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Court of Appeals
Division III
State of Washington

NO. 32043-0-III

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Respondent,

v.

SAMUEL MILLER, Appellant.

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, by and through Tamara A. Hanlon, deputy prosecuting attorney for Yakima County.

II. ISSUE PRESENTED FOR REVIEW

Did the Superior Court correctly decide that the commencement date was the Appellant's first physical appearance in court and that CrRLJ 3.3 was not violated?

III. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in Appellant's brief. Therefore, pursuant to RAP 10.3(b), the State shall not set forth an additional facts section. The State shall refer to the record as needed.

IV. ARGUMENT

A. BONIFACIO HAS BEEN SUPERSEDED BY THE 2003 REVISIONS TO THE SPEEDY TRIAL RULES.

Appellant Miller claims that the Superior Court decision conflicts with case law, citing City of Seattle v. Bonifacio, 127 Wn.2d 482, 900 P.2d 1105 (1995). However, the 2003 amendments to the rules governing arraignment and speedy trial took effect 8 years after the Bonifacio case.

Bonifacio is no longer good authority on the issue presented in Miller's case. The date of arraignment in this case was properly determined from the date Miller first physically appeared in Yakima County District Court, January 3, 2013. (Findings, p.2).

CrRLJ 4.1(a)(ii) states that the defendant shall be arraigned not later than 14 days after that "appearance" which follows the filing of the complaint or citation and notice. "Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for the delay." CrRLJ 4.1(a)(ii). "Appearance" is defined as the defendant's physical presence in the trial court for the charged conduct. CrRLJ 3.3(a)(3)(iii), (iv).

In this case, Miller was summoned for his first court appearance. He first appeared in court on January 3, 2013. (Findings, p.2). At that court date the judge properly determined Miller's date of arraignment as January 17, 2013, which was within 14 days of his preliminary court appearance. Id. On February 28, 2013, the District Court, however, erroneously dismissed the charge with prejudice after finding that speedy trial expired on January 17, 2013. (Findings, p.3). The State appealed and the Superior Court reversed the lower court's dismissal of the charge, finding that there was no violation of CrRLJ 3.3.

Miller argues the Superior Court's ruling conflicts with the 1995 Bonifacio case. However, Bonifacio has since been superseded by the revisions to the court's rules governing arraignment and time for trial. See CrRLJ 3.3, 4.1. These revisions went into effect September 1, 2003.

CrRLJ 3.3 and CrRLJ 4.1 (where referenced by CrRLJ 3.3) now provide the exclusive rules for determining trial time limits. CrRLJ 3.3(c)(1) states that the initial commencement date for the time to trial is the date of arraignment as determined by CrRLJ 4.1. CrRLJ 4.1(a)(2) provides the arraignment deadline for a defendant who is not in jail. The rule states that a defendant shall be arraigned "not later than 14 days after that appearance which next follows the filing of the complaint or the citation." CrRLJ 4.1(a)(2).

The rule goes on to state "any delay in bringing the defendant before the court ***shall not*** affect the allowable time for arraignment, ***regardless*** of the reason for delay." Id. (emphasis added). "Appearance" for the purposes of CrRLJ 3.3 means either the physical presence of the defendant in the courtroom (or Notice of Appearance filed by the defendant's attorney). CrRLJ 3.3(a)(3)(iii), CrRLJ 4.1(f)(4). There are no exceptions to this rule. Once the defendant appears before the trial court, the date of arraignment may be calculated and the expiration date of

speedy trial may be determined. That is precisely the procedure the court at arraignment followed in this case.

Dismissal with prejudice for a time-to-trial violation shall only occur for a time violation under rule CrRLJ 3.3. CrRLJ 3.3(h). Specifically, "No case shall be dismissed for time-to-trial reasons except as expressly required by [CrRLJ 3.3]..." Id. Unless waived, the time between the commencement date and trial shall be no longer than . . . 90 days for a defendant out of jail. CrRLJ 3.3(b)(2).

CrRLJ 2.1 allows an officer to serve a citation for misdemeanors and gross misdemeanors. CrRLJ 2.1(b)(1). The rule provides that the citation must be filed with the clerk of the appropriate court within two days of issuance. CrRLJ 2.1(d)(2). The rule specifically gives the court discretion to remedy a violation of this rule: "A citation and notice not filed within the time limits of the rule *may be dismissed without prejudice*." Id. (emphasis added).

Nothing in CrRLJ 2.1 allows the court to dismiss a citation *with* prejudice, as the District Court did in this case. (Findings, p.3). And the rule does not state that the charge *has* to be dismissed or that the charge *shall* be dismissed. When reading the language of CrRLJ 2.1 and CrRLJ 3.3 together, it is clear that the Court does not have to dismiss at all. The

language also stresses that the speedy trial clock starts at the defendant's first court appearance. See CrRLJ 4.1(a)(2).

In the case of State v. Thomas, the Court of Appeals held that the amended language in the rules "specifically prohibited any dismissals for time-for-trial reasons unless expressly required by the rule, a statute, or constitutionally." 146 Wn. App. 568, 574, 191 P.3d 913 (2008). In Thomas, the defendant was arrested and booked into jail on September 10, 2005. Id. at 570. He posted bail and was released the same day. Id. On November 14, 2005, the State filed a summons directing Thomas to appear in court on November 28, 2005. However, the summons sent to his last known address was returned back to the court.

Thomas did not appear and on January 18, 2006, a bench warrant was issued for his arrest. Id. at 570. He was eventually arrested on February 25, 2006 and first appeared in court on February 27. He was then arraigned on March 6, 2006, setting his speedy trial 90 days out since he was out of custody. Id. at 571. Thomas argued that under State v. Fulps, 141 Wn.2d 663, 9 P.3d 832 (2000), the State was required to bring him to trial by December 9, 2005, 90 days after he posted bail.

On March 31, 2006, the District Court dismissed Thomas's case with prejudice after finding that his speedy trial rights had been violated under Fulps. Thomas, 146 Wn. App. at 571. The State appealed and the

Superior Court reversed the dismissal. After accepting discretionary review, the Court of Appeals affirmed the Superior Court's reversal and found that the 2003 amendments supersede the Fulps holding. Id. at 576. In doing so, the court relied on the plain language of the rules. Id.

It is important to note that Thomas posted bail, and the court still determined that his speedy trial clock started when he made his first appearance in court. See id. Here, Miller did not post bail, nor was he ever taken into custody. (CP 129). There were no conditions of release placed upon him. (CP 192). Therefore, Miller's speedy trial clock could not have started prior to his first appearance in court. See CrRLJ 4.1(a)(2).

Bonifacio, which construes the *former* court rules, is a 1995 case that provides no authority for applying the current rules. The holding in Bonifacio does not apply to Miller's case as the Court Rules were amended in 2003 to specifically avoid what occurred in Bonifacio. Of particular concern to the Time-to-Trial Task Force was the number of cases that were being dismissed with prejudice for time-to-trial violations that resulted from the Striker/Greenwood requirements. See Washington Courts Time-For-Trial Task Force, Final Report, II(C) (Oct. 2002) (on file with Admin. Office of the Courts), available at http://www.courts.wa.gov/programs_orgs/pos_tft).

Similarly, Bonifacio's case was dismissed with prejudice for a time-to-trial violation, 127 Wn.2d at 484. Like the case at hand, Bonifacio was given a copy of his criminal citation, but a copy was not filed with the court within two days. Id. at 483-84. The charges that followed did not result in a first court appearance within 20 days after the issuance of the citation. Id. Given the speedy trial rules in effect at the time, Bonifacio's case was dismissed with prejudice. Id. at 484.

In 2003, however, the Time-to-Trial Taskforce amended CrRLJ 3.3 and CrRLJ 4.1 to prevent this type of dismissal – a dismissal where the Court ruled one rule was violated but then sought a remedy outlined in a different rule. See Washington Courts Time-For-Trial Task Force, supra, at II(C).

In 2009, in State v. Rookhuyzen, the Court reiterated that a defendant's speedy trial clock starts when the defendant first appears in court. 148 Wn. App. 394, 397, 200 P.3d 258 (2009). In Rookhuyzen, the defendant was summoned to court 30 days after the information was filed. Id. at 395. He argued that his arraignment was untimely and that he should have been arraigned prior to the 30 days. Id. The Court ruled:

> Under the current criminal rules, there are no specific time limitations on when an out-of-custody defendant must first appear before the court. Rather, and expressly, to

> the contrary, CrR 4.1(a)(2) provides that '[a]ny delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay.' It is only after a defendant's first appearance that the rules provide any basis to expect arraignment within a given time period.

Id. at 397.

Therefore, the logical result from this is that Bonifacio is not controlling here. Both Thomas and Rookhuyzen essentially ruled that the clock starts upon the defendant's first appearance and not when an officer hands a defendant a citation with no court date.

CrRLJ 3.3 was amended to specifically state that time-to-trial begins with commencement. See CrRLJ 3.3(c)(1). The rule now conclusively states that the initial commencement date shall be the date of the arraignment as defined in CrRLJ 4.1. Id. Looking at CrRLJ 4.1(a)(2), arraignment shall occur no later than 14 days after the appearance that next follows the filing of the complaint. In effect, commencement is the arraignment date (or the date the defendant's attorney files a notice of appearance). CrRLJ 3.3(a)(3)(iii), CrRLJ 4.1(g)(4).

Neither CrRLJ 2.1 nor the issuance of a citation are mentioned in CrRLJ 4.1, nor does CrRLJ 3.3 make a reference to CrRLJ 2.1 or the issuance of a citation. CrRLJ 4.1 further states "*any* delay in bringing the

defendant before the court shall not affect the allowable time for arraignment." CrRLJ 4.1(a)(2) (emphasis added). Had Bonifacio been decided with the court rules as presently written, the case would have been decided differently. However, Bonifacio was decided seven years prior. Consequently, Bonifacio has been effectively superseded by the changes in the court rules that have occurred since 1995. These new rules allow a dismissal with prejudice only for a CrRLJ 3.3 violation. CrRLJ 3.3(h). The sole discretionary remedy for a CrRLJ 2.1 violation is a dismissal *without* prejudice. CrRLJ 2.1(d)(2).

The Court in State v. Thomas stated that "there is nothing in the amended rules or task force final report that shows the amendments were narrowly drawn as to address only the Striker/Greenwood line of cases." 146 Wn. App. at 575. In the present case, the District Court determined that the rules were amended to address the Striker/Greenwood issues and not specifically the present issue, therefore, the court found that Bonifacio was still good law. However, Thomas, which was decided in 2008, states that the rules were not to be so narrowly defined. Id.

In Thomas, King County Superior Court found that the amendments were controlling and superseded Fulps. Id. at 576. Again, in the present case, fewer restrictions were placed on Appellant Miller then

on the individuals in Fulps and Thomas. Miller was never taken into custody and was never required to bail out; nor were there any conditions of release placed upon him. (CP 192). As such, there is no reason to find speedy trial commences any sooner than his first physical appearance in court.

Appellant argues that Bonifacio is still good authoritative law because CrRLJ 2.1(5) was not changed after Bonifacio. However, CrRLJ 2.1 was amended in 2006. A citation no longer needs a space for a person to sign a promise to appear. Rule 2.1(3)(v) was eliminated. In addition, section 4 of Rule 2.1 was eliminated. That section had provided as follows: "Release. To secure his or her release, the person must give his or her written promise to appear in court as required by the citation and notice served." This is significant because in Bonifacio, the court noted that Bonifacio had signed the citation and was "released from police custody upon signing the citation, indicating his promise to "respond as directed on [the] notice." 127 Wn.2d at 484.

Here, the citation contained no promise to appear or respond. The box for "MANDATORY COURT APPEARANCE" was checked but the box for an appearance date was left blank. Unlike Bonifacio, Miller did not sign the citation, nor indicate a promise to respond in court as directed.

This is significant because the Bonifacio court relied on the fact "the issuance of a citation in lieu of arrest is "in effect...a release of [a] defendant on his personal recognizance, and as a result, a citation and notice to appear are process initiated by the court named in the citation." Id. at 487 (citing Dolman, 22 Wn. App. at 921). Here, Miller didn't sign the citation or agree to appear on any particular date.

Appellant's argument regarding CrRLJ 2.1(5) remaining "unchanged," also ignores the fact that the State Supreme Court analyzed that rule in conjunction with CrRLJ 3.3(c)(1), which *has* changed significantly. Bonifacio did not analyze CrRLJ 2.1 in a vacuum and did not characterize the case as whether there was a violation of CrRLJ 2.1. Quoting Bonifacio, the decision appealed was the "dismissal of criminal charges against Dennis Bonifacio for...failure to comply with **CrRLJ 3.3**. 127 Wn.2d at 483 (emphasis added). The issue decided by Bonifacio was whether the "time for trial limits set forth in **CrRLJ 3.3(c)(1)** had been exceeded." Id. at 485 (emphasis added).

Here is the text of former CrRLJ 3.3(c)(1) as it appeared in 1995:

> Time for Arraignment and Trial.
>
> (1) Cases Filed in Court. If the defendant is detained in jail, or subject to conditions of release, the defendant shall be arraigned not later than 15 days after the date the complaint is filed in court. If the defendant

> is not detained in jail or subjected to conditions of release, the defendant shall be arraigned not later than 15 days after that appearance in court which next follows the filing of the complaint or citation and notice. A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment. A defendant released from jail whether or not subjected to conditions of release pending trial shall be brought to trial not later than 90 days after the date of arraignment.

Former CrRLJ 3.3(c)(1); Bonifacio, 127 Wn.2d at 484 n.1. Now, that same rule reads as follows:

> Commencement date.
>
> (1) Initial commencement date. The initial commencement date shall be the date of arraignment as determined under CrRLJ 4.1.

CrRLJ 3.3(c)(1).

The underlying rules which were the basis for the Bonifacio decision have been completely revamped. To argue that Bonifacio still remains good law because CrRLJ 2.1(b)(5) has not changed ignores the fact that the decision did not rest solely on CrRLJ 2.1. In fact, Bonifacio was really deciding a time-for-trial question under CrRLJ 3.3. The court merely referenced CrRLJ 2.1 in answering that question.

Bonifcacio also relied heavily on the 1979 case of State v. Dolman, 22 Wn. App. 917, 594 P.2d 450 (1979). The holding in Dolman was that

"the failure to bring Dolman to trial within 60 days as required by JCrR 3.08 mandated dismissal of the charge against him with prejudice. 22 Wn. App. at 921. Again, the ultimate issue in the Dolman case was whether speedy trial was violated under the old speedy trial provisions of JCrR 3.08, not under the notice provisions of JCrR 2.01 (the juvenile court equivalence of CrRLJ 2.1).

In reaching its conclusion, the Dolman case also relied on RCW 10.19.130, which provided that a willful failure to appear in court after release on personal recognizance was a crime. Bonifacio, 127 Wn.2d at 487 n.3. The statute has since been repealed. Id.

So the issue now is not whether CrRLJ 2.1 has remained unchanged, as Appellant argues, but whether the speedy trial rules have changed. And they have. Accordingly, Bonifacio is no longer good law, as it was an analysis of speedy trial rules that are no longer in effect.

The State would also argue that until the citation is filed in court, there is no jurisdiction whatsoever over the case. CrRLJ 2.1 starts with the following: "Except as otherwise provided in this rule, all criminal proceeding shall be initiated by a complaint." CrRLJ 2.1(a)(1). A citation is one exception. There are 2 parts to initiating a prosecution by citation: 1) signing the citation, and 2) filing it. CrRLJ 2.1(5). CrRLJ 2.1(5) provides as follows:

> Initiation. When signed by the citing officer **and** filed with a court of competent jurisdiction, the citation and notice shall be deemed a lawful complaint for the purpose of initiating prosecution of the offense charged therein.

CrRLJ 2.1(b)(5) (emphasis added). As such, there was no "lawful complaint" at the time the citation in Miller's case was issued because it was not filed with the court. If there is no lawful complaint, time for trial cannot start.

Importantly, CrRLJ 2.1(b)(5) uses the conjunctive "and" and not the disjunctive "or." The Legislature could have indicated that a citation becomes a lawful complaint when signed by the citing officer **or** filed with a court of competent jurisdiction. The deliberate use of the word "and" was explained in Ski Acres v. Kittitas County, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992):

> The statute contains an "and", not an "or". We thus read the "and" as simply being an "and". The Legislature would have used the word "or" if it had intended to convey a disjunctive meaning. See State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982) (where the lower court erred in reading an "and" in former JCrR 4.10 as conveying a disjunctive meaning); Childers v. Childers, 89 Wn.2d 592, 596, 575 P.2d 201 (1978) (the word "and" does not mean "or").

118 Wn.2d 852, 856 (1992).

Jurisdiction is the power of a court to hear and determine a case. State v. Lane, 112 Wn.2d 464, 468, 771 P.2d 1150 (1989). The court may not proceed with a case if the complaint has not been properly filed because it lacks subject matter jurisdiction. See State v. Cummings, 87 Wn.2d 612, 555 P.2d 835 (1976), Orting v. Ruschner, 66 Wn.2d 732, 404 P.2d 983 (1965), State v. Corrado, 78 Wn. App. 612, 898 P.2d 860 (1995). As explained by the State Supreme Court in the context of justice court traffic rules, which contain language identical to CrRLJ 2.1:

> **These rules clearly require that the ticket be filed as a complaint. In the absence of such a ticket or other appropriate complaint, a court has no jurisdiction to proceed**, and no authority is needed to pinpoint, demonstrate or support such a basic requirement of due process. The fact that the traffic ticket was belatedly admitted as an exhibit in the case certainly did not confer jurisdiction on the court. Furthermore, jurisdiction over the subject matter was not waived by entering a plea, assuming that a plea was entered in this case. The conclusion is inescapable that **without a complaint on file there was no jurisdiction** for either the municipal court or the superior court to proceed in this matter.

Orting v. Rucshner, 66 Wn.2d 732, 734 (1965) (emphasis added). Here, there was no complaint filed and thus, no jurisdiction. To find that

charges can be initiated solely by the signing of a complaint and not filing it would render meaningless the second requirement of CrRLJ 2.1(b)(5).

V. CONCLUSION

For all of the reasons set forth above, the Superior Court's decision that there was no CrRLJ 3.3 violation was a correct interpretation of the law. The decision should be affirmed.

Respectfully submitted this 28th day of July, 2014,

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