

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35272-2-III

STATE OF WASHINGTON, Respondent,

v.

JOHN MARTIN MALING, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
PO Box 1241
Walla Walla, WA 99362
Phone: (509) 876-2106
Andrea@2arrows.net
Attorney for Appellant

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I. INTRODUCTION

John Maling failed to appear for a court appearance and was subsequently arrested on a warrant. He appeared on the warrant the following day and then, apparently, was forgotten. On the sixtieth day after his appearance, with about one hour until the court closed, the State learned he was in custody and arranged a last-minute court hearing, at which it asked the court to continue the trial or release Maling to buy additional time in which to bring him to trial. Maling opposed the motion and asked the court to dismiss the case. The court granted the motion and released Maling on his own recognizance. Maling later moved to dismiss the prosecution, arguing that the time for trial had expired. The trial court denied the motion, and Maling was subsequently convicted after a bench trial. He was sentenced to twenty months' incarceration and now appeals, contending the trial court erred in denying his motion to dismiss the prosecution.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in denying Maling's motion to dismiss on the grounds that the time for trial had expired.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Did the State timely move to release Maling or continue the trial under the applicable court rules?

ISSUE NO. 2: For purposes of CrR 3.3, does the sixtieth day expire at 11:59 p.m. on the calendar day, at the close of court business, or at the time it would no longer be possible to assemble a jury venire and commence the trial?

IV. STATEMENT OF THE CASE

The State charged John Maling with three counts of possessing a controlled substance with intent to deliver. CP 4. He failed to appear at a pretrial hearing and was subsequently arrested, appearing in court again on September 1, 2016. RP (Arraignment, Hearing, Trial Confirmation)¹ at 4. The court reset an omnibus hearing and advised Maling the State had 60 days to bring him to trial. RP (Arraignment, Hearing, Trial Confirmation) at 4.

On October 31, 2016, at 3:09 p.m., a hearing was held without prior notice to defense counsel, who was unaware that Maling had been

¹ The record on appeal consists of two volumes, non-consecutively paginated, each containing multiple hearings identified by name and date. For clarity, this brief will refer to each volume by the name of the hearings transcribed, followed by the page number.

arrested and was in custody. RP (Arraignment, Hearing, Trial Confirmation) at 8-9. The State advised the court that the case was a mess and it was the last day of speedy trial. RP (Arraignment, Hearing, Trial Confirmation) at 9. It asked for a continuance or, if that were not granted, to release Maling. RP (Arraignment, Hearing, Trial Confirmation) at 10. Maling objected to a reset and moved to dismiss, arguing that the time for trial had run. RP (Arraignment, Hearing, Trial Confirmation) at 11-12. The State contended that the time did not expire for another hour. RP (Arraignment, Hearing, Trial Confirmation) at 12. The trial court ordered Maling released and reset his trial date. RP (Arraignment, Hearing, Trial Confirmation) at 12, 15. Maling again objected. RP (Arraignment, Hearing, Trial Confirmation) at 13.

Before trial, Maling filed a motion to dismiss for violation of the speedy trial rule. CP 8. The trial court denied the motion. CP 17-20; RP (Motions, 3.5 Hearing, Stipulated Trial) at 26. Maling subsequently waived his right to a jury trial and stipulated to facts and evidence for the court to consider. CP 16, RP (Motions, 3.5 Hearing, Stipulated Trial) at 60. The trial court found Maling guilty on all three counts. CP 23; RP (Motions, 3.5 Hearing, Stipulated Trial) at 72. Calculating all three counts as one point for encompassing the same criminal conduct, the trial court sentenced Maling to a low-end term of 20 months' imprisonment based on

an agreed offender score of “5”. CP 26, 27; RP (Motions, 3.5 Hearing, Stipulated Trial) at 94-95. Maling also agreed to some discretionary legal financial obligations, and the court imposed a total of \$3,150. CP 29; RP (Motions, 3.5 Hearing, Stipulated Trial) at 98.

Maling now appeals, and has been found indigent for that purpose.
CP 38

V. ARGUMENT

The sole issue on appeal is whether the trial court erred in denying Maling’s motion to dismiss the prosecution due to the State’s failure to timely bring him to trial under the rule. It is undisputed that the State moved for Maling’s release on the late afternoon of the last day of the time for trial period, without notice and on an emergency basis, for the sole purpose of evading the expiration of the speedy trial rule, because it forgot that Maling was incarcerated. It is also uncontested that the State could not have proceeded had the matter been called at that time. Under these circumstances, the court should hold that Maling’s time for trial expired.

The time for trial rule is set out in CrR 3.3. Under that rule, an incarcerated defendant must be brought to trial within 60 days of the commencement date. CrR 3.3(b)(1). Where, as here, a defendant fails to appear after his initial appearance, the commencement date is reset to the

next date at which the defendant appears in court. CrR 3.3(c)(2)(ii).

Failure to bring the defendant to trial within the time required under the rule mandates dismissal with prejudice. CrR 3.3(h).

Under these rules, Maling's commencement date was reset to September 1, 2016, when he appeared in court following a prior failure to appear. RP 4. Thus, the time for trial expired on October 31, 2016. He was not brought back before the court until sometime between 3:30 and 4:00 p.m. on October 31, 2016. CP 18. Maling's attorney objected to the hearing due to the lack of notice. CP 18.

The purpose of the hearing was the State's motion to continue the trial. RP (Arrestment, Hearing, Trial Confirmation) at 10 ("This is the last day of speedy trial, Judge. The state's got to request a continuance at this point."). Continuances must be requested by motion, and must be made before the time for trial has expired. CrR 3.3(f)(2). Because the State failed to comply with the requirements for bringing a motion, including giving proper notice to the defense, and because compliance with the notice requirements would have resulted in the motion being heard after the time for trial had expired and therefore precluded under the rule, the trial court erred in considering the State's motion and denying the defense motion to dismiss.

The Criminal Rules expressly incorporate requirements of the civil rules concerning motions. CrR 8.2 incorporates CR 7(b), which requires that all motions, unless made during a hearing or trial, “shall be made in writing.” CrR 8.4 incorporates CR 5 concerning the service and filing of written motions. Under CR 5(a), every written motion shall be served on the parties. Finally, CrR 8.1 incorporates CR 6 concerning the computation of time. CR 6(d) requires all written motions and notice of the hearing thereon to be served no less than 5 days before the time set for hearing. While these requirements can, presumably, be waived by agreement of the parties, that did not happen here.

Because the State failed to comply with the requirements to present a motion to the court, and because Maling objected to the lack of notice, the trial court erred in proceeding. Compliance with the rules and the giving of required notice would have allowed a hearing date of November 7, 2016,² at the earliest. The time for trial would have already expired. Thus, under the plain language of CrR 3.3(f)(2), the motion would not be allowed and dismissal would be required.

² If the State gave notice on October 31, 2016, it could schedule a hearing as early as five days later on November 5, 2016. However, November 5, 2016 was a Saturday.

Alternatively, the State moved for Maling's release under CrR 3.2. But the rule does not exempt the State from following the notice requirements of CR 6. Under CrR 3.2(j), an accused who is held on bail may move for reconsideration, and a hearing is to be held within a reasonable time. That rule does not authorize the State to bring such a motion. Under CrR 3.2(k), a court may "at any time" amend its order to impose new or different conditions of release, but that rule applies only when the order being reviewed is an order for the release of the accused. Here, Maling had not been ordered released, so the order being reviewed was not subject to CrR 3.2(k). In the event the State wished to move to eliminate the requirement of bail and permit his release, nothing in CrR 3.2 exempts it from the notice requirements of CR 6.

Accordingly, the State failed to timely move for relief in accordance with the applicable rules. Maling's objection to the lack of notice preserved the issue for review. Because the relief requested could not have been granted within the time for trial, denying Maling's motion to dismiss was erroneous. The judgment and sentence should, therefore, be vacated, and the case remanded for dismissal with prejudice.

In the event the court overlooks or excuses the procedural defects, it should still hold that under the facts of this case, ordering Maling's

release on the late afternoon of the last day for trial, when the trial could not have proceeded on that day, did not prevent the time for trial from expiring.

Speedy trial rules do not only reflect constitutionally significant personal rights, but also public interests in the effective and efficient administration of justice. *State v. Striker*, 87 Wn2d 870, 876, 557 P.2d 847 (1976). As a result, the speedy trial rules are applied strictly, to ensure that the State is diligent in prosecuting defendants. *State v. Logan*, 102 Wn. App. 907, 911-12, 10 P.3d 504 (2000).

The State has no duty to hold a defendant in custody and may request the release of a defendant for the sole purpose of extending the time in which to bring him to trial. *State v. Chavez-Romero*, 170 Wn. App. 568, 578, 285 P.3d 195 (2012), *review denied*, 176 Wn.2d 1023 (2013) (*citing State v. Kelly*, 60 Wn. App. 921, 928, 808 P.2d 1150 (1991)). And the speedy trial rule contemplates that the time for trial may be extended if the defendant is released before the 60-day time limit has expired. *Id.* at 578. Thus, whether Maling was timely tried depends on whether his release by the court in the final hour of the final day of the speedy trial period, when the State was entirely unprepared to proceed, when there was no question that the State remembered Maling was

incarcerated only that same day, and when nothing in the record indicates the Court would have been capable of summoning a jury venire and commencing the trial proceedings in the final hour or so of the court's business day, occurred before the 60-day time limit expired.

Kelly, relied upon heavily by the State, is instructive. In *Kelly*, the trial date was repeatedly continued in the final days of the defendant's speedy trial time. On the final day, the State moved for a six-day continuance and for Kelly's release because its complaining witness was out of the state and unavailable to testify. *Kelly*, 60 Wn. App. at 923. In the companion case, on the day before the expiration of the speedy trial period, the prosecutor moved for a continuance and for the defendant's release due to a key witness's impending absence. *Id.* at 924. Neither case involved the prolonged neglect and eleventh-hour realization that the time for trial was about to expire that presented itself here. To the contrary, in both cases, while the releases occurred late in the time for trial period, they occurred when the parties were expecting and prepared to proceed with trial, but for last-minute logistical problems with witness unavailability. As such, nothing in the releases in those cases undermines the purpose of the rule to ensure prosecutorial diligence.

But here, the release served merely to forgive the State's heedless inattention at a time when there was no real possibility that the trial could have commenced. Under these circumstances, the expiration of the sixty-day period under the rule should not be construed as the closing of the court for public business on the sixtieth day. Instead, the court should interpret the sixtieth day to expire when the case is not called for trial on the final day, regardless of the hour.

Maling's interpretation is consistent with the language of the rule and furthers the interests of the rule. CrR 3.3 does not provide any definition of a "day" for purposes of calculating the time for trial. A "day" could have a technical meaning of 24-hour calendar days, or periods in the calendar day during which the courthouse is open for business, or periods during which specific court business, such as the calling of dockets, occurs. By urging the court to adopt a pragmatic interpretation of a "day" for purposes of the speedy trial rule, Maling suggests that a day cannot practically be considered a day in which he could be brought to trial once the court's trial call has concluded and no jury venire is available to commence that day.

Because a "day" under the speedy trial rule can be susceptible of various meanings, the one that favors the defendant must be preferred

absent evidence of intent to the contrary. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009). Here, the sixtieth day for trial should be interpreted to have ended once it was no longer possible to call Maling's case for trial on that day. Because Maling was not ordered released until shortly before the end of the court's daily business, when it was uncontested that the trial could not have commenced that day, the time for trial expired before his release and his motion to dismiss should have been granted.

VI. CONCLUSION

For the foregoing reasons, Maling respectfully requests that the Court REVERSE and DISMISS his convictions.

RESPECTFULLY SUBMITTED this 10 day of October, 2017.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

John Maling, DOC # 265207
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-2049

Tamara A. Hanlon
Yakima County Courthouse
128 N. Second Street, Room 329
Yakima, WA 98901

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 10 day of October, 2017 in Walla Walla,
Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

October 16, 2017 - 12:00 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35272-2
Appellate Court Case Title: State of Washington v. John Martin Maling
Superior Court Case Number: 15-1-01833-2

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