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AUG 31, 2015

Court of Appeals
Division III
State of Washington

No. 32971-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

THOMAS ALAN SCOTT,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00105-5

BRIEF OF RESPONDENT

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A. **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Did the trial court violate the defendant's right to a speedy trial?

B. **STATEMENT OF THE CASE**

The state accepts and adopts the procedural and substantive facts recited in the Brief of Appellant.

C. **ARGUMENT**

**THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S
RIGHT TO A SPEEDY TRIAL**

Analysis

A defendant's right to a speedy trial is protected by the Federal and State Constitutions. 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 rights in Washington State. CrR 3.3 provides time limits for trial to ensure defendants do not languish in jail and are brought to trial in a timely manner. Speedy trial within CrR 3.3 time periods, however, is not a constitutional mandate. *State v. Silva*, 72 Wn.App. 80, 83, 863 P.2d 597(1993).

CrR 3.3 also provides trial court judges with flexibility to grant continuances for a variety of reasons. The decision to grant a continuance under CrR 3.3 rests in the sound discretion of the trial court and will not be disturbed unless the defendant makes a clear showing that the court's decision was manifestly unreasonable or exercised on untenable grounds.

Additionally, the defendant must demonstrate that the court abused its discretion and that he was prejudiced by the court's continuance. *State v. Torres*, 111 Wn.App. 323, 330, 44 P.3d 903(2002)(citing *State v. Melton*, 63 Wn.App. 63, 66, 817 P.2d 413 (1991)); *State v. Kokot*, 42 Wn.App. 733, 735, 713 P.2d 1121 (1986); *State v. Flinn*, 154 Wn.2d 193 ,110 P.3d 748 (2005); *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004); *State v. Williams*, 104 Wn.App. 516, 520-21, 17 P.3d 648 (2001); *State v. Teems*, 89 Wn.App. 385, 388, 948 P.2d 1336 (1997).

In *Barker v. Wingo*, 407 U.S. 514, 530-534, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court developed a four part balancing test to determine when a defendant's right to a speedy trial has been violated.

The first factor is the length of delay. When considering this factor, "a defendant must show that the length of delay crossed a line from ordinary to presumptively prejudicial" *State v. Iniguez*, 167 Wn. 2d 273, 283, 217 P.3d 768 (2009)(internal citations omitted).

The second factor is the reason the government is asking for the delay. If the reason is a deliberate attempt to delay the trial or to hamper the defense, then that is weighed very heavily. If the reason is for a more neutral reason, such as negligence, that is weighed less heavily.

The third factor is the responsibility of the defendant to assert the right to the speedy trial. It is emphasized that a failure to assert the right will

make it difficult for a defendant to prove he was denied a speedy trial.

The fourth and final factor is the prejudice to the defendant. This factor should be addressed in light of the interests that the right to a speedy trial is designed to protect. Those interests are further defined as 1) to prevent oppressive pre-trial incarceration; 2) to minimize anxiety and concerns of the accused; and 3) to limit the possibility that the defense will be impaired; with the most important being the last, because the inability to prepare a defense adequately will skew the fairness of the system. An example would be the effect the length of time had on the availability and the ability to recollect events of defense witnesses.

The Washington State Supreme Court has developed a similar test for deprivations of the right under Const. art. 1, § 22 (amend. 10). *State v. Fladebo*, 113 Wn.2d 388, 393-94, 779 P.2d 707 (1989) (citing *State v. Christensen*, 75 Wn.2d 678, 686, 453 P.2d 644 (1969); *State v. Bradfield*, 29 Wn.App. 679, 683, 630 P.2d 494 (1981)).

With the case at hand, none of the continuances were based on untenable grounds, there was no abuse of discretion in granting any of the continuances in this case, and the defendant failed to demonstrate he was prejudiced in any way by the continuances. Even if this court were to review the basis of the continuances, when using the *Barker* factors, it is clear that none of the continuances granted violated the defendant's right to a speedy trial.

i. *September 3, 2014*

On September 3, 2014 a continuance of the trial date was granted and the defendant was released from custody, due to multiple trials being scheduled. When a court continues a trial beyond the speedy time requirements of CrR 3.3 based on court congestion, it must document the availability of pro tempore judges and unoccupied courtrooms *State v. Kenyon*, 167 Wn.2d 130, 139-140, 216 P.3d 1024 (2009).

In this case, the court did not continue the trial beyond the speedy trial requirements. Defendants detained in jail are to be tried within 60 days, and defendants not detained in jail are to be tried within 90 days. CrR 3.3(b). The initial trial set was September 3, 58 days after arraignment took place on July 7. While the defendant was detained from the time of arraignment until September 3, the defendant was released on his own recognizance on September 3. "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).

When the trial was continued and the defendant was released prior to the expiration of the 60 day limit, there is no speedy trial violation. The defendant was released from custody 58 days after arraignment, therefore, there is no speedy trial violation. It should be noted that on September 15, at a pre-trial hearing, defense counsel requested the trial be set on October 8, to which the prosecutor had no objection (RP at 44). There was clearly no objection to trial being set on October 8, as defense counsel picked the

date.

While the point is moot because the trial was not extended beyond the time limits, it should be noted that even though it may be true that there was no documentation of unoccupied courtrooms or the availability of a visiting judge or judge pro tem, that is because Klickitat County only has one courtroom. There are no other courtrooms to document. It does not make sense for the Court to offer a defendant a judge pro tem, when there would be no courtroom to have another trial. Klickitat County does not have the option of holding two trials simultaneously, even if another Judge is available.

ii. *October 6, 2014*

On October 6, the parties appeared in court on this matter. When the case was called, the prosecutor stated the cause number and “Time set for status.” (RP page 47, line 8-9). When the defense attorney stated that they were confirming trial on October 8, the Judge responded with “When?” (RP page 47, line 12). When defense counsel re-iterated October 8, the Judge responded with “The day after tomorrow? Did, it’s not noted for final review, so that just didn’t get into the . . . ?” (RP page 47, line 14-15) It is clear from this colloquy that the Judge was not expecting trial on October 8. When the Judge asks the prosecutor his position, the prosecutor also indicated that they believed it was just a status hearing, and that subpoenas had not gone out on the matter. It is at that time that the prosecutor asked

for a continuance. (RP page 48, lines 1-3).

Further in the colloquy, the Judge asks defense attorney “explain to me again how this fell through the cracks? Even when we have a final review, if there’s a trial on Wednesday, I always try to note it up for the Monday before for this very kind of reason.” (RP page 48, line 4-7). The Judge goes on to state that the fact that it was labeled on the docket as a status, rather than a final review, “threw us off. It didn’t have the words ‘Final Review’ so when I look at it, I see status, which means . . . ” to which the defense attorney finishes the trial courts sentence with “Usually two and a half weeks ” (RP page 48, line 16-18). The Judge also comments that “the Prosecutor probably fell in the same . . . ” (RP page 48, line 21).

In this case, it is obvious from the colloquy the court had with the prosecutor and the defense counsel that it was clearly a surprise to both the judge and the attorney that it was a trial set, due to the labeling on the docket. It was not a simple matter of being unprepared. The decision to grant a continuance was not for untenable reasons, as it was clear the Judge was just as surprised as the prosecutor.

While there was no abuse of discretion in granting this continuance, even if you examine the *Barker* factors it is clear the continuance did not violate the defendants right to a speedy trial: 1) the continuance was for a short period of two weeks; 2) the continuance was not a deliberate attempt to delay the trial, but rather it was due to the prosecutor needing a short

continuance to be prepared due to confusion; and 3) there was no actual prejudice to the defendant, as there was no detriment to the presentation of the defense, there was no oppressive incarceration because the defendant was out of custody, and the short delay did not affect any availability of defense witnesses.

As far as the factor concerning the defendant asserting his right to a speedy trial, while the defense orally objected to the continuance based on the speedy trial rule; however, the defense did not file a note for motion docket to hear any objection to a potential speedy trial violation. “Defense counsel must assert a client's speedy trial rights and attempt to assure compliance before the time for trial expires” *State v. Carson*, 128 Wn.2d 805, 815, 912 P.2d 1016 (1996). “A defendant waives his speedy trial rights under the court rules if the defendant does not timely object to the violation. *State v. Chavez-Romero*, 285 P.3d 195, 201(2012) (citing *State v. Harris*, 130 Wn.2d 35, 45, 921 P.2d 1052(1996)). CrR 3.3(d)(3) states that a written motion and note for motion docket must be filed within 10 days after the notice of the new trial date is given, moving the court to set a trial within the time limits required by CrR3.3. “The 2003 revised version of CrR 3.3 has not altered the burden on defendants to file a written objection within 10 days of the notice of the trial date. *State v. Chavez-Romero* 285 P.3d at 201(citing *State v. Farnsworth*, 133 Wn.App.1, 13 n.5, 130 P.3d 389(2006)).

In this case, the defendant did orally object, but he never filed a written objection or a note for motion docket to move the court to set the trial within the time limits. “A party who objects to the date set upon the ground that it is not within the 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 time limits prescribed by this rule.” CrR 3.3(d)(3), *State v. Chavez-Romero* 285 P.3d at 201.

iii. *October 20, 2014*

On October 20, the State asked for a continuance, based on the fact that the arresting officer would be on a preplanned vacation in Las Vegas. The defendant properly cites that scheduled vacations are a valid reason to continue a trial. “A preplanned vacation can be a basis to grant a continuance under [former] CrR 3.3(h)(2) when the defendant will not be substantially prejudiced in the presentation of his defense.” *State v. Heredia-Juarez*, 119 Wn.App. 150, 150, 79 P.3d 987(2003). (It should be noted that CrR3.3 was revised after *State v. Heredia-Juarez* and former CrR3.3(h)(2) reads substantially the same as CrR(f)(2) in effect.)

The defendant goes on to argue that while vacations are a valid

reason to continue a trial, in this case it is not valid because back on October 8 “the witness probably had not scheduled the vacation and could have been available.” (Appellant’s opening brief at 6). This is somewhat baseless, as it is the State’s experience that officers and other members of the court tend to plan vacations well more than two weeks in advance, because of the nature of the job and how vacations effect the justice system.

The continuance was not based on untenable grounds, as the vacation of the arresting officer is clearly a valid reason for a continuance, there was no abuse of discretion. Even so, if you look at the *Barker* factors, 1) the continuance was for a short period, two weeks, until the next trial setting; 2) the reason for the continuance was not an attempt to delay the trial or hamper the defense, it was for a pre-planned vacation; 3) and there was no actual prejudice to the defendant as the delay did not affect any ability to present a defense and had no effect on the availability or memory of defense witnesses, and there was no oppressive pre-trial incarceration because the defendant was not in custody; and 4) once again, the defendant verbally objected but never filed a written objection or note for motion docket, moving that the trial court set the trial within the time constraints.

iv. *November 3, 2014*

The final continuance was requested on November 3, due to the victim/witness requesting that the trial be continued because her father had died unexpectedly. The victim/witness did not feel that she could testify due

to the grieving process. The victim/witness was effectively unavailable. “Unavailability of a material prosecution witness is grounds to delay the trial for a reasonable time.” *State v. Torres*, 111 Wn.App. 323, 329, 44 P.3d 903, (2002) citing *State v. Day*, 51 Wn.App. 544, 549, 754 P.2d 1021 (1988).

Again, the continuance was not based on untenable grounds and there was no abuse of discretion. And again looking at the *Barker* factors, 1) the continuance was for a short period, two weeks; 2) the reason for the continuance was due to the unavailability of a prosecution witness and not to deliberately delay the trial to hamper the defense; 3) there was no actual prejudice to the defense as it did not affect any defense witnesses or any impairment to the defense, and there was no oppressive pre-trial confinement because the defendant was out of custody; and 4) finally, again, the defendant verbally objected, but did not file a written motion or a note for motion docket seeking a ruling ordering the trial be set within the time limits.

v. *Strict Compliance with the Speedy Trial Rule*

The defendant argues that there must be strict compliance with the speedy trial rule, regardless of whether the defendant can show prejudice. While it is true that there must be strict compliance with the speedy trial rule, the “constitutional right to a speedy trial does not mandate trial within 60 days.” *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980) (citing

State v. Mack, 89 Wn.2d 788, 576 P.2d 44 (1978)). What the constitution does require is “[u]nless time is excluded or extended by rule, the trial of a defendant charged in superior court who is not in custody on the charge must begin no more than 90 days after arraignment” *State v. Raschka*, 124 Wn.App. 103, 100 P.3d 339 (2004).

In this case, the court only extended the time in accordance with rule CcR 3.3(f)(2): “on motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired.”

Further, the record does not cite the section of CcR 3.3 that is being applied when granting the continuances. The defendant assumes that the applicable section is CcR 3.3(e)(8): “Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. However, “when a continuance is sought before the trial date, the circumstances are by definition ‘foreseen’” *State v. Williams*, 104 Wn.App. 516, 523-24, 17 P.3d 648 (2001). Because every continuance was asked for prior to the expiration of the speedy trial limitations, it is clear that the court was invoking CrR 3.3 (f)(2) and not CrR(e)(8).

While it may be true that some of the continuances were not “unforeseen circumstances,” that is not the only basis that a continuance is

allowed upon. “Any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case” *Barker* 402 U.S. at 521-22.

Looking at the totality of the case at hand, there is clearly no violation of the speedy trial rights. The trial court did not abuse its discretion in granting any of the three short continuances. Each continuance was for a two week period, set over only to the next trial week (in Klickitat County criminal trials are held every other week). The defendant was arraigned on July 7. Trial is started on November 19.

The defendant must show that he would be substantially prejudiced by the continuances. *State v. Heredia-Juarez*, 119 Wn.App. 150, 150, 79 P.3d 987(2003). This is impossible for the defendant to show. First and foremost, the defendant was not in custody. The defendant was out on his personal recognizance, he did not have to post bail. The overall delay was not of a significant amount of time. The short delay did not impair the defense, nor any defense witnesses, especially considering that the only witness was the defendant himself. Further, the defendant never once filed a motion and a note for motion docket requesting that the court set a trial date within the speedy time limits.

D. CONCLUSION

Because each and every continuance was granted within CcR 3.3(f)(2) and there was no abuse of discretion in granting the continuances, the court did strictly comply with the speedy trial rule. Further, the defendant lost the right to object to the continuances under CcR 3.3(d)(3). The conviction should be affirmed.

Respectfully submitted this 31st day of August, 2015.

KLICKITAT COUNTY
PROSECUTING ATTORNEY

A handwritten signature in cursive script that reads "Erika George". The signature is written in black ink and is positioned above a horizontal line.

ERIKA GEORGE
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
Division III**

STATE OF WASHINGTON
Respondent,
vs.
THOMAS A. SCOTT,
Appellant

NO. 32971-0-III
Superior Court No. 14-1-00105-5
CERTIFICATE OF MAILING

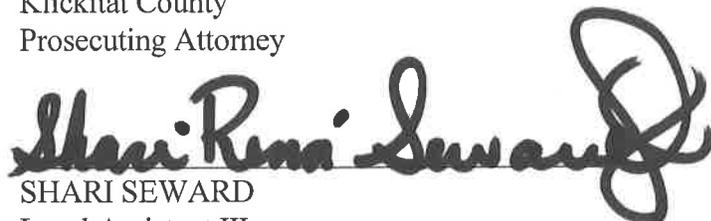
I, Shari Seward, certify that on August 31, 2015, I emailed, a copy of the Brief of Respondent to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31st day of August, 2015.

DAVID R. QUESNEL
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
Division III**

STATE OF WASHINGTON
Respondent,
vs.
THOMAS A. SCOTT,
Appellant

NO. 32971-0-III
Superior Court No. 14-1-00105-5
CERTIFICATE OF MAILING

I, Shari Seward, certify that on August 31, 2015, I deposited in the United States mail by certified mail, proper postage affixed, a copy of the Brief of Respondent to:

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ROSLYN, WA 98941

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31st day of August, 2015.

DAVID R. QUESNEL
Klickitat County
Prosecuting Attorney



SHARI SEWARD
Legal Assistant III