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Division III  
State of Washington  
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NO. 35272-2-III

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

STATE OF WASHINGTON, RESPONDENT

v.

JOHN MARTIN MALING, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY

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RESPONDENT'S BRIEF

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## **I. ISSUES PRESENTED FOR REVIEW**

1. On the sixtieth day of Maling's time for trial period, the State, during a hearing, orally moved to continue or, alternatively, release Maling from custody. Following his release, Maling was given an opportunity to brief and argue his asserted time for trial issue. Did the trial court abuse its discretion by entertaining the State's oral motion and preserving Maling's objection for argument at a later date?
2. Maling was released from custody during the afternoon of the sixtieth day of the time for trial period. Under CrR 3.3, had Maling's allowable time for trial expired prior to the conclusion of the sixtieth day?

## **II. STATEMENT OF THE CASE**

On December 1, 2015, Maling was charged with three counts of possessing a controlled substance with intent to deliver under RCWs 69.50.401(1) and (2)(b). Clerk's Papers (CP) at 4.

Maling subsequently failed to appear for a pre-trial hearing on August 29, 2016, and the trial court issued a bench warrant for Maling's arrest. VRP 9/1/16 at 4. Maling re-appeared in court on September 1,

2016, at which time the trial court noted that Maling's time for trial recommenced, giving the State sixty days of speedy trial under CrR 3.3. *Id.*

On October 31, 2016, the State had Maling's case added to the afternoon trial court docket. CP at 18. Maling, still in custody, and defense counsel were present. *See* VRP 10/31/16 at 8. The record reflects neither the procedure used to note the hearing for October 31, 2016, nor whether any specific request was made by the State at the time the hearing was scheduled. The parties calculated that, based on Maling's prior appearance, the sixty day time for trial period would expire that same day, October 31, 2016. *See id.* at 10.

Given the limited remaining time for trial, the State requested a continuance or, alternatively, Maling's release from custody, thereby allowing an additional thirty days under CrR 3.3(b)(3). *Id.* at 10, 12. Defense counsel objected and asked that the case be dismissed. *Id.* at 11. The State noted that the sixtieth day had yet to expire. *Id.* at 12.

The trial court released Maling, *id.*, and allowed defense counsel to make a record of Maling's objection to release. *Id.* at 13. Following Maling's release, the trial court recalculated Maling's time for trial pursuant to CrR 3.3(b)(3) as November 30, 2016. *See* CP at 19. Maling was given a new hearing date for November 10, 2016. VRP 10/31/16 at 16.

Maling's case was subsequently continued by agreement of the parties to allow for settlement negotiations. *See* CP at 13. On March 20, 2017, Maling filed a motion regarding the speedy trial issue addressed on October 31, 2016. CP at 8–11. On March 29, 2017, the matter proceeded to trial. *See* VRP 3/29/17 at 4. Following argument regarding the time for trial issue, the trial court denied Maling's motion. *See id.* at 26.

Ultimately, Maling waived his right to a jury trial and opted for a stipulated facts bench trial. *See id.* at 53–56; *see also* CP at 16. Following a review of the police reports, the trial court found Maling guilty on all three counts. VRP 3/29/17 at 72–73. Written findings of fact and conclusions of law followed for both the time for trial motion and bench trial. *See* CP at 17–24.

On May 8, 2017, Maling was sentenced to twenty months confinement concurrent across the three counts, twelve months of community custody, and legal financial obligations. CP at 25–33.

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### III. ARGUMENT

#### **A. The trial court did not abuse its discretion when entertaining the State’s oral motion to release while preserving Maling’s objection for argument at a later date**

##### **1. As the State’s motion was made orally during a hearing, CrR 8.2 does not mandate that the State first make its motion in writing**

Maling argues that the State violated the CR 7(b) written motion requirement as incorporated by CrR 8.2. *See* Br. of Appellant at 6. Maling further contends that, due to the alleged CR 7(b) violation, the State acted contrary to CR 5(a) and CR 6(d). *See id.*

CrR 8.2 states that “[r]ules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases.” CrR 8.2. Under CR 7(b)(1),

[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

CR 7(b)(1). Further, CrR 8.4 states that “CR 5 shall govern service and filing of written motions . . . in criminal causes.” CrR 8.4. CR 5(a) requires that “every written motion . . . shall be served upon each of the parties.” CR 5(a). Finally, CrR 8.1 mandates that “[t]ime shall be computed and enlarged in accordance with CR 6.” CrR 8.1. Under

CR 6(d), “[a] written motion . . . and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing.”

CR 6(d).

CR 7(b)(1) does not apply as the State’s motion was “made during a hearing.” *See* CR 7(b)(1); *see also Trust Fund Services v. Glasscar, Inc.*, 19 Wn. App. 736, 745, 577 P.2d 980 (1978) (noting that “CR 7(b) provides that motions which are not made during a hearing or trial are to be made in writing”). Accordingly, CR 7(b)(1) does not mandate that the State’s motion first be made in writing. As the State was not required to have brought the motion in writing, neither CR 5(a) nor CR 6(d) are applicable. *See* CR 5(a) (requiring “written motion[s]” to be served upon each party); CR 6(d) (mandating that “written motion[s] . . . shall be served not later than 5 days before the time specified for the hearing”).

As a general practice, motions to either release or reduce bail are routinely made during a hearing, sometimes without notice to the opposing party. Allowing such an oral, spontaneous motion is reasonable given the circumstances—as a defendant is typically in custody when such a motion is brought, a five day delay prior to the motion’s adjudication could result in five days of unnecessary incarceration.

As the State’s motion was made orally during a hearing, the State did not violate the Superior Court Criminal Rules. The State was not

required to first make a written motion given the procedural posture and setting of the State's request.

**2. The trial court did not abuse its discretion in entertaining the State's motion to release as Maling was given a later opportunity to contest the alleged time for trial issue**

Maling argues that “[b]ecause 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.” Br. of Appellant at 6. As Maling was given a later opportunity to argue the time for trial issue, the trial court did not abuse its discretion when entertaining the State's request to release Maling on his own recognizance.

“Failure to enforce the requirements of rules can constitute an abuse of discretion.” *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). “Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *see also State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (describing “manifestly unreasonable” as a decision which “falls ‘outside the range of acceptable choices, given the facts and the applicable legal standard’”) (internal citation omitted). “Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the

trial court has not abused its discretion.” *State v. Quaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014) (internal citation omitted).

As an initial matter, the State’s request to release Maling was not in violation of CrR 3.3. In *State v. Chavez-Romero*, 170 Wn. App. 568, 285 P.3d 195 (2012), this Court noted that “CrR 3.3(b)(3) does not contain a provision that precluded the State from requesting release of Mr. Chavez-Romero to extend the time for trial. A judge has the discretion to release a defendant specifically for that purpose.” *Id.* at 578. Accordingly, similar to *Chavez-Romero*, “[t]he State acted within the bounds of CrR 3.3 by requesting release” in order to extend the time for trial. *See id.* at 579.

Further, the trial court appropriately exercised its discretion when entertaining the State’s motion while noting Maling’s objection for the record. In *State v. Puapuaga*, 164 Wn.2d 515, 192 P.3d 360 (2008), the prosecutor obtained an *ex parte* order impounding Puapuaga’s property from Western State Hospital. *Id.* at 518. The property was transferred to the prosecutor’s office via a second *ex parte* order. *Id.* Neither order was obtained in open court, nor was a record made of the proceedings. *Id.* at 519. Defense counsel was not informed of either order. *See id.*

Puapuaga argued that the State violated “criminal motion notice requirements,” including CrR 8.2, CR 7(b), and CR 6(d). *See id.* at 524.

The Court ruled that, although it did not necessarily agree with the prosecutor's actions, the trial court "acted well within its authority" "by permitting Puapuaga to challenge the State's action in a hearing." *Id.* at 525.

Here, the trial court gave Maling an opportunity to note his objection under CrR 3.3. *See* VRP 10/31/16 at 12–13. Maling later filed a written motion addressing the issue, *see* CP at 8–11, and presented extensive oral argument to the trial court. *See* VRP 3/29/17 at 8–16, 22–26. Although the trial court denied Maling's motion, *see id.* at 26, Maling was given ample opportunity to present both the relevant legal principles and argument concerning the alleged time for trial violation.

Accordingly, as the trial court allowed Maling to raise the CrR 3.3 time for trial issue in a later motion, the trial court did not act manifestly unreasonably in entertaining the State's oral motion on October 31, 2016.

**3. Assuming *arguendo* that the Court finds the trial court's decision was manifestly unreasonable, Maling did not suffer prejudice as the State's request to release Maling (1) was compliant with CrR 3.3(b)(3) and (2) could have occurred within the CrR 3.3(g) cure period**

Under CrR 3.3(g),

[t]he court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a

continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense.

CrR 3.3(g).

Maling's 60 day time for trial period ended on October 31, 2016.

As noted by Maling, "[i]f 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." Br. of Appellant at 6 n.2.

As noted above, CrR 3.3(b)(3) permits the State to request a defendant's release in order to extend the time for trial period. *See Chavez-Romero*, 170 Wn. App. at 578. Accordingly, the State's request to release Maling did not run afoul of CrR 3.3 and the trial court was permitted to exercise its discretion in considering the State's request. *See id.* (noting that "[a] judge has the discretion to release a defendant specifically for that purpose").

Further, under CrR 8.1, "[t]ime shall be computed and enlarged in accordance with CR 6." CrR 8.1. CR 6(a) states that,

[i]n computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so

computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday.

CR 6(a).

Maling's time for trial period ended on October 31, 2016, a Monday. Accordingly, the period during which CrR 3.3(g) could operate would begin on November 1, 2016, and end on November 5, 2016, a Saturday. Following CR 6(a), the State could rely upon CrR 3.3(g) until the next Monday, November 7, 2016.

Accordingly, assuming a writing was required, the State could have provided Maling with written notice of its motion on October 31, 2016, noted the motion for a hearing on November 7, 2016, and thereby complied with CR 6(d). The trial court could then have entertained either the State's motion to continue or request to release Maling under CrR 3.3(g). *See* CrR 3.3(g). Further, Maling would not have been "substantially prejudiced in the presentation of his . . . defense" by his release from custody. *See* CrR 3.3(g); *see also State v. Kelly*, 60 Wn. App. 921, 926, 808 P.2d 1150 (1991) (noting that defendants' challenge to an order releasing them from custody was "disingenuous" as "each defendant resisted release in order to cause their speedy trial period to expire and compel dismissal of their case for violation of CrR 3.3").

As CrR 3.3 authorizes both Maling's release as well as a mechanism by which the trial court could have entertained the State's requests without violating Maling's time for trial, Maling has failed to demonstrate that he suffered any prejudice from the State's alleged failure to strictly comply with criminal motion notice requirements. As noted in *Kelly*, Maling cannot be prejudiced solely as a result of his own release from custody. The subsequent agreed continuances only serve to buttress the lack of actual prejudice. *See* CP at 13.

**B. Maling's proposed definition of a "day" would both be contrary to the term's common understanding and unworkable in practice**

Maling argues that "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." Br. of Appellant at 11. Maling urges the Court to adopt a "pragmatic interpretation" of a "day," under which his time for trial would have expired prior to Maling's release. *See id.* at 10.

This Court recently confronted a similar issue in *In re McMahan*, 1 Wn. App. 2d 373, 405 P.3d 1012 (2017). *McMahan* concerned the definition of a "year" under RCW 71.09.070(1). *See id.* at 377, *see also* RCW 71.09.070(1) ("Each person committed [as an Sexually Violent Predator] shall have a current examination of his or her mental condition made by the department at least once every year."). As neither the

Sexually Violent Predator statute nor the Revised Code of Washington defined a “year,” this Court looked to “common parlance” to define a “year” as “a cycle in the Gregorian calendar of 365 or 366 days, divided into 12 months, beginning with January and ending with December.” *McMahan*, 1 Wn. App. 2d at 379 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2648 (1993)). This Court concluded that “[b]y using the generic term ‘year,’ instead of ‘anniversary year’ or some form of ‘preceding year,’ the legislature indicated its intent that the Department only complete an examination at least once every calendar year.” *Id.*

A generic “day” refers to “[a] period of time consisting of twenty-four hours” or “[t]he space of time which elapses between two successive midnights.” BLACK’S LAW DICTIONARY 396 (6th ed. 1990). This comports with the commonsense understanding of a “day”—a twenty-four hour period lasting from one midnight to the next. Although Maling argues that a “day” “under the speedy trial rule can be susceptible of various meanings,” *see* Br. of Appellant at 10, Maling has not provided a reasonable basis for this Court to deviate from the everyday understanding of the term. *See State v. Engel*, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009) (“A reading that produces absurd results should be avoided, if possible, because we presume the legislature does not intend them.”); *State v.*

*McGee*, 122 Wn.2d 783, 789, 864 P.2d 912 (1993) (“The rule of lenity does not require [a court] to reject an ‘available and sensible’ interpretation in favor of a ‘fanciful or perverse’ one.”) (quoting *Commonwealth v. Tata*, 28 Mass. App. Ct. 23, 25–26, 545 N.E.2d 1179 (1989)).

Further, courts have consistently described the time for trial period in definitive terms. *See State v. Logan*, 102 Wn. App. 907, 912, 10 P.3d 504 (2000) (noting that time for trial rules are strictly applied); *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997) (describing CrR 3.3 time for trial as ending at “the expiration of a fixed time”). Courts’ utilization of consistently firm language weighs in favor of finding that time for trial expires at the conclusion of the final day, not the randomized and arbitrary point at which an official decides the State will no longer be able to proceed. A strict application counsels against Maling’s proposal—how can a court strictly apply a concept that has a fluid deadline?

Additionally, Maling’s proposed definition is unworkable and would result in disparate treatment for similarly situated defendants. When would a given defendant’s time for trial period expire? Who would make that determination? Court systems might utilize different procedures for commencing a jury trial which may vary depending on the day of the

week or time of year. Instead of a firm deadline, every time for trial period would be susceptible to alteration until the final twenty-four hour period expired. As above, a “strict” interpretation of time for trial rules counsels against Maling’s proposed “pragmatic,” yet malleable and nebulous, definition. *See Logan*, 102 Wn. App. at 912.

This Court should emulate *McMahan* and define a “day” as the term is understood in common parlance—a full twenty-four hour period. As time remained on the sixtieth “day” of Maling’s time for trial period, Maling did not suffer a CrR 3.3 violation on October 31, 2016.

#### IV. CONCLUSION

This Court should affirm Maling’s convictions as the trial court did not abuse its discretion in entertaining the State’s oral motion to continue and alternative request to release Maling on his own recognizance. Further, the Court should define a “day” for the purpose of CrR 3.3 as the term is commonly understood—a single twenty-four hour period.

Dated this 16th day of January, 2018.

STATE OF WASHINGTON

/s/Michael J. Ellis  
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DECLARATION OF SERVICE

I, Michael J. Ellis, state that on January 16, 2018, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Andrea Burkhart at andrea@2arrows.net.

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

DATED this 16th day of January, 2018, at Yakima, Washington.

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