

FILED

JUL 02, 2015
Court of Appeals
Division III
State of Washington

NO. 329712

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

THOMAS ALAN SCOTT

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KLIKITAT COUNTY
The Honorable Brian Altman

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR

The trial court violated the defendant's right to a speedy trial.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court violate the defendant's right to a speedy trial when it granted multiple continuances beyond the speedy trial date for circumstances the State could have avoided?

III. STATEMENT OF THE CASE

Officers arrested 55-year-old Thomas Alan Scott (Mr. Scott) when his on again off again girlfriend, 40-year-old Susan Peppers (Peppers), alleged he strangled her. 11/19/14 RP 195. Mr. Scott lived in an RV on Peppers' father's property. The two men had a very good relationship. 11/19/14 RP 214-216. Conversely, Mr. Scott's relationship with Peppers was tough. Peppers had a drug problem and would run off with other men. 11/19/14 RP 212. Despite her cheating, Mr. Scott loved Peppers and allowed her to live with him in the RV from time to time. 11/19/14 RP 212-214.

One morning, Peppers returned to the RV after she had been out with another man the night before. 11/19/14 RP 220-221. Mr. Scott told her to go back to her boyfriend. He had had enough of the relationship. 11/19/14 RP 221-222. Peppers became enraged and started to beat Mr. Scott. 11/19/14 RP 222. Mr. Scott raised his arms to shield himself from Peppers' blows, but she managed to pin him in a chair. 11/19/14 RP 222. In an effort to get Peppers off of him, Mr. Scott slapped Peppers across her throat. Peppers ran to her parents' house, which was about 40 feet from the RV. 11/19/14 RP 222; 11/19/14 RP 193. She told her stepmother that Mr. Scott choked her and her stepmother called police. 11/19/14 RP 183.

Despite the fact Mr. Scott suffers from permanent back injuries and a hernia, and is some 14 years Peppers' senior, the State charged him with one count second-degree assault. CP 1-2; 11/19/14 RP 216; 11/19/14 RP 223. Mr. Scott was arraigned on July 7, 2014. CP 18. He pleaded not guilty to the charge and the court set trial for September 3, 2014. 7/7/14 RP 14.

On September 3rd, the day of trial, the State moved for a continuance. Mr. Scott's trial was scheduled on or around the same time as another trial. Speedy trial dates were about to expire in both cases. The State sought to try the other case first and moved the court to continue Mr. Scott's case. The record suggests Mr. Scott objected to the continuance. 9/3/14 RP 40-41. The court granted the State's motion over Mr. Scott's objection. In an effort to cure Mr. Scott, the court released him on his own recognizance and set trial for October 8th. 9/3/14 RP 40-41; 9/15/14 RP 44.

On October 6th, two days before the second trial date, the State asked for another continuance because it was not prepared to try Mr. Scott. The State had not even issued subpoenas to any potential witnesses. 10/6/14 RP 47-48. Over Mr. Scott's objection, the court granted the State's motion and set trial for October 22nd. 10/6/14 RP 49.

On October 20th, again two days before the third trial date, the State asked for another continuance. This time, the State need more time because a witness, the officer who arrested Mr. Scott, was on vacation in Las Vegas. 10/20/14 RP 56. Mr. Scott objected to the continuance and reminded to court about the case's arduous history. 10/20/14 RP 56-57. The court found the officer was material to the case and granted the continuance. The court set trial again for November 5th. 10/20/14 RP 60.

On November 3rd, the State asked for yet another continuance because Peppers' father had died unexpectedly the week before. Peppers and her stepmother both were grief-stricken and did not feel they could testify just days before the memorial service. 11/3/14 RP 63-64.

Mr. Scott objected and again reminded the court of the previous continuances. Over Mr. Scott's objection, the court granted the State's continuance and set trial for November 19th. 11/3/14 RP 66-67.

On November 19th, Mr. Scott finally went to trial. A jury found him not guilty of second-degree assault, but guilty of fourth degree assault, the lesser included of second-degree assault. CP 124; CP 125-126. The court sentenced Mr. Scott to 364 days in jail. 12/1/14 RP 81. Mr. Scott filed a notice to appeal the conviction. This appeal followed. CP 139-140; CP 131-135.

IV. ARGUMENT

THE TRIAL COURT VIOLATED MR. SCOTT'S RIGHT TO SPEEDY TRIAL WHEN IT GRANTED MULTIPLE CONTINUANCES BEYOND THE SPEEDY TRIAL DATE FOR CIRCUMSTANCES THE STATE COULD HAVE AVOIDED.

Standards of review

This court will review de novo whether the trial court violated Mr. Scott's right to a speedy trial. State v. Carlyle, 84 Wn.App. 33, 35-36, 925 P.2d 635 (1996); Brown v. State, 155 Wn.2d 254, 261, 119 P.3d 341 (2005); State v. Iniguez, 167 Wash. 2d 273, 280-81, 217 P.3d 768, 771 (2009). As for whether the trial court abused its discretion when it granted the State's continuances, this court will disturb the trial court's decision, if there is a clear showing the decision is manifestly unreasonable, or exercised on

untenable grounds, or for some untenable reasons. State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (quoting State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) and State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Analysis

A speedy trial in criminal cases is a personal right protected by the United States Constitution and our State Constitution. U.S. Const. amend. VI; Wash. const. art. 1, § 22; State v. Striker, 87 Wn. 2d 870, 876, 557 P.2d 851 (1976). Superior court criminal rule (CrR) 3.3 governs speedy trial in our state. State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009) citing State v. Mack, 89 Wn.2d 788, 791–92, 576 P.2d 44 (1978); State v. Cummings, 87 Wn.2d 612, 615, 555 P.2d 835 (1976). It provides time limits for arraignment and trial to ensure criminal defendants are brought to trial in a timely manner. CrR 3.3(e)(8),(f); State v. Kenyon, 167 Wn.2d 137. A defendant waives his speedy trial rights under the court rule if he does not timely object to the violation. State v. Harris, 130 Wn.2d 35, 45, 921 P.2d 1052 (1996); State v. Chavez-Romero, 170 Wn. App. 568, 581, 285 P.3d 201 (2012).

The rule charges the court to comply with speedy trial requirements. CrR 3.3(a); State v. Raschka, 124 Wn. App. 103, 110, 100 P.3d 339, 343 (2004). For example, the rule requires trial courts to bring defendants, not detained in jail, to trial within 90 days after arraignment. CrR 3.3(b)(2). However, CrR 3.3 provides courts some flexibility. Courts can exclude from the time for trial continuances for unavoidable or unforeseen circumstances. CrR 3.3(e)(8),(f); State v. Kenyon, 167 Wn.2d 137. Here, each continuance the court granted beyond Mr. Scott's speedy trial date could have been avoided.

First continuance. The first continuance occurred on September 3rd, the day of trial. Mr. Scott's trial was scheduled on or around the same time as another trial. Speedy trial dates were about to expire in both cases. The State decided to try the other case first and moved the court to continue Mr. Scott's case. The record suggests Mr. Scott objected to the continuance. 9/3/14 RP 40-41.

Our Supreme Court allows courts to grant continuances for scheduling conflicts. State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005) See State v. Heredia–Juarez, 119 Wn.App. 150, 153–55, 79 P.3d 987 (2003). And although scheduling conflicts may be valid reasons to continue trial, court congestion is not. State v. Kenyon, 167 Wn.2d 137, 216 P.3d 1024 (2009) citing State v. Mack, 89 Wn.2d 788, 576 P.2d 44 (1978). When the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms.” State v. Flinn, 154 Wn.2d at 200, 110 P.3d 748.

A court can allow a continuance due to congestion if it carefully makes a record of the unavailability of judges and courtrooms and of the availability of judges pro tempore. State v. Silva, 72 Wn.App. 80, 84–85, 863 P.2d 597 (1993). The court must take action to alleviate court congestion. State v. Kenyon, 167 Wn. 2d at 137.

Here, the court did not make a record and did not take action to alleviate court congestion. Instead, over Mr. Scott's objection, the court granted the State's motion and released Mr. Scott on his own recognizance. The court set a new trial date for October 8th. 9/3/14 RP 40-41; 9/15/14 RP 44.

Second continuance. On October 6th, two days before the second trial date, the State moved the court for another continuance because it was not prepared for trial. It had not even issued subpoenas to any potential witnesses. 10/6/14 RP 47-48. Mr. Scott objected. 10/6/14 RP 46.

Allowing counsel time to prepare for trial is a valid basis for continuance. State v. Flinn, 154 Wn.2d 193, citing State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); State v. Williams, 104 Wn.App. 516, 523, 17 P.3d 648 (2001). However, simple mismanagement and unpreparedness “conflicts with the spirit of the speedy trial rule, CrR 3.3, and is grounds for dismissal. State v. Sulgrove, 19 Wn. App. 860, 863, 578 P.2d 76 (1978). Instead, the court, here, continued trial again and set the next date for October 22nd. 10/6/15 RP 49.

Third continuance. On October 20th, again two days before the third trial date, the State moved to continue trial because a material witness, the officer who arrested Mr. Scott, was on vacation in Las Vegas. 10/20/14 RP 56.

Scheduled vacations are valid reasons to continue trial. This is necessary to preserve the dignity of officers who would otherwise never be able to plan a vacation. State v. Torres, 111 Wn. App. 323, 331, 44 P.3d 906 (2002). However, this circumstance could have been avoided had the State issued a subpoena for this witness to appear in court on October 8th. The witness probably had not yet scheduled the vacation and could have been available. Again, the court did not dismiss the case. Instead, the court granted the State’s continuance and set trial for November 5th. 10/20/14 RP 60.

Fourth continuance. On November 3rd, the State asked for yet another continuance. Peppers’ father died unexpectedly the week before. She and her

stepmother were both grief-stricken and did not feel they could testify just days before the memorial service. 11/3/14 RP 63-64.

Granted, the unavailability of a witness is a valid reason for a continuance. State v. Iniguez, 167 Wn. 2d 273, 294, 217 P.3d 768, 778 (2009). But again, this circumstance could have been avoided had the State been ready to proceed on the previous trial dates.

Remedy. The State may argue Mr. Scott was not prejudiced by the continuances because he was out of custody during that time. Therefore, his conviction should stand. The speedy trial rule applies even though the delay resulted in no prejudice to the defense. State v. Striker, 87 Wn.2d 870, 875–77, 557 P.2d 847 (1976). Moreover, if a court, like the court here, fails to strictly comply with the speedy trial rule, it must dismiss the charge, regardless of whether the defendant can show prejudice. State v. Adamski, 111 Wn.2d 574, 582, 761 P.2d 621 (1988); State v. Swenson, 150 Wn.2d 181, 186–87, 75 P.3d 513 (2003); State v. Ralph G., 90 Wn.App. 16, 20–21, 950 P.2d 971 (1998); State v. Raschka, 124 Wn. App. 103, 112, 100 P.3d 339, 344 (2004).

V. CONCLUSION

The court granted the State's continuances, over Mr. Scott's objections, for circumstances the State could have avoided. Those continuances extended beyond Mr. Scott's speedy trial date. If this court finds the trial court violated Mr. Scott's right to a speedy trial, Mr. Scott asks this court to remand the case and to order the trial court to dismiss the fourth degree assault conviction.

Submitted this 2nd day of July, 2015.

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DECLARATION OF SERVICE

July 2, 2015

Court of Appeals Case No. 329712

Case Name: **State of Washington v. Thomas Alan Scott**

I declare under penalty and perjury of the laws of Washington State that on Thursday, July 2, 2015 I filed an appellant's opening brief with Division Three Court of Appeals and served copies to:

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