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Court of Appeals
Division III
State of Washington

34033-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRADEN HALL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S ASSIGNMENTS OF ERROR

The court erred in denying the defendant's motion to dismiss for violation of the speedy trial rule.

II. ISSUES PRESENTED

1. Whether the defendant's time for trial commenced when he did not make an in-court appearance for arraignment as required by JuCR 7.8?
2. Whether the defendant's time for trial was reset to zero days when he failed to appear for a pretrial hearing as required, assuming his time for trial had commenced, as he had not previously appeared in court?
3. Whether the defendant's failure to comply with JuCR 7.8 requirements is excused by his deference to a contradictory local rule and "local practice"?
4. Whether the defendant invited error by failing to call the scheduling issue to the attention of the court and by his attorney's failure to reschedule the case to the plea docket as she promised?
5. Whether defense counsel's failure to reschedule the defendant's case on the docket as promised or probation's unavailability for the plea and disposition qualifies as "unavoidable or unforeseen circumstances" under JuCR 7.8(d)(7)?
6. Whether the trial court erred in determining that the defendant's time for trial commencement date was recommenced when it made a specific finding the defendant earlier failed to appear and the new commencement date was the date of his next court appearance?

III. STATEMENT OF THE CASE

An information was filed on October 10, 2014, charging Braden Hall with criminal mischief, fourth degree assault, obstructing a law

enforcement officer and being a minor exhibiting the effects of having consumed liquor. CP 1-2. Mr. Hall was summoned to court for his arraignment on October 28, 2014. CP 3, 79. The defendant failed to appear for this arraignment hearing. CP 36, 79. Defense counsel requested a continued arraignment date to November 4, 2014. CP 6, 79. The matter was not docketed on November 4, 2014, and was reset for November 14, 2014. CP 79. The defendant again failed to appear on that date. CP 36. Defense counsel requested another continuance and the arraignment was again continued by agreed order to November 25, 2014. CP 7, 79.

On November 21, 2014, the defendant signed and filed both a waiver of in-court arraignment, CP 11, and an acknowledgement that he was advised of his constitutional rights, CP 9-10. The waiver of in-court arraignment set an adjudicatory hearing for December 29, 2014, with a pretrial hearing of December 17, 2014. CP 11, 79. In that order, the defendant promised to appear for “the date set by the Court.” CP 11.

On December 17, 2014, the defendant failed to appear for the pretrial conference set by the court. CP 36. Despite the defendant’s absence, defense counsel requested a continuance of the adjudicatory hearing and pretrial dates, and an agreed scheduling order was signed by the court. CP 12. That order set the adjudicatory hearing for January 12, 2015 and the pretrial conference for December 31, 2014. CP 12.

On December 30, 2014, the State received email correspondence from defense counsel with a plea offer. CP 36, 41, 80. The State accepted that offer. CP 36, 41. Defense counsel then requested the court set a new pretrial conference on January 14, 2015 to accommodate the setting of a plea date, and informed the court of the agreed resolution. CP 13, 80. Neither of the two scheduling orders filed after the advice of rights and waiver of arraignment was signed by the defendant. CP 12-13.

On January 13, 2015, the day before the pretrial conference was to be held, defense counsel requested a plea date. CP 37. The defendant's case was set for plea on February 4, 2015.¹ CP 37. On February 3, 2015, the parties were notified via email from the juvenile probation department that it was not prepared for the plea because the assigned probation officer was on medical leave and the covering probation officer had not yet conducted his investigation and was not ready to present any information to the court.² CP 45-46, 80. In order to allow the probation officer time to conduct his investigation, the defense attorney represented to the State and to the probation officer that she would reset the plea date. CP 37, 80.

¹ There was no formal scheduling order setting this date. The State assumes this request was made electronically.

² Pursuant to the probation counselor's statutory duties codified in RCW 13.04.040(4) and 13.40.130(7).

Defense counsel failed to request a new plea date. RP 80. On March 17, 2015, the prosecutor emailed the defense attorney to indicate that Mr. Hall needed his plea date to be reset. CP 48, 80. The defense attorney then indicated that she believed there to be a speedy trial issue. CP 48, 80. On March 23, 2015, the State inquired why the defense believed there to be a speedy trial violation. CP 48, 80. The defense attorney indicated that it had been “60 days since the last order was entered.” CP 48. The prosecutor then indicated to the defense attorney she assumed the defense would set the issue for a motion. CP 48.

On April 13, 2015, the deputy prosecutor sent the defense attorney another email observing that the defense attorney had not yet set a motion to address the alleged speedy trial violation, and that the State would be requesting the case be set back on the pretrial docket. CP 50-51, 80. The State requested a new hearing date of April 22, 2015. CP 80. On April 22, Mr. Hall was present at the juvenile court building, but did not appear in court. CP 80. Defense counsel did not file the motion to dismiss until April 27, 2015. CP 14, 80.

Based upon these facts and the argument presented at the motion hearing, the Honorable Salvatore Cozza denied the defendant's motion to dismiss pursuant to the court-rule right to speedy trial, concluding:

1. Pursuant to JuCR 7.8(7) and the facts in this case the delay in trial was based upon unforeseen or unavoidable circumstances, and therefore no violation of time for trial has occurred.
2. Pursuant to the respondent being present for a hearing on April 22, 2015, the Court finds April 22, 2015 to be the new commencement date.

CP 80.

Mr. Hall's matter proceeded to a stipulated facts trial on December 15, 2015.³ CP 73-74, 104. The trial court adjudicated Mr. Hall committed the crimes of fourth degree assault and obstruction of a law enforcement officer. CP 82. The defendant timely appealed.

IV. ARGUMENT

The Sixth Amendment and Article I, section 22 of the State Constitution provide criminal defendants with the constitutional guarantee to a speedy trial. Additionally, CrR 3.3, CrRLJ 3.3 and JuCR 7.8 provide court-rule enforcement of the right to a speedy trial, but are not themselves

³ Defendant's stipulated facts trial was originally set to be heard on August 25, 2015, but the defendant failed to appear for that hearing as well, and a warrant was issued for his arrest. CP 62.

a guarantee of constitutional rights. *See State v. Brewer*, 73 Wn.2d 58, 62, 436 P.2d 473 (1968).

Although defendant argued below that his constitutional right to a speedy trial was violated by the instant scenario, he has not persisted in making that argument on appeal. Rather, his argument on appeal is only that his time for trial under JuCR 7.8 was violated. He claims that he is therefore entitled to a dismissal of his charges with prejudice. In challenging the trial court's conclusion that there was no time for trial violation, the defendant does not challenge the findings of fact, or the evidentiary support for those findings, but rather, challenges only the court's conclusion that there were "unavoidable or unforeseen circumstances beyond the control of the court" that allowed the exclusion of that time from the calculation of the time for trial. Appellant's Br. at 1.

Standard of Review

This court reviews a claim of an alleged violation of the speedy trial court rule *de novo*. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). On review, uncontested findings of fact are verities on appeal. *State v. Tolles*, 174 Wn. App. 819, 824, 301 P.3d 60 (Div. 2, 2013). The appellate court may affirm the trial court's decision on any basis supported by the record. *State v. Olmos*, 129 Wn. App. 750, 755, 120 P.3d 139 (Div. 2, 2005).

A. NO VIOLATION OF THE DEFENDANT’S COURT-RULE RIGHT TO SPEEDY TRIAL OCCURRED.

The defendant’s right to a speedy trial pursuant to JuCR 7.8 was not violated for two reasons. First, the defendant never “appeared” in court for an arraignment prior to the alleged speedy trial violation as required by JuCR 7.8, and therefore, he had no commencement date from which speedy trial could be calculated. Second, even assuming his written waiver of arraignment constituted a court “appearance” within the meaning of JuCR 7.8, the defendant subsequently failed to appear in court as ordered, and therefore, the elapsed time since his “appearance” for arraignment was reset to zero days. The speedy trial calculation then remained at zero days until the date of his next physical appearance in court.

1. Determination of Speedy Trial Commencement Date.

A juvenile who is not held in detention shall be brought to adjudicatory hearing within the longer of 60 days after the commencement date, or 15 days after the end of any excluded period pursuant to JuCR 7.8(e). JuCR 7.8(b)(2)(i)-(ii). The initial commencement date is the date of arraignment as determined by JuCR 7.6 and CrR 4.1. JuCR 7.8(c)(1). JuCR 7.6 provides the time requirements for arraignment of a defendant who is held in detention or under conditions of release.⁴

⁴ Mr. Hall was out of custody without conditions of release at all times pertinent to the calculation of speedy trial. CP 3-7, 11.

CrR 4.1 provides that defendants who are not detained shall be arraigned “not later than 14 days after that *appearance* which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay.” CrR 4.1(a)(2)(emphasis added).

“Appearance” within the meaning of CrR 4.1(a)(2) is defined in CrR 3.3(a)(3)(iii) and JuCR 7.8(a)(2)(iii) as the defendant’s “physical presence in the ... court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.” *See also, State v. Sanchez*, 172 Wn. App. 678, 684, 291 P.3d 902 (Div. 3, 2012) *rev. denied*, 178 Wn.2d 1009 (2013). These definitions of “appearance” are identical except for the language in CrR 4.1(a)(2) that requires that appearance must be made in the “adult division” of the superior court. Therefore, unlike the rules applicable to courts of limited jurisdiction, which allow for the “appearance” by only an attorney and entry of a plea of “not guilty” by that attorney on the defendant’s behalf, CrRLJ 4.1(g), the juvenile and adult rules of the Superior Court both require the actual physical presence of a defendant for arraignment. There is no court rule adopted by the

Washington State Supreme Court that allows for the waiver of arraignment by a juvenile defendant.⁵

Because the juvenile rules require a defendant's physical presence for arraignment, the "commencement date" for the calculation of speedy trial is the date the defendant actually physically appeared in court pursuant to CrR 4.1(a)(2) and JuCR 7.8(a)(2)(iii) to be arraigned. JuCR 7.6, 7.8(c)(1); CrR 4.1. Where a defendant never actually physically appears for arraignment, but files a "waiver of arraignment" (which is not allowed by the juvenile rules), the commencement date for speedy trial purposes is calculated not as of the date the defendant signed that document (here, November 20, 2014), filed that document (here, November 21, 2014), or was ordered to appear but did not do so due to the earlier filing of the waiver of arraignment (here, November 25, 2014), but rather, as of the date the defendant makes his actual first physical appearance in court, (here, the earliest possible date was April 22, 2015).⁶

⁵ A thorough discussion of former Spokane County LJuCR 7.6 which allowed a juvenile offender to waive in-person arraignment and how it affects defendant's speedy trial claim is discussed below. Because the local rule cannot trump a conflicting state rule as discussed below, the local rule's provisions are discussed separately from the state rule's provisions.

⁶ For purposes of JuCR 7.8(a)(2)(iii) or CrR 4.1(a)(2), it is doubtful the defendant actually "appeared" on April 22, 2015, either. While the trial court found that the defendant was "present in the building" on that date, CP 100, there is no court-finding that the prosecutor was aware of his presence at the time, or that the presence was contemporaneously noted on the record under the cause number of

Therefore, there could be no violation of the defendant's time for trial right because no violation of the time for trial can occur when the time for trial has not even commenced.

2. The Defendant's Failure to Appear at a Hearing Where His Presence was Required Reset the Elapsed Time for Trial to Zero.

The speedy trial rules provide that the elapsed time from the commencement date is reset to zero whenever the juvenile fails to appear for any proceeding at which the juvenile's appearance was required. JuCR 7.8(c)(2)(ii). Where this occurs, the elapsed time remains at zero days until the date of the juvenile's next "appearance,"⁷ which is the new commencement date. JuCR 7.8(c)(2)(ii).

Even assuming Mr. Hall was actually arraigned on November 25, 2014,⁸ (the date his formal arraignment was supposed to be held), Mr. Hall

the pending charge as required by both rules to satisfy the "appearance" requirement, and there is no evidence in the record that would support either such finding. Certainly if such a proceeding existed, the defendant would have designated it on appeal for review.

⁷ "Appearance" in this context would be defined in the same manner as discussed above. JuCR 7.8(a)(2)(iii).

⁸ No error is assigned to the Court's finding of fact that Mr. Hall was arraigned on November 25, 2014. Appellant's Br. at *passim*. As discussed above, the advice of rights and waiver of arraignment were signed by the court on November 20, 2014 and were filed with the court on November 21, 2014.

It is ultimately irrelevant whether the defendant was arraigned on November 25, 2014 or on an earlier date by the filing of his waiver of arraignment, because the Court specifically found that the defendant failed to appear as ordered by the Court's scheduling order of November 21, 2014. A failure to appear

subsequently failed to appear for a required hearing as directed by the court. CP 79. The waiver of arraignment specifically provided that the defendant was required to appear on “the date set by the court.” CP 11. The court below found that Mr. Hall did not appear in court on December 17, 2014, despite the court order requiring his attendance. CP 11, 79. Because Mr. Hall failed to appear for a court date at which his attendance was required, the elapsed time since Mr. Hall’s arraignment was reset to zero and the new commencement date under JuCR 7.8(c)(2)(ii) was the date of the defendant’s next appearance. The trial court specifically concluded that the date of the defendant’s next appearance, April 22, 2015, was the new commencement date, as the defendant was “present in the building”⁹ on that date. CP 80.

Even assuming that there was an “initial commencement date” from which the defendant’s speedy trial calculation could be determined, defendant’s failure to appear reset the time for trial to zero days until the date of the defendant’s next appearance, which was, at the earliest, April 22,

operates to reset the commencement date, regardless of what date that might be, to zero, and the new commencement date is the date of the defendant’s next physical court appearance. JrCR 7.8(c)(2)(ii).

⁹ As discussed above, a defendant’s mere presence in the building does not constitute an “appearance” for purposes of JuCR 7.8(a)(2)(iii) or 7.8(c)(2)(ii) unless such presence is contemporaneously noted on the record and the prosecutor is aware of the presence.

2015,¹⁰ five days before the defendant filed his motion to dismiss. Assuming a new commencement date of April 22, 2015, the defendant would have a time for trial right under the court rule to an adjudicatory hearing within 60 days of that date. Sixty days after April 22, 2015 was June 21, 2015. There was no speedy trial violation based on the JuCR 7.8 as adopted by the Supreme Court of the State of Washington, and the trial court properly denied the motion to dismiss.

B. THE FORMER LOCAL RULE AND “LOCAL PRACTICE” DO NOT EXCUSE OR JUSTIFY THE DEFENDANT’S FAILURE TO COMPLY WITH JuCR 7.8’S REQUIREMENT THAT HE APPEAR IN COURT TO CLAIM BENEFIT OF THE TIME FOR TRIAL RULE.

Defendant argues that the “accepted practice” in Spokane County of “not requiring juvenile defendants to appear at pretrial hearings” affects the analysis of whether the court was correct when it determined that there were “unavoidable or unforeseen circumstances” allowing for the exclusion of some period of time from the time for trial calculation under JuCR 7.8(e)(7). Appellant’s Br. at 6. The trial court’s conclusion that “unavoidable or unforeseen circumstances” existed in this case is addressed in detail below.

¹⁰ At the latest, the commencement date would be the first date when defendant’s actual physical appearance was noted on the record, which, as far as the State is able to discern from the record before the court was sometime in December 2015, given that is when Mr. Hall’s stipulated facts trial occurred, and the courtroom minutes from all other recorded proceedings indicate that he was not present.

The defendant also cites former LJuCR 7.6(3) as a justification for his waiver of arraignment. Appellant's Br. at 2. The effect of the former local rule and "local practice" will each be taken in turn.

1. Former LJuCR 7.6(3) was an invalid local rule because it impermissibly excused a defendant from appearing in court for arraignment.

The defendant argues on appeal that the juvenile court of Spokane County "established, followed or at a minimum acquiesced in practices which left open the possibility that juvenile adjudicatory hearings could be rescheduled without regard to the provisions of the speedy trial rule or the rights of the alleged juvenile offender." Appellant's Br. at 1-2, 5-6. However, the fact that the juvenile court, as well as the parties, formerly operated under the local rule does not mean that Mr. Hall is now entitled to relief under JuCR 7.8.

Superior courts may rely on RCW 2.28.150 for authority to create a mode of proceeding necessary to carry out a statutory directive without violating constitutional rights. In promulgating and amending local court rules governing practice and procedure, superior courts must follow the guidelines set forth by the Supreme Court in CR 83 and GR 7. The local rule (1) must be adopted by a majority of the court, (2) must not be inconsistent with the general rules of procedure as established in the Official Rules of Court that govern all superior courts of this state and (3) becomes

effective only after being filed with the state administrator for the courts. CR 83; GR 7; *State v. Chavez*, 111 Wn.2d 548, 554, 761 P.2d 607 (1988). “Inconsistent” when involving court rules means that the court rules are so “antithetical that it is impossible as a matter of law that they can both be effective.” *Chavez*, *supra*, citing *Heaney v. Seattle Mun. Court*, 35 Wn. App. 150, 155, 665 P.2d 918 (1983). When a local rule and a State rule conflict, the local rule is ineffective. *Harbor Enter., Inc. v. Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991) (“We note that even if the local rule were as plaintiffs claim, the *local rule would not control because its provision conflicts with the statute*. We have held that local rules must not be inconsistent with rules adopted by this court. The same principle negates a local rule which conflicts with a statute. The statute grants a valuable right to a litigant; a local rule cannot restrict the exercise of that right...”)(emphasis added).

The then-existing Spokane County juvenile court rule applicable to arraignments and pleas, LJUCR 7.6(3), provided that “an in-court appearance by the juvenile and counsel is required *at the initial hearing unless a Waiver of Arraignment signed by the juvenile*, the defense attorney, and approved by the prosecutor has been filed with the court; or a continuance order signed by the prosecutor, the defense attorney and approved by the court has been filed.” (Emphasis added.)

The effect of LJuCR 7.6(3) was to allow a juvenile offender to waive formal and in-person arraignment. The provisions of the local rule directly conflicted with the state court rule, promulgated by our Supreme Court, because the state rules do not allow any circumstance where a defendant may waive arraignment in either the adult or juvenile divisions of the Superior Court,¹¹ but rather, require the defendant's physical presence for arraignment, and for the time for trial commencement date to be set. These rules cannot be harmonized. As such, this conflict negated the local rule. In terms of asserting his time for trial right under the state rule, the defendant cannot now claim he was excused for failing to comport with the state rule because he followed an ineffective local court rule.^{12, 13}

¹¹ As discussed above, had the Supreme Court intended to allow waiver of in-person arraignment by juveniles, it could have promulgated a rule similar to CrRLJ 4.1(g) that would allow for such a waiver of arraignment by counsel. The Court did so for district court cases, but did not do so for juvenile court cases. Thus, it must have intended juveniles to attend their arraignments in person.

¹² A number of Spokane County local court rules for Juvenile Court were deleted on an emergency basis effective April 1, 2016 and on a permanent basis effective September 1, 2016. *See* LJuCR 7.1-7.14 (2017). LJuCR 7.6(3) was one such rule.

¹³ For that matter, the time for trial rule (and time for arraignment rule) is a procedural rule. *See Olmos*, 129 Wn. App. at 757. The deletion of the local rule while the defendant's case is still pending and not final would have the effect of mooting the defendant's claim that the former local rule applies to his case and justifies his conduct in failing to follow the state rule. "A new criminal court rule applies to pending cases on its effective date, regardless of when the case began, unless in the court's opinion the former rule should apply in the interests of justice... Moreover, a new rule of criminal procedure applies to all cases pending

As discussed above, the earliest time the defendant made a physical appearance in court (and the earliest possible commencement date) was April 22, 2015. This is the *only* finding the trial court made establishing the defendant's physical presence in the courthouse. CP 80 (Finding of Fact 18). The defendant's time for trial calculation began no sooner than that date.

2. "Local Practice."

Regarding the "practice" of the court or counsel to allow juveniles to waive attendance for their pretrial hearings, although defense counsel made this argument below,¹⁴ the trial court made no written or oral findings of fact to this effect. CP 79-80. Trial counsel's argument is not evidence.

on direct review or that are not yet final with no exception for cases in which the new rules constitutes a clear break from the past." *Id.*

¹⁴ [Defense Counsel:] [T]he argument that he failed to appear for a mandatory hearing is not correct because there was no mandatory hearing, it was that we at that point in time where we were not requiring the presence of juveniles at their pretrial, they were not required to appear. As the Court is strongly aware, November 21st, we did not have a new administration, we did not require that they appear, we signed off on the continuance so there was no required or mandatory appearance for him to do that. So, therefore, his commencement date did not reset because he didn't appear and, therefore, the time for trial rules have been violated.

RP 15.

On the contrary, the trial court specifically found:

5. On 11/25/14 the respondent was arraigned, and the initial adjudicatory hearing was set for 12/29/14 and a pretrial conference was set on 12/17/14.

6. On 12/17/14 a pretrial conference was held, and *despite the prior Court order, the respondent was not present*. At that time, his attorney requested that the matter be reset to 12/31/14 and a 1/12/15 trial date.¹⁵

CP 79 (emphasis added).

Whether there was a “common practice” to not require juvenile defendants to attend criminal pretrials in Spokane County is not relevant because not only did the court below fail to make a finding to that effect, but also in order to reap the benefits of the time for trial rule, a defendant must actually comply with the rule.

Even assuming the local rule and practice in some way excused the defendant’s failure to comply with a strict reading of JuCR 7.8, he is not entitled to dismissal under the rule. JuCR 7.8(a)(3) provides:

The allowable time for the adjudicatory hearing shall be computed in accordance with this rule. If a hearing is timely under the language of this rule *but was delayed by circumstances not addressed in this rule or JuCR 7.6*, the pending charge shall not be dismissed unless the juvenile’s constitutional right to a speedy trial was violated.

(Emphasis added.)

¹⁵ These unchallenged findings of fact are verities on appeal.

Mr. Hall's hearings were timely under the rule because he was never arraigned in person, and failed to appear for a pretrial which reset any elapsed time to zero days. If this court determines however, that the local rule or practice delayed Mr. Hall's hearing in some fashion not addressed by JuCR 7.8, then Mr. Hall's case can only be dismissed upon a showing of a constitutional speedy trial violation. Defendant cannot make that showing.

C. THE INVITED ERROR DOCTRINE PRECLUDES THE DEFENDANT FROM SETTING UP THIS ALLEGED ERROR AND THEN COMPLAINING OF IT ON APPEAL.

The invited error doctrine precludes a criminal defendant from seeking appellate review of an error he helped create. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). To determine whether the invited error doctrine is applicable to a case, the court considers whether the petitioner affirmatively assented to the error, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009); *In re Pers. Restraint of Copland*, 176 Wn. App. 432, 442, 309 P.3d 626 (2013).

Mr. Hall failed to comply with the rule's requirement that he make a physical appearance in court in order to trigger the time for trial commencement date, as discussed above. JuCR 7.8(a)(2)(iii) and (c)(1).

Any claim that this failure was based on “local practice” (whether sanctioned by his defense attorney or acquiesced to by the trial court¹⁶) is a mere attempt to deflect blame from defense counsel’s failure to set the matter on the docket for plea as she agreed and told counsel and the Court she would do. Unlike the claimed “local practice” relied upon by the defendant to excuse his lack of court attendance (regarding which the trial court made no findings whatsoever) the trial court *specifically found* that defense counsel represented to the court and to the State that she would reset the plea date after the probation officer notified counsel that it was not prepared for court. CP 80 (Findings of Fact 9-11). The Court *specifically found* that defense counsel did not do so. CP 80 (Finding of Fact 12). It also *specifically found* that even when the State inquired of defense counsel three times as to the status of the case and whether she would set a motion to dismiss on time for trial grounds, she failed to set any motion and as a result, the State requested a hearing on the matter. CP 80 (Findings of Fact 13-17). The court and the prosecutor should have been able to rely on counsel’s

¹⁶ At the time the defendant failed to appear for the pretrial hearing, he had not made *any* appearance before the trial court. Certainly then, the “current practice” of allowing defendants to not attend pretrial hearings, if communicated to the defendant, was communicated by defense counsel, not the court, in direct conflict with the “Waiver of Arraignment” orders (signed by the defendant and defense counsel) requiring defendant’s physical appearance in court for the subsequent pretrial hearing.

representation that this case would result in a plea and on her promise to reset the plea date.

As in *Sanchez*, in order for a defendant to assert a time for trial violation under these rules, he must comport with the rules affording him that protection. In *Sanchez*, a juvenile defendant and his counsel appeared for a pretrial hearing only to discover that the case was not listed on the docket and the matter was not called by the Court. Both left the courtroom without notifying the Court of their presence and of the scheduling error. 172 Wn. App. at 681. This court held that the defendant did not “appear” as required by JuCR 7.8 even though he was physically present in the courtroom because he failed to address the court on the record. *Id.* at 684-685. In order for Mr. Sanchez to have obtained the benefit of the time for trial rule, “counsel had to advise the court of the calendaring error and have the court address it on the record. That did not happen.” *Id.*¹⁷

Similarly, the trial court orally stated in this case:

[I]n order for Mr. Hall here to get the benefit of the, of the rule, as in the *Sanchez* case, the defense is, you know, kind of placed with the burden of bringing the problem to the attention of the Court on the record so that the Court can

¹⁷ Even under the pre-2003 time for trial rules, “if the defendant caused any delay through fault or connivance, the delay was excluded from the speedy trial time.” *See Olmos*, 129 Wn. App. at 756.

properly do something to solve the problem... [T]hat didn't happen here.”¹⁸

RP 21.

In *Sanchez, supra*, the defendant's case “fell off the docket” due to clerical error. However, in failing to advise the court of the error when he appeared in court, the defendant was precluded from arguing that his time for trial had passed. Here, the case also “fell off the docket” but this did not occur due to clerical or court error, but *due to defense counsel's representations* that she would schedule the matter for a plea, and *her failure to follow through with that assurance*.

Any error in this regard is invited error because the defendant, through his counsel, set up the error. Certainly he benefitted from not appearing in court, regardless of whether local practice or his attorney's advice sanctioned that behavior. Involvement in the criminal justice system is much easier, less time-consuming, and more pleasant when an individual never has to come to court. And, Mr. Hall benefitted from his attorney's failure to reset his case for a plea – whether this failure was inadvertent or

¹⁸ A trial court's oral ruling has no final or binding effect unless formally incorporated into findings, conclusions and the judgment. *State v. Bryant*, 78 Wn. App. 805, 812, 901 P.2d 1046 (Div. 2, 1995). However, an appellate court may consider a trial court's oral decision in interpreting its written findings of fact and conclusions of law so long as there is no inconsistency between the written and oral rulings. *See State v. Tili*, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003).

intentional - because this failure allowed him to set up the current time for trial complaint. He should not be allowed to benefit from the alleged error that in part was due to his and his attorney's actions (or inaction).

D. THE COURT'S DETERMINATION THAT UNAVOIDABLE OR UNFORESEEABLE CIRCUMSTANCES BEYOND THE CONTROL OF THE COURT OR THE PARTIES EXCLUDED TIME FROM THE SPEEDY TRIAL CALCULATION WAS CORRECT, AND IN ANY EVENT, THIS COURT MAY AFFIRM ON ANY BASIS SUPPORTED BY THE RECORD.

In this case, the trial court made two conclusions of law based on his findings of fact:

1. Pursuant to JuCR(7) and the facts in this case the delay in trial was based on unforeseen or unavoidable circumstances, and therefore no violation of time for trial has occurred.
2. Pursuant to the respondent being present for a hearing on April 22, 2015, the Court finds April 22, 2015 to be the new commencement date.

CP 80.

The trial court's ruling that unforeseen or unavoidable circumstances existed is easily supported by this record for two reasons. First, it was unavoidable or unforeseen that the assigned probation officer would be ill and the covering probation officer would be unprepared for the original plea date; therefore, it was unforeseeable or unavoidable that the original plea date would need to be reset. Second, it was also unforeseeable that defense counsel would fail to follow through with resetting the plea

date as she promised. In any event, this conclusion of law is not necessary for this court to determine that there was any excluded period of time from the defendant's time for trial calculation, because, as indicated above, the defendant never appeared in court, thus commencing his time for trial.

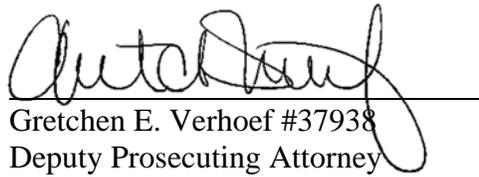
The court's second conclusion of law supports this argument. The court actually calculated a new commencement date. Under JuCR 7.8, the only time that a new commencement date is established is upon the occurrence of one of the events in JuCR 7.8(c)(2), which includes failure to appear. "Unavoidable or Unforeseen Circumstances" do not qualify as an event that resets the time for trial, but rather as an event that excludes time from the calculation. JuCR 7.8(e). The trial court's determination that the defendant's time for trial was subject to a new commencement date of April 22, 2015 is supported by his finding of fact that the defendant failed to appear as ordered on December 17, 2014. CP 79. There was no error in the trial court's conclusions of law based upon its findings of fact. Even if there were an issue with the court's first conclusions of law, this court may affirm the trial court on any basis supported by the record. *Olmos*, 129 Wn. App. at 755.

V. CONCLUSION

The defendant's time for trial right under JuCR 7.8 was not violated. He did not make an appearance in court until April 22, 2015. Therefore, his time for trial did not commence until that date. He cannot rely on the invalid local court rule and "local practice" to excuse his failure to comply with JuCR 7.8, and his failure to comply with the time for trial rule precludes him from entitlement to relief under that rule. Additionally, his attorney's failure to reset his case for a plea, whether intentional or unintentional, caused the defendant's case to "fall off the docket," which materially contributed to the error, if any existed. The trial court correctly concluded that there was no violation of the time for trial rule. The State respectfully requests that this Court affirm the lower court's ruling and adjudication.

Dated this 13 day of January, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

BRADEN HALL,

Appellant.

NO. 34033-3-III

CERTIFICATE OF MAILING

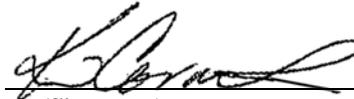
I certify under penalty of perjury under the laws of the State of Washington, that on January 13, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Janet Gemberling

jan@gemberlaw.com; admin@gemberlaw.com

1/13/2017
(Date)

Spokane, WA
(Place)


(Signature)