

**FILED**

**MAY 18 2015**

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

No. 329283

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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State of Washington, Respondent

v.

Joshua James Clark, Appellant

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BRIEF OF RESPONDENT

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## **I. STATEMENT OF THE ISSUES**

- A. Did the trial court comply with CrR 3.3 when it (1) granted defense counsel's request to continue the trial and (2) extended the allowable time for trial 30 days past the new trial date?
- B. Did Mr. Clark fail to preserve the issue regarding his ability to pay legal financial obligations when he did not raise the issue at the trial court?

## **II. STATEMENT OF THE CASE**

On August 4, 2014, the State charged Mr. Clark with Possession of a Stolen Motor Vehicle. CP 1-2. On August 6, 2014, trial was set for August 8, 2014, with a time for trial expiration of November 3, 2014. CP 24. On October 6, 2014, Mr. Clark's attorney requested a continuance of the trial due to a scheduling conflict he had; Mr. Clark's attorney also mentioned to the court that his client (Mr. Clark) did not agree with the request for continuance. RP 10. The court acknowledged defense counsel's reason for the continuance and granted the motion, setting the trial for October 23, 2014, and noting a time for trial expiration date of November 24, 2014. CP 53; RP 10. The trial was continued one more time to November 6, 2014, at the State's request. RP 13-15. On November 6, 2014, 18 days before his time for trial period expiration of November 24, Mr. Clark's trial began.

RP 45. The trial ended that same day with the jury convicting Mr. Clark of Possession of a Stolen Motor Vehicle. CP 117.

On November 10, 2014, the trial court sentenced Mr. Clark to 38 months in prison and \$1,846.62 in total legal financial obligations. CP 120-128. There is nothing in the record indicating the trial court made any non-boilerplate findings as to Mr. Clark's ability to pay these legal financial obligations. This appeal followed. CP 134.

### **III. ARGUMENT**

A. The trial court did not violate Clark's time for trial right under CrR 3.3.

1. The trial court properly granted defense counsel's motion for continuance.

Although CrR 3.3(b) generally states that an out-of-custody defendant must be brought to trial within 90 days of his arraignment, this time period may be extended due to certain excluded periods of time. CrR 3.3(b), (e). One such excluded period of time is any delay of the trial due to a request for a continuance. CrR 3.3(e)(3). The request for the continuance may be made by either party and may be granted as long when it is required in the administration of justice and as long as the defendant will not be prejudiced in presenting his defense. CrR 3.3(f)(2). A continuance of the

trial is an excluded period of time, and the time for trial shall not expire earlier than 30 days after the newly set trial date. CrR 3.3(b), (e), (f).

“A trial court’s decision to grant or deny a motion for a continuance [of the trial] will not be disturbed on appeal absent a showing of manifest abuse of discretion.” *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929, 938 (1984) (citing *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970)). “Furthermore, moving for a continuance ‘by or on behalf of any party waives that party’s objection to the requested delay.’” *State v. Saunders*, 153 Wn. App. 209, 217, 220 P.2d 1242 (2009) (quoting CrR 3.3(f)(2)). “[U]nder CrR 3.3, [defense] counsel has authority to make binding decisions to seek continuances.” *State v. Ollivier*, 178 Wn.2d 813, 825, 312 P.3d 1, 9 (2013). In *Ollivier*, the Washington Supreme Court held that, despite the fact that the defendant had objected to many of his attorney’s requests for continuances, “Ollivier’s own counsel sought the continuances about which he complains, and as [CrR 3.3] expressly provides, any objection is therefore waived.” *Id.* at 824.

In the present case, it was Mr. Clark’s own attorney who moved for the first continuance. Additionally, it goes without saying that a defense attorney cannot provide effective representation for his client if he cannot even appear for the trial. Thus, the continuance was necessary to mitigate defense counsel’s scheduling conflict. Finally, there is nothing in

the record indicating that this continuance would prejudice Mr. Clark in any way. In conclusion, Mr. Clark waived his objection to the continuance because it was made by his own attorney; furthermore, it was necessary to ensure defense counsel would be available for the trial.

2. The continuance of the trial at defense counsel's request automatically moved the time for trial deadline to November 24, 2014.

Because the trial court did not abuse its discretion in continuing the trial from October 6 to October 23, CrR 3.3(b) automatically extended the time for trial period 30 days past the new trial date. In this case, the continuance extended the time for trial expiration to November 24. Therefore, because the trial on November 6 occurred well within the prescribed time for trial, no violation of CrR 3.3 occurred.

- B. The issue of whether Mr. Clark had the ability to pay his legal financial obligations was not preserved for appeal.

A defendant is not entitled to challenge the imposition of legal financial obligations for the first time on appeal where he did not object at the trial court. *State v. Blazina*, 174 Wn. App. 906, 912, 301 P.3d 492, 494 (2013). In *Blazina*, the court held that “because [Blazina] did not object in

the trial court to [the] finding [that he had the ability to pay LFOs], we decline to allow him to raise it for the first time on appeal.” *Id.*

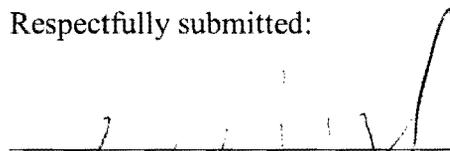
Because Mr. Clark did not preserve the “ability to pay” issue at the trial court level, this court should decline to address it now for the first time on appeal. If the court chooses to address this issue and holds that the court failed to determine Mr. Clark’s ability to pay legal financial obligations, the State requests that the case be remanded for the limited purpose of making the finding.

#### **IV. CONCLUSION**

Based on the foregoing analysis, both issues in front of the Court should be resolved in favor of the State. As to the first issue, there was no violation of Mr. Clark’s rights under CrR 3.3 because the time for trial period was automatically extended after the court properly granted a motion for a continuance of the trial made by Mr. Clark’s own attorney. The second issue regarding Mr. Clark’s ability to pay his legal financial obligations was not preserved for appeal and should not be considered.

DATED: May 15, 2015

Respectfully submitted:

  
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