

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 345149

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JUSTIN ALLEN DUNLAP,

Defendant/Appellant

Respondent's Brief

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The court did not abuse its discretion in setting the defendant's trial sixty-four days after his arraignment when the continuance into the cure period was at his attorney's request over the defendant's objection because she was not ready for trial.

B. ISSUES PRESENTED

- a. When a defense attorney says she is not ready for trial can the court grant a one week continuance over the defendant's objection when that causes his trial to begin sixty-four days after his arraignment?

C. STATEMENT OF THE CASE

The defendant was arraigned on charges in this case on March 21, 2016 (RP at 17). He was charged with three counts: Burglary in the First degree, Assault in the Second degree, and Malicious Mischief in the third degree. (RP at 17 -18). At the arraignment, dates were set, including a trial date of May 10, 2016 with Mr. Dunlap's expiration for the time for trial set on May 20, 2016 and the court held the defendant in custody with a bail requirement and he remained in custody as the case proceeded (CP at 2, 260, 30 -31, 36).

On April 29, 2016 the court informed the parties that Mr. Dunlap's trial was the third set trial in priority for the May 10, 2016 date. (RP at 35, CP at 37). A scheduled pretrial date set for April 29 was re-noted to May 9. (RP at 35, CP at 37). On May 9, the state announced that it was ready to proceed to trial on May 10, but that the case was second set in priority; another trial was scheduled and in fact went to trial beginning on May 10 (RP at 38, 43). On May 13 the state represented to the court that Mr. Dunlap's attorney was in a different trial, but asked that a status be set for Monday, May 16 at 1:30 p.m. and indicated Mr. Dunlap's trial was the first set trial for the following week, to begin in Tuesday, May 17 (RP at 41).

At a hearing in court on May 16, Mr. Dunlap's attorney informed the court she was not ready for trial based on the amendment of the information by the state to add additional charges while also indicating Mr. Dunlap wanted to move forward with trial regardless of her feelings of preparedness (RP at 42 – 44). The new charges alleged that on May 9 (one week before the hearing) Mr. Dunlap violated an existing no contact order and tampered with a witness.

(RP at 44; CP 111 – 113) The court engaged in a dialogue with Mr. Dunlap where it reiterated to him that even though his attorney was saying she wasn't ready, the court would keep the trial set if that was Mr. Dunlap's desire. (RP at 44 – 47; 50 – 52). Mr. Dunlap wanted trial to begin the next day, even though the attorney represented on the record she was not ready for trial (RP at 51). The court over Mr. Dunlap's insistence re-set the trial one week to give his attorney time to prepare for additional counts added by the state and found good cause for a continuance (RP at 53). The defendant addressed the court and said, "I was just going to ask you to try and get an understanding of how it's okay to go past my 60-day constitutional – my constitutional right at 60 day – I was just trying to understand that." The court went into a lengthy explanation about "speedy" and the court rule regarding the sixty day limit (RP at 54 – 57).

Mr. Dunlap's trial began on May 24, 2016; sixty four days after his arraignment. While the facts of the trial are interesting, they are not relevant to the appeal and have been omitted by the state for purposes of brevity. Mr. Dunlap was found guilty by the jury of violating a no contact order as

charged in count five (RP at 369 – 70; CP 258). This appeal followed.

ARGUMENT

- a. Is it an abuse of discretion for a court to grant a continuance of a defense attorney of one week over a defendant's objection when that extra week sets the trial within the cure period for time for speedy trial under CrR 3.3(g)?

CrR 3.3(b) (1) and (c) (1) sets the time for trial when a defendant is in custody as 60 days from the arraignment date. CrR (d) (3) requires that any objection to a trial setting shall be made within ten days of the setting of that date or objection shall be waived. Also under CrR 3.3(f)(2) upon motion by the court or a party the court can continue the trial date to a specified date when the interests of justice so require and any bringing of such motion by or on behalf of any party waives that party's objection to the requested delay. The court additionally provides a five day "cure" period beyond the expiration set by the court under CrR(g) upon a finding the defendant will not be substantially prejudiced in the presentation of his defense by a continuance.

Generally, trial within 60 days is not a constitutional mandate, and a trial court's grant or denial of a motion for continuance will not be disturbed on appeal absent a showing of manifest abuse of discretion. State v. Brown, 40 Wn. App. 91, 697 P.2d 583, review denied, 103 Wn.2d 1041 (1985). Grant or denial of a continuance rests within sound discretion of trial court and is reviewable only for manifest abuse of discretion. State v. Yuen, 23 Wn. App. 377, 597 P.2d 401, review denied, 92 Wn.2d 1030 (1979). The granting of a continuance rests with the discretion of the trial court, which will not be disturbed without a showing that the defendant was prejudiced or that the result of the trial would have been different. State v. Turner, 16 Wn. App. 292, 555 P.2d 1382 (1976).

Although 22 continuances were granted before defendant's trial was held, defendant's speedy trial rights were not violated because defense counsel requested each of the continuances in order to be adequately prepared for trial. State v. Ollivier, 161 Wn. App. 307, 254 P.3d 883 (2011). Although defendant objected to the majority of the continuances, defendant did not specify what prejudice he in fact suffered. (Id.) Defendant's right to speedy trial

was not violated by grant of continuance to defense counsel without defendant's consent. State v. Davis, 17 Wn. App. 149, 561 P.2d 699, review denied, 89 Wn.2d 1005 (1977). The trial court did not abuse its discretion in granting a brief continuance beyond the speedy trial period while defense counsel was on vacation. State v. Selam, 97 Wn. App. 140, 982 P.2d 679 (1999).

The state did not violate the defendant's right to a speedy trial where it could be inferred from the record that the court entered five-day extensions of the trial date and the defendant was deemed to have waived objection since he did not file one. State v. Donahue, 76 Wn. App. 695, 887 P.2d 485 (1995). The state, the court, or a party may move for and the court may grant a continuance when the administration of justice requires it and the defendant will not be substantially prejudiced in the presentation of his defense. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). When trial court exercises its discretion under this rule, it must occur within the time limits of this rule and must make a record of its acts and reasons to afford appellate review. State v. Markovich, 17 Wn. App. 809, 565 P.2d 440 (1977), review denied, 89 Wn.2d 1015 (1978).

Continuance of a criminal proceeding pursuant to this rule must be supported by reasons appearing in the record in order that such period be excluded in determining delay which may result in a dismissal. State v. Reid, 13 Wn. App. 855, 537 P.2d 799 (1975).

Two-week continuance to give codefendant's newly appointed counsel time to prepare argument on a motion for severance was necessary in the administration of justice, and the court did not abuse its discretion in granting it. State v. Hall, 55 Wn. App. 834, 780 P.2d 1337 (1989). Continuance over defendant's objection to allow newly-appointed defense counsel time to prepare was proper. State v. Bebb, 44 Wn. App. 803, 723 P.2d 512 (1986), *aff'd*, 108 Wn.2d 515, 740 P.2d 829 (1987). Continuance granted to prosecution due to prosecutor's scheduling conflict, which resulted in defendant being brought to trial one day after expiration of 60-day speedy trial period, was justified, absent a showing of substantial prejudice to defendant. Brown, 40 Wn. App. at 95. Defendant's speedy trial rights were not violated where the judge granted a three-week recess to allow the defendant's newly-appointed co-counsel to prepare for trial after his original counsel withdrew. State v. Berrysmith, 87 Wn. App. 268, 944 P.2d 397 (1997), *review denied*, 134 Wn.2d 1008, 954 P.2d 277 (1998). Trial court did not abuse its

discretion in granting continuances to give defendant's counsel time to deal with the DNA evidence amassed by the state and to ensure that he would receive adequate representation from his public defenders. State v. Woods, 143 Wn.2d 561, 23 P.3d 1046, cert. denied, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001).

As long as defendant is brought to trial within the speedy trial period, continuances within that period, even if improvidently granted, do not require dismissal, absent a showing of actual prejudice. Hall, 55 Wn. App. at 834. The defendant's request for a continuance tolled the speedy trial clock. State v. Greene, 49 Wn. App. 49, 742 P.2d 152 (1987). Reversible error was committed when the charge against defendant was amended on the day of trial without a continuance when one was requested. State v. Purdom, 106 Wn.2d 745, 725 P.2d 622 (1986).

As cited above, case law in this area regarding CrR 3.3 and time for trial is extensive. When applied to the facts of this case, the answer is clear that there was no abuse of discretion. The defendant's trial commenced sixty-four days after his arraignment. The court made a record with the defendant when his attorney made a record she would not be prepared for trial if the trial proceeded on May 17 and under existing law, had the court forced Mr. Dunlap's

attorney to trial when she made a record she was not prepared, there would have been reversible error.

Rule CrR 3.3 is about fairness and efficiency. Defendant cannot support any claim of prejudice to him for the court granting a one week continuance sought by his attorney that in fact lead to his trial commencing sixty-four days after his arraignment. There is nothing in the record or in notions of fairness that indicate anything prejudicial happened to the defendant in this case. His attorney needed more time, the court gave her one week, a week that set his trial to begin within the cure period for the speedy trial rule.

Defendant makes an argument about delay on the part of the state regarding amending of the information. The charges were amended on May 16 to add crimes committed by the defendant while in custody seven days prior to the amendment. It's clear from this record there was no substantial delay by the state in amending charges and nothing about the state's "late" amendment that suggest it was an attempt to play hide-the-ball. The information was amended at a late date because the defendant committed the crimes while the case was pending and the case was amended as practicably as possible. If there is any "fault" to attribute regarding the timeliness of the amendment, it can be attributed to the defendant

who made a recorded jail telephone call making third party contact with the victim in this case in violation of the court's order.

CONCLUSION

For the reasons stated, the judgment and sentence should be affirmed; appellant's requests must be denied.

Respectfully submitted May 10, 2017,

/s/

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PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on May 10, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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APPELLATE COURT OF THE STATE OF WASHINGTON

DIVISION III

State of Washington,)	
)	No. 34514-9-III
Respondent.)	
)	AFFIDAVIT OF MAILING
JUSTIN ALLEN DUNLAP,)	
Appellant.)	
_____)	

STATE OF WASHINGTON)
) ss.
 County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 10th day of May, 2017, affiant emailed an electronic copy directed to Court of Appeals and a hard copy in the mail to the Appellant's Attorney.

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containing copies of the following documents:

- (1) Affidavit of Mailing
- (2) Respondent's Brief

Theresa Burroughs

SIGNED AND SWORN to (or affirmed) before me on this 10th day of May, 2017, by THERESA BURROUGHS.

Robin A Raap
 NOTARY PUBLIC in and for the
 State of Washington.
 My Appointment Expires: 11/5/21

KITTITAS COUNTY PROSECUTOR'S OFFICE

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