

FILED  
Court of Appeals  
Division III  
State of Washington  
3/27/2020 10:41 AM

NO. 36902-1-III

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

---

**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**MICHAEL LOGAN ARNETT,**

Defendant/Appellant.

---

**BRIEF OF APPELLANT**

---

Dennis W. Morgan    WSBA #5286  
Attorney for Appellant  
P.O. Box 1019  
Republic, Washington 99166  
(509) 775-0777

## TABLE OF CONTENTS

### TABLE OF AUTHORITIES

CASES	ii
CONSTITUTIONAL PROVISIONS	ii
STATUTES	ii
RULES AND REGULATIONS	iii
ASSIGNMENTS OF ERROR	1
ISSUES RELATING TO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	4
CONCLUSION	10

**TABLE OF AUTHORITIES**

**CASES**

*Guardado v. Guardado*, 200 Wn. App. 237, 402 P.3d 357 (2017) ..... 9

*State v. Baker*, 194 Wn. App. 678, 378 P.3d 243 (2016)..... 9

*State v. Harris*, 130 Wn.2d 35, 921 P.2d 1052 (1996) ..... 6, 9

*State v. White*, 94 Wn.2d 498, 617 P.2d 998 (1980)..... 10

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)..... 6

**CONSTITUTIONAL AUTHORITIES**

Const. art. I, § 22..... 4

United States Constitution, Sixth Amendment ..... 4

**STATUTES**

RCW 43.43.690(1)..... 4

## RULES AND REGULATIONS

CrR 3.3 .....	4, 9, 10
CrR 3.3(a) .....	10
CrR 3.3(a)(1).....	1, 4, 8
CrR 3.3(a)(3)(ii).....	1, 5, 10
CrR 3.3(a)(5).....	1, 5, 6
CrR 3.3(b)(2).....	5
CrR 3.3(b)(5).....	5
CrR 3.3(e) .....	5
CrR 3.3(e)(5).....	5, 6, 10
ER 404(b).....	1, 3, 8

## **ASSIGNMENTS OF ERROR**

1. Defense counsel was ineffective in not raising an objection to the timeliness of the trial. Defense counsel was the same attorney in both the District Court and Superior Court matters.

2. The trial court should have been alerted to the time-for-trial issue based upon the State's ER 404(b) motion. The trial court failed to *sua sponte* address the issue.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Was defense counsel ineffective in not raising a time-for-trial violation under CrR 3.3(a)(5)?

2. Is a trial court required to *sua sponte* raise a violation of CrR 3.3(a)(3)(ii), involving related charges, pursuant to its duty under CrR 3.3(a)(1)?

## **STATEMENT OF THE CASE**

Deputy Harden of the Lincoln County Sheriff's Office stopped a blue van with no front license plate on April 11, 2018. Mr. Arnett was driving the van. His driver's license was suspended. (RP 57, l. 24 to RP 58, l. 1; RP 59, ll. 7-9; RP 61, ll. 5-17; RP 62, ll. 1-3; ll. 14-17)

Mr. Arnett was arrested. A cursory search was done before he was placed in the patrol car. Deputy Harden later had Mr. Arnett exit the patrol car. At that time he saw a bindle containing a white substance on the patrol car seat. (RP 62, ll. 19-23; RP 64, ll. 1-9)

An additional pat-down search of Mr. Arnett revealed two (2) pills in his jacket pocket. Deputy Gyllenskog, a corrections officer, later found more pills in Mr. Arnett's wallet when he was booked into jail. (RP 65, ll. 1-4; RP 85, ll. 11-17; RP 133, ll. 7-9; RP 136, ll. 1-2)

Deputy Manke issued a criminal citation to Mr. Arnett on April 11, 2018 charging him with possession of a legend drug. The citation was filed in Lincoln County District Court. (CP 116)

Mr. Arnett pled guilty to driving while suspended third degree and possession of a legend drug on May 3, 2018. He was represented by attorney David R. Hearrean. (CP 117-120). Attorney Hearrean also represented Mr. Arnett in the Superior Court matter. (CP 12)

Deputy Harden filed a probable cause statement with the District Court. The probable cause statement detailed the discovery of the multiple items located following Mr. Arnett's arrest. (CP 125-127)

The items seized from Mr. Arnett at the time of his arrest were sent to the Washington State Patrol Crime Lab (WSPCL). The bindle that contained a white powdered substance was sent to the WSPCL on May 7, 2018. It is unknown as to when the other items were sent to the WSPCL. (CP 9)

The WSPCL report dated September 28, 2018 relates to Count I of the original Information dated October 23, 2018. (CP 1; Exhibit 10)

The May 20, 2019 WSPCL report relates to Count II of the Second Amended Information which was filed on May 14, 2019. (CP 20; Exhibit 11)

Several continuances and time-for-trial waivers were entered. Trial eventually commenced on May 22, 2019. (CP 14; CP 15; RP 14, ll. 2-8; ll. 16-17; RP 17, ll. 12-15; RP 18, l. 10)

The State filed an ER 404(b) notice on May 16, 2019 relating to the Lincoln County District Court case. The notice stated, in part: “Specifically, the State intends to introduce evidence of the defendant’s possession of Nabumetone pills at the time he was arrested ....” (CP 41)

Attorney Hearrean filed a written objection to the State’s proposed ER 404(b) evidence. There was no discussion regarding related charges in the objection. (CP 44)

The trial court denied the State’s motion. (RP 42, ll. 14-16)

Jennifer Allen, a WSPCL forensic scientist, testified at trial. She identified the items that had been tested as methamphetamine and hydrocodone. (RP 138, ll. 18-20; RP 141, ll. 6-25; RP 143, l. 18; RP 148, ll. 4-8)

After the State rested defense counsel filed a motion for a mistrial and challenged the sufficiency of the evidence. The motions were denied. (RP 169, l. 10 to RP 174, l. 3)

The jury determined that Mr. Arnett was guilty of Count I and not guilty on Count II. (CP 77; CP 78)

Defense counsel renewed the mistrial motion based upon his belief that a juror had been sleeping. The motion was again denied. (RP 262, l. 7 to RP 263, l. 15)

Judgment and Sentence was entered on May 28, 2019. Mandatory legal financial obligations were imposed along with a \$200.00 crime lab fee. *See:* RCW 43.43.690(1) (CP 81)

Mr. Arnett filed a Notice of Appeal on June 18, 2019. An Order of Indigency was entered on June 25, 2019. (CP 94; CP 110)

### **SUMMARY OF ARGUMENT**

A trial court has a mandatory duty to ensure that a criminal defendant receives a timely trial.

A defendant's attorney has a constitutional duty to provide effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Neither the trial court nor defense counsel fulfilled their duties under CrR 3.3.

### **ARGUMENT**

CrR 3.3(a)(1) states: "*Responsibility of Court.* It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."

Mr. Arnett's appeal revolves around CrR 3.3 and its complexity. The issue arises based upon the definition of a "related charge."

CrR 3.3(a)(3)(ii) states: “‘Related charge’ means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.”

Mr. Arnett asserts that the charges filed in Lincoln County District Court, which included a count of possession of a legend drug, snugly fit into the definition of a “related charge.”

The District Court charges were filed on April 11, 2018. The Information in Superior Court was not filed until October 23, 2018. Mr. Arnett had already pled guilty to the District Court charges on May 3, 2018.

Whether time-for-trial is computed from April 11 or May 3 the ninety-(90) day time period provided for in CrR 3.3(b)(2) was not met.

CrR 3.3(b)(5), dealing with excluded periods, extends time-for-trial for a period of thirty-(30) days after any excluded period.

CrR 3.3(a)(5) states: “*Related charges.* The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.”

It is at this point that the difficulty arises since the rule is self-contradictory. It is self-contradictory due to the provisions of CrR 3.3(e)(5). CrR 3.3(e) provides, in part:

**Excluded periods.** The following periods shall be excluded in computing the time for trial:

...

(5) *Disposition of Related Charge.* The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant’s arraignment in superior court on a related charge.

When CrR 3.3(a)(3)(ii) and (5) are read in conjunction with CrR 3.3(e)(5) it becomes apparent that the two (2) provisions cannot be read harmoniously.

CrR 3.3(a)(5) should be read as starting the time-for-trial on related charges at the same time as time-for-trial starts on the filed charge(s).

On the other hand, CrR 3.3(e)(5) declares that it is an excluded period, and that time-for-trial does not commence until arraignment on the related charge.

QUERY: Was defense counsel ineffective in not raising a time-for-trial issue?

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all of the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Arnett contends that if defense counsel had raised a time-for-trial issue he would not have been convicted. This is the resulting prejudice.

Defense counsel was ineffective in not recognizing the time-for-trial issue. Defense counsel represented Mr. Arnett in both courts. Defense counsel should have been readily aware that the charges were related.

Mr. Arnett contends that it was unreasonable for defense counsel to not at least raise the issue in Superior Court.

Related charges have been discussed in various cases. The case most akin to Mr. Arnett's is *State v. Harris*, 130 Wn.2d 35, 45-6, 921 P.2d 1052 (1996).

... [T]imely objections are required so that, if possible, the trial court will have an opportunity to fix the error and still satisfy the speedy trial requirements. *State v. Greenwood*, 120 Wn.2d 585, 606, 845 P.2d 971 (1993). If a defendant does not timely raise the objection, then the defendant's speedy trial rights under the court rules are deemed waived. CrR 3.3(e), (f)....

Defendant moved to dismiss the TMV charge the first time he appeared in court, which was during his arraignment on May 31, 1994. At that point, the speedy trial deadline had already expired at no fault of Defendant. Obviously, Defendant could not raise a speedy trial objection prior to the State's filing of the second charge in May. Since Defendant could not have raised the speedy trial objection any earlier, he "cannot be deemed to have waived his . . . objection." *Greenwood*, 120 Wn.2d at 606. His objection was timely, so his speedy trial rights were not waived.

The second question is whether or not the State satisfied any of the exceptions to the speedy trial rule. The speedy trial rule lists certain circumstances where a court may grant a continuance or delay, which period would be excluded in computing the deadline under the rule. . . . A court may allow a continuance, if requested by the prosecutor, and

the State's evidence is presently unavailable, the prosecution has exercised due diligence, and there are reasonable grounds to believe that it will be available within a reasonable time[.]

.... In this kind of situation, where the second charge is filed beyond the speedy trial deadline, the court would have to grant a retroactive continuance if the late-filed charge is to be upheld. Allowing a retroactive continuance does not violate the spirit of the speedy trial rule, so long as the State can satisfy the rule's requirements for obtaining a continuance and the defendant is not prejudiced by the minor delay. *See State v. Carson*, 128 Wn.2d 805, 817, 912 P.2d 1016 (1996).

The State's delay in not filing charges in a timely manner was compounded by defense counsel's failure to object.

QUERY: Should the trial court have *sua sponte* raised the time-for-trial issue?

When the State filed its ER 404(b) motion the trial court was alerted to the fact that Mr. Arnett also had charges filed in District Court. The Superior Court did not make any detailed inquiry of the attorneys concerning the District Court charges. Rather, the judge questioned the admissibility of the District Court guilty plea as prior misconduct evidence. The trial court was directed to that issue based upon defense counsel's memorandum.

Since the trial court did not independently take any steps to determine whether Mr. Arnett's trial was timely based upon the information it had before it, did it fail to comply with CrR 3.3(a)(1)?

Mr. Arnett contends the trial court's duty is mandatory and a court is required to be aware of the law regarding timely trials.

As stated in *State v. Erickson*, 22 Wn. App. 38, 587 P.2d 613 (1978), the State must act diligently in circumstances where two or more charges arise from the same criminal conduct or criminal episode. If the state has already filed and/or prosecuted one of those charges, and there is probable cause to bring the second charge,

the [second] charge should be filed; if, when the trial date becomes imminent, the State has been unable to secure the necessary evidence to convict, it may seek an extension of time pursuant to CrR 3.3(e)(2)(ii). In short, if the State does not charge a defendant with all related offenses arising out of the same criminal conduct or episode as soon as it has probable cause to do so it runs the risk of a dismissal for failure to provide a speedy trial.

*Erickson*, 22 Wn. App. at 44-45.

Once the State prosecuted Defendant in December 1993 on the NVOL charge, it should have filed and tried the TMV charge by February 21, 1994. If it had filed the charge in a timely fashion, and then discovered that additional infor-

mation was needed, it could have applied for a continuance. Instead, the State delayed filing the TMV until far beyond the expiration of the speedy trial deadline. The State's reasons for the lengthy delay do not meet the standard of "due diligence" as required to obtain a continuance....

*State v. Harris, supra* at 47.

Even if the trial court did not have that duty, as required by the court rules, the ambiguity involved between the subdivisions of the rule must result in application of the rule of lenity.

‘If after applying rules of statutory construction we conclude that a statute is ambiguous, “the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.”’ *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009) (quoting *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005)).

*State v. Baker*, 194 Wn. App. 678, 684, 378 P.3d 243 (2016).

The rules of statutory construction are equally applicable to court rules.

Interpretation of a court rule is a question of law that we review *de novo*. *N. Coast Elec. Co. v. Signal Elec., Inc.*, 193 Wn. App. 566, 571, 373 P.3d 296 (2016). We interpret court rules in the same manner as statutes. *Id.* If the rule’s meaning is plain on its face we will give that meaning effect as an expression of the drafter’s intent. *Id.* If the rule is ambiguous, we will attempt to determine the rule’s intent by reading the rule as a whole, harmonizing its provisions, and considering related rules. *Id.* To determine a rule’s meaning, we may employ traditional rules of grammar. ...

*Guardado v. Guardado*, 200 Wn. App. 237, 243, 402 P.3d 357 (2017).

As previously indicated, the provisions of CrR 3.3 are contradictory. Mr. Arnett asserts that there is no way that they can be harmonized even by reading the rule as a whole.

A “related charge” either has a commencement date the same as the charge already filed (CrR 3.3(a)(3)(ii)) or it does not (CrR 3.3(e)(5)). It cannot be both.

## CONCLUSION

As set out in *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980):

CrR 3.3, or some version of it, has been in effect since 1973. It has undergone a number of amendments. ... Since 1973, throughout the various charges and revisions, we have consistently insisted upon strict compliance with the rule and a sanction of dismissal with prejudice in those instances where the rule was not followed. [Citations omitted.]

CrR 3.3(a) was not followed under the facts and circumstances of Mr. Arnett's case.

Neither the trial court nor defense counsel recognized that an error was occurring.

The lack of such recognition constitutes ineffective assistance of counsel due to the failure to argue that "related charges" were involved and the subsequent prejudicial impact of a drug conviction on Mr. Arnett.

The trial court failed to comply with its duty to guarantee that Mr. Arnett was brought to trial within the provisions of CrR 3.3.

A strict construction of the provisions of CrR 3.3 requires reversal of Mr. Arnett's conviction and dismissal of the case.

DATED this 27th day of March, 2020.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99166

(509) 775-0777

(509) 775-0776

**NO. 36902-1-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	LINCOLN COUNTY
Plaintiff,	)	NO. 18 1 00070 7
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
MICHAEL LOGAN ARNETT,	)	
	)	
Defendant,	)	
Appellant.	)	
_____	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 27th day of March, 2020, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

COURT OF APPEALS, DIVISION III  
Attn: Renee Townsley, Clerk  
500 N Cedar St  
Lincoln, WA 99201

E-FILE

JEFFREY S. BARKDULL  
Lincoln County Prosecutor's Office  
PO Box 874  
Davenport, Washington 99122-0874  
[jbarkdull@co.lincoln.wa.us](mailto:jbarkdull@co.lincoln.wa.us)

E-FILE

MICHAEL LOGAN ARNETT  
PO Box 612  
Wellpinit, Washington 99041

U. S. MAIL

s/ Dennis W. Morgan  
DENNIS W. MORGAN WSBA #5286  
Attorney for Defendant/Appellant.  
P.O. Box 1019  
Republic, WA 99169  
Phone: (509) 775-0777  
Fax: (509) 775-0776  
[nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com)

**March 27, 2020 - 10:41 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36902-1  
**Appellate Court Case Title:** State of Washington v. Michael Logan Arnett  
**Superior Court Case Number:** 18-1-00070-7

**The following documents have been uploaded:**

- 369021\_Briefs\_20200327104103D3136654\_6739.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Arnett Brief of Appellant.pdf*

**A copy of the uploaded files will be sent to:**

- jbarkdull@co.lincoln.wa.us

**Comments:**

---

Sender Name: Dennis Morgan - Email: nodblspk@rcabletv.com  
Address:  
PO BOX 1019  
REPUBLIC, WA, 99166-1019  
Phone: 509-775-0777

**Note: The Filing Id is 20200327104103D3136654**