 34. In Iniguez, our Supreme Court did not find pre-trial incarceration in the Franklin County Jail for more than eight months to be unduly oppressive or prejudicial, stating, “Certainly, longer delays have been allowed.” Iniguez, 167 Wn.2d at 295. In the instant case, defendant was held for less than five months awaiting trial; nothing the record suggests the conditions of his confinement were unduly oppressive, and upon conviction he received credit against his sentence for all time served. (CP 14).

Most importantly, defendant makes no showing of any impairment of his ability to present a defense at trial. Such impairment is sometimes difficult to prove and is not required to establish every speedy trial violation. Iniguez, 167 Wn.2d at 295. But this is not to say actual prejudice can never be shown. See Barker, 407 U.S. at 532 (noting that “[i]f witnesses die or disappear

during a delay, the prejudice is obvious”); see also *Prejudice Resulting from Unreasonable Delay in Trial*, 7 AM. JUR. PROOF OF FACTS 2d 477 (2011). Certainly, a defendant who can show actual prejudice to his defense “will have a stronger case for finding a speedy trial violation.” Iniguez, 167 Wn.2d at 295. Here, the absence of this most serious form of prejudice weighs heavily against finding a speedy trial violation. Graves v. United States, 490 A.2d 1086, 1103 (D.C. App. 1984).

Finally, even if one or more of the delays was improper, that does not necessarily equate to a constitutional speedy trial violation. Rather, the determination must be made based on a balancing of the factors. Iniguez, 167 Wn.2d at 295; State v. Vicuna, 119 Wn. App. 26, 35-36, 79 P.3d 1 (2003). In Vicuna, the court found one of the delays (resulting from allowing the withdrawal of defense counsel) was not justified. Nonetheless, after balancing the factors, it concluded there was no speedy trial violation. Vicuna, 119 Wn. App. at 35-36. In the instant case, as in Iniguez, “[o]n balance, the totality of the circumstances here does not support finding a speedy trial violation of constitutional magnitude to justify the extreme remedy of dismissal of the charges with prejudice.” See Iniguez, 167 Wn.2d at 295.

Defendant also cites CrR 8.3(b), which permits the court on its own motion to dismiss a criminal prosecution due to “arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which manifestly affect the accused’s right to a fair trial.” However, this provision clearly has no relevance here. First, as demonstrated above, there was no arbitrary action or governmental misconduct. Second, as also shown above, there has been no prejudice to defendant’s rights under either CrR 3.3 or constitutional speedy trial provisions.

Amicus argues that conditions at the federal detention center in Tacoma impair counsel’s ability to communicate with their clients, but nothing in this record supports that contention nor was the trial court asked to make any findings of fact on the issue. Matters not in the record cannot be considered on appeal. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

B. DEFENDANT WAIVED ANY OBJECTION TO THE TRIAL DATE BY NOT MOVING TO SET A TRIAL DATE WITHIN THE LIMITS OF CrR 3.3.

CrR 3.3(d)(3) provides:

A party who objects to the date set upon the ground that it is not within 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 limits prescribed by this rule.

When a party loses the right to object, the set trial date is generally the last allowable date for trial, but that date remains subject to further excluded periods under CrR 3.3(e) (including good cause continuances under CrR 3.3(e)(3)) and/or a cure period under CrR 3.3(g). See CrR 3.3(d)(4).

At the hearing on May 19, 2009, the prosecutor suggested a trial date of July 15, 2009. (RP 5/19/09, Page 5 lines 5-8). Defense counsel stated, "And that's fine, your Honor." (RP 5/19/09, Page 5 line 9). Defense counsel stated her intention to file a "motion to dismiss on violation of speedy trial" without specifying whether she was referring to CrR 3.3 or constitutional provisions. (RP 5/19/09, Page 5 lines 14-15). However, she did not move to set a trial date within the provisions of CrR 3.3.

As previously noted, when defendant returned to Franklin County on May 15, 2009, there were still 15 days remaining before the 90th day after arraignment (June 1, 2009). At that point, defendant came under the 90-day rule under CrR 3.3(b)(3)&(4). If

there was any question about that, the trial court had the option of again releasing him on his own recognizance. The court could have re-set the case for trial within 90 days of arraignment if defendant had so moved.

In any event, June 1, 2009, was no longer the last available day for trial. CrR 3.3(b)(5) provides a "buffer period" whereby if any time is excluded pursuant to CrR 3.3(e), the allowable time for trial does not expire earlier than 30 days after the end of that excluded period. Time spent in a federal jail is such an excluded period. CrR 3.3(e)(6).

Even if there were circumstances that prevented the case from proceeding to trial on or before June 1, 2009 (or such later date as may be permissible in light of the buffer period), the court still had other options. It could have granted a good cause continuance under CrR 3.3(f), which would have been excluded from the time-for-trial calculation under CrR 3.3(e)(3). The court also could have granted a cure period under CrR 3.3(g)

In any event, it was not necessary for the trial court to exercise any of these options because defendant did not move to set a trial date within the requirements of CrR 3.3. The failure to so move waived any objection.

C. THE COURT'S FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO A SUPPRESSION HEARING WAS HARMLESS ERROR.

Appellant contends that the trial court's failure to enter findings of fact and conclusions of law requires reversal and dismissal. A court's failure to enter written findings of fact and conclusions of law following a suppression hearing as required by CrR 3.6 is harmless error if the court's oral opinion and the record of the hearing are "so clear and comprehensive that written findings would be a mere formality." State v. Smith, 68 Wn. App. 201, 208, 842 P.2d 494 (1992). In the case at bar, the trial court had the opportunity to review the legal memorandums filed by the defendant and the state. The court was able to hear the live testimony of witnesses during the suppression hearing and the oral arguments of counsel. The record was sufficient with the court's oral findings to permit the appellate court to review the court's final determination. Appellant suffered no prejudice by the findings entered by the trial court and had an ample record from which to develop his arguments. The trial court's oral ruling was as follows:

Given the totality of the circumstances, the very quick response that the officers had to the dispatch - - As I was saying it's clear at the time the seizure did take place, and I think both parties agree that given the totality of the circumstances the officer had reasonable suspicion to initially investigate the 911 hang up call. In a very short period of time they discovered alcohol in the vehicle and that the female was underage. I think that follows that they had a right to ask for identification and ages. I will deny the motion to suppress.

(RP 2/2/09, Page 29 lines 5-7, Page 30 lines 3-11). The facts were clear and the issue at the suppression hearing was not complex. Defendant fails to explain why the trial court's oral ruling is not sufficient to permit appellate review.

In any event, even if the failure to enter written findings was not harmless, dismissal would not be the result. The remedy would be to remand to the trial court for entry of written findings based on the evidence already heard. See State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998). The burden of showing prejudice from any such late entry of findings rests with the defendant. Id. at 625. None has been shown.

D. THERE WAS NO ERROR COMMITTED  
WHEN THE TRIAL COURT DENIED  
DEFENDANT'S MOTION TO SUPPRESS.

The contact of the defendant was a legitimate Terry detention for investigative purposes. Testimony at the suppression hearing on June 2, 2009, showed officers of the Pasco Police Department were advised of a possible assault occurring just minutes before their contact with the defendant. (RP 14). The dispatcher was able to determine a general area of origin of the complaining party's phone call. (RP 4-5, 14-15). The dispatcher clearly heard, "put the bat down" during the call. (RP 14). Based upon the time of night and the area from which the call originated, multiple officers responded to the address. (RP 4-5, 15). The contact of the defendant in his car took place within minutes of the call to the police. (RP 15-16). There were numerous specific and articulable facts which, taken together with rational inferences from those facts, that reasonably warranted the contact of the defendant's vehicle by Officer Harris. The officer only needs reasonable suspicion, not probable cause, to stop a vehicle in order to investigate whether the driver committed a crime. The scope of the investigatory stop is determined by considering (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect's liberty, and the (3) length of time of the seizure. See State v. Laskowski, 88 Wn. App. 858, 950 P.2d 950 (1997), review

denied, 135 Wn.2d 1002 (1998).

When police have a “well-founded suspicion not amounting to probable cause” to arrest, they may request a person’s identification and ask them to explain their activities. State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). Police may temporarily detain a suspect pending the results of a radio check following a lawful, investigatory stop, and warrant checks during such stops are reasonable routine police procedure. State v. Madrigal, 65 Wn. App. 279, 283, 827 P.2d 1105 (1992). The officer may continue to detain the person until the results of the warrant check have been received, even if the original reason for the stop has been concluded. Id. at 282-83.

A Terry detention is a seizure for investigative purposes. To justify a Terry stop under the Fourth Amendment and Art. I, Sec. 7, a police officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about

to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Probable cause is not required for a Terry stop because a stop is significantly less intrusive than an arrest. Id., Brown v. Texas, 443 U.S. 47, 50, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (same). State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999).

When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The court takes into account an officer’s training and experience when determining the reasonableness of a Terry stop. Id. at 514.

The contact of the defendant’s vehicle was a lawful seizure pursuant to a Terry stop. The information the officers had was that the hang-up call was made from a cell phone and that a weapon maybe involved. There were no other individuals present when Officer Harris contacted the occupied vehicle. The hang up call could have very well originated from the vehicle. While present at the scene officers have a duty to investigate possible criminal activity they observe while investigating the original complaint. At the suppression hearing, defense counsel stated, “I’m not denying that the officer couldn’t do a quick investigatory stop and contact

the individual;" defense counsel merely argued "they should have immediately been able to realize they were not the basis of the call." (RP 6/2/09, Page 29 lines 12-15). But almost immediately, the officers observed an alcoholic beverage container in the vehicle. (RR 6/2/09, Page 7 lines 12-14). This justified further investigation of whether a minor was possessing alcohol or was being furnished alcohol. In addition, the time of night, the location of the defendant's vehicle, the location of the defendant and the victim within the vehicle and the obvious difference in ages warranted further inquiries from the officers. Notably, the male and female occupants were in the back seat of the vehicle when first contacted by police. (RP 16-17). The officer's actions were justified at the time of the stop and were reasonably related in scope to the circumstances which justified the interference in the first place. The court's decision to deny appellant's motion to suppress should be affirmed.

An alternative justification can be found in the community caretaking function of the police. A 911 hang-up call "often signals that the caller is in grave danger." State v. Davis, 154 Wn.2d 291, 303, 111 P.3d 844 (2005). The scenario of a 911 hang-up call may indicate both that the caller is need of assistance and that he or

she is being prevented by another person from seeking assistance from police. Thus, police are justified in briefly infringing on privacy rights when responding to 911 hang-up calls. See State v. Lynd, 54 Wn. App. 18, 771 P.2d 770 (1989); State v. Leupp, 96 Wn. App. 324, 980 P.2d 765 (1999). Such authority arises not only from the authority to investigate suspected crimes, but from “a police officer’s community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm.” Leupp, 96 Wn. App. at 330. Occasionally there is overlap between the community caretaking and law enforcement functions, and an officer’s seizure of a person may be justified by either or both. State v. Villarreal, 97 Wn. App. 636, 984 P.2d 1064 (1999). “Simply, if the law prevented officers from detaining persons who were found at the residence from where the 911 [hang-up] call originated, they could be entirely frustrated from performing their law-enforcement duty.” Bisbee v. Reynard, 29 F.Supp.2d 498, 504 (C.D. Ill. 1998). A police department policy “requiring the temporary seizure of persons who are found in the area from which a non specific 911 call was made . . . would not violate the Constitution.” Id. In State v. Pearson-Anderson, 136 Idaho 847, 41 P.3d 275 (2001), the defendant “essentially ask[ed] for a ruling that

where a 911 hang-up call has been received, responding officers must take the word of a person at the scene who offers a plausible explanation for the hang-up and assures officers that all is now safe and calm.” Id. at 278. The court responded:

Such a rule would not well serve the interests of public safety. In our view, 911 hang-up calls are qualitatively different from other emergency calls in which the caller communicates with the operator. In the latter circumstance, responding officers ordinarily know, at a minimum, the gender of the caller and something about the nature of the emergency. With this information, officers who have responded can discern whether the reported emergency is under control and whether they have communicated with the person who was in need of help. The same cannot be said when the 911 call has been disconnected before there is any communication with the operator. When responding to a 911 hang-up call, officers may reasonably be cautious about concluding that the need for help has dissipated based solely upon the explanation from whoever greets them upon their arrival.

Id. at 278. In instant case, the officers properly remained at the scene until they had made a thorough inquiry. There was no illegal seizure.

Even if there was an illegal seizure, suppression of the victim’s testimony at trial would not be an appropriate remedy. “[C]ourts are more reluctant to exclude the testimony of other witnesses than they are physical evidence.” State v. Russell, 125

Wn.2d 24, 57 n.9, 882 P.2d 747 (1994) (citing United States v. Ceccolini, 435 U.S. 268, 274-79, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978)). Moreover:

[T]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is invoked to support suppression of an inanimate object.

State v. West, 49 Wn. App. 166, 169, 741 P.2d 563 (1987) (quoting Ceccolini, 435 U.S. at 280). In West, 49 Wn. App. at 170, the court adopted the four factors articulated in United States v. Hooton, 662 F.2d 628, 632 (9th Cir. 1981), for determining whether a sufficient attenuation between the police misconduct and live-witness testimony exists:

(1) the stated willingness of the witness to testify; (2) the role played by the illegally-seized evidence in gaining the witness' cooperation; (3) the proximity between the illegal behavior, the witness' decision to cooperate and the actual testimony at trial; and (4) the police motivation in conducting the search.

In Hooton, the testimony of the witness was attenuated from the illegal search where police were not searching for evidence of the charged crime. Hooton, 662 F.2d at 632-33. Similarly, here the police were not seeking evidence of a child rape at the time defendant was seized. Their only motivation was to investigate a

911 hang-up call. The testimony of the victim at trial was attenuated from any illegality and there was no reason to suppress it.

V. CONCLUSION

On the basis of the arguments set forth herein, it is respectfully requested that this court affirm the jury's finding of guilt, subsequent conviction, and judgment and sentence.

Dated this 26th day of July, 2011.

Respectfully submitted,

SHAWN P. SANT  
Prosecuting Attorney

By:   
Frank W. Jenny,  
WSBA #11591  
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

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)

COMES NOW Deborah L. Ford, being first duly sworn on oath, deposes and says:

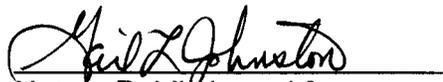
That she is employed as a Legal Secretary by the Prosecuting

Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 26th day of July, 2011, a copy of the foregoing was delivered to Jose G. Chavez-Romero, Appellant, c/o Kristina M. Nichols, P.O. Box 19203, Spokane, Washington 99219, and to Kristina M. Nichols, opposing counsel, P.O. Box 19203, Spokane, Washington 99219; and to Cindy Renee Arends, Washington Defender Association, 110 Prefontaine PI S Suite 610, Seattle, Washington 98104-2626 by depositing in the mail of the United States of America a properly stamped and addressed envelope.



Signed and sworn to before me this 26th day of July, 2011.



Notary Public in and for  
the State of Washington,  
residing at Pasco  
My appointment expires:  
September 9, 2014

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