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Court of Appeals
Division III
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No. 37169-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

SHANE MICHAEL CURTISS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Judges David A. Eloffson, Richard Bartheld, and Gayle
Harthcock

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Curtiss' right to a speedy trial was violated when the trial court granted the State's request for a continuance past August 23, 2019.
2. The trial court erred in granting the State's request for a continuance of the trial date on August 9, 2019.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Curtiss' right to a speedy trial was violated when the trial court granted the State's request for a continuance past August 23, 2019.

C. STATEMENT OF THE CASE

On June 12, 2019, the State charged Shane Michael Curtiss with three crimes, alleged to have occurred on or about June 9, 2019: possession of a stolen motor vehicle; possession of a controlled substance (methamphetamine); and second degree driving while license suspended or revoked. (CP 7). Mr. Curtiss was arraigned on these charges on June 24, 2019. (CP 9). Mr. Curtiss was held in custody at the time of his arraignment, and he remained in custody until trial. (CP 9, 13-14, 22-23, 51; RP 6, 32).

At arraignment, an omnibus hearing was scheduled for July 25, 2019. (CP 9). At the omnibus hearing, trial was scheduled for August 12, 2019, with a time for trial deadline of August 23, 2019. (CP 11-12).

At the trial readiness hearing held on August 9, 2019, the State requested the trial court grant a continuance of the August 12, 2019 trial date. (RP 5-11). The State gave two reasons for its request. (RP 5-6, 14-15). First, the unavailability of the assigned deputy prosecutor:

One is just my own unavailability to try this case. As I've mentioned before, I currently have two cases already on the trail with shorter speedy trial times. And so, those -- and then, basically, those need to go out next week or they'll need to be continued. And then, on the 19th and 20th I am scheduled to be doing pretrial on an aggravated homicide case. And then from the 21st through the 28th, I am out of -- well, the 22nd through the 28th, but I can't start trial on the 21st, I'm scheduled to be out of the country with a pre longstanding vacation plan. So, that covers basically the rest of Mr. Curtiss' current speedy trial window.

(RP 5).

Second, to give the crime lab more time to test the alleged controlled substance:

Also, as I mentioned last time, Count 2 here is possession of a controlled substance methamphetamine. This case arose on June 9th and so, it's just over two months old. I know that, cause I've spoken to YSO, evidence about this, the drugs, have been or the suspected controlled substances have been sent to the crime lab. And so, I will reach out to the crime lab to ask them to expedite the testing so we can get an answer on that. But they are not done as of today's date.

(RP 5-6).

Mr. Curtiss objected to the State's request for a continuance, unless the trial court would release him on his own recognizance, arguing he has the right to be tried within 60 days of his arraignment, pursuant to CrR 3.3. (RP 6-7).

Defense counsel argued "I don't think that my client's right to a speedy trial can be held contingent upon the . . . availability of the drug lab - - of the crime lab to get the drug testing done." (RP 7). Defense counsel identified the prejudice to Mr. Curtiss, if the requested continuance was granted, as "hav[ing] to languish in custody" (RP 7).

The trial court granted the State's motion to continue and scheduled trial for September 30, 2019. (CP 14; RP 7-11). The trial court found:

All right. Defense is ready. State needs a continuance. I find there's good cause for the continuance. There's no prejudice to Mr. Curtiss in the presentation of his defense in that matter. The continuance will be granted.

(RP 7-8).

Mr. Curtiss objected to this trial setting, and requested a trial date on or before August 23, 2019, or that the charges be dismissed with prejudice. (CP 15-20; RP 14-15). Defense counsel argued that congestion in the crime lab, resulting in a delay in testing the alleged controlled substance, is not good cause to violate Mr. Curtiss' right to a speedy trial under CrR 3.3, relying on *State v. Wake*, 56 Wn. App. 472, 783 P.2d 1131 (1989). (CP 16-19). Defense counsel further argued "there's no reason this trial can't be reassigned so my client could have his trial on or before August 23rd." (RP 14). The trial court denied Mr. Curtiss' request. (RP 14-15).

On September 27, 2019, the State requested the trial court grant a one-week continuance of the trial date to October 7, 2019. (RP 18-19). Mr. Curtiss objected to the State's request for a continuance, arguing the time for trial expired on August 23, 2019. (RP 19). The trial court granted the State's motion to continue, characterizing the request as "a reset within the thirty day buffer." (CP 22; RP 18-19).

Mr. Curtiss objected to this trial setting, and requested the charges be dismissed with prejudice. (CP 24-32; RP 22-26). In his written objection, Mr. Curtiss included emails from the deputy prosecutor showing the alleged controlled substance was sent to the crime lab for testing on July 29, 2019, and the deputy prosecutor requested it be tested on August 9, 2019. (CP 25, 31-32).

Defense counsel argued:

The defendant objects to postponing the trial, and renews its objection to postponing trial so the Laboratory could get around to testing the suspected methamphetamine especially when neither the request for the Laboratory to test nor even sending the suspected methamphetamine to the Laboratory for testing occurred in a timely fashion while he languishes in custody, and moves the Court to dismiss this case with prejudice since he was and can not be brought to trial by August 23.

.....

Routine and foreseeable congestion at the Laboratory is not and never has been or will be good cause to grant the plaintiff's motion to continue beyond the time for trial.

(CP 26).

Defense counsel argued the time for trial has already expired. (RP 24). He reiterated the trial court's decision granting a continuance of the trial on August 9, 2019, was in error. (RP 24-25). Defense counsel stated the defense does not agree to speedy trial, and "I don't want to - - there to be any hint that I've waived that issue." (RP 24).

The trial court denied Mr. Curtiss' request. (CP 50; RP 24-26). The trial court stated that the time for trial extends to "the end of roughly October 29, 30." (RP 24).

The case did not proceed to a jury trial on October 7, 2019, due to availability of the crime lab witness, and the assigned deputy prosecutor handling another case first. (RP 23).

The case proceeded to a jury trial, commencing on October 21, 2019. (RP 27-407).

Mr. Curtiss objected to the October 21, 2019 trial date, and requested the charges be dismissed with prejudice, because the time for trial expired August 23, 2019. (CP 52-53; RP 29-33). Defense counsel argued:

Continuance to allow for testing of alleged controlled substances is not a valid basis to continue a trial date which violated the defendant's right to trial by August 23. The plaintiff's claim that it also so sought [sic] continuance beyond August 23 because plaintiff's counsel was or expected to be unavailable for trial on or before August 23 was also not a valid reason to grant the motion to continue because the plaintiff made no showing why trial could not have been re-assigned to another attorney so that the defendant could have enjoyed his right to a speedy trial. This case is relatively simple factually and legally; so another attorney could have easily familiarized herself or himself to bring this case to trial on or before August 23.

(CP 52-53; RP 32-33).

Mr. Curtiss filed his objection to the October 21, 2019 trial date on the first day of trial, informing the trial court "I filed another objection to the trial setting of today because I didn't . . . get notice of that trial setting until Friday." (RP 29).

The State argued:

I would just ask the Court to note the objection to this trial date for the purpose of appeal and then proceed. Because, I think we are

within an appropriate thirty day buffer period following an excluded period under 3.3.

(RP 31).

The trial court denied Mr. Curtiss' request. (RP 31-33). The trial court found:

And -- and I did review the file. It looks like Mr. Curtiss was arraigned on 6/24. No trial date was set at that time. An omnibus hearing was set, but within the sixty days a trial date was set on 7/25 for 8/12 on that -- on the 7/25 date. The omnibus order in that said that good cause to exceed the 3.3 sixty day period essentially, and I'm paraphrasing, had been found at that point on the omnibus order. And then, on August 9th a new trial date was set and it was over the objection of Mr. Curtiss. That was a contested continuance to 9/30 and I believe the basis, at that point, which was found as good cause by Judge Elofson was unavailability of the deputy prosecuting attorney as well as the necessity to, I guess, get results from the crime labs. So, and so, that was set. Then there was -- there is the thirty day buffer period, which this does fall within. I understand that -- that [defense counsel] and Mr. Curtiss -- [defense counsel], on his behalf, is arguing that it should have been set within the initial sixty days. But good cause was found by both Judge Elofson, as well as myself over the objection of Mr. Curtiss and for those reasons, I'm gonna go ahead and -- and deny the objection to the trial setting and request for dismissal. And, the good cause, in my mind, is that [the deputy prosecutor], it's my understanding, was in another trial previously -- I believe even as recently as last week. Additionally, there was his unavailability earlier on which Judge Elofson found was good cause and would not prejudice the ability of Mr. Curtiss to present a defense. I understand he's been in custody and incarcerated since June and also the necessity of obtaining the evidence, despite the Wake matter which is 56 Wn. App. 472.

(RP 31-32).

At trial, forensic scientist Jason Trigg testified he tested the controlled substance sent to the crime lab for this case. (RP 268, 278-279; Pl.'s Exs. 16, 20,

21). He testified the crime lab received the controlled substance on July 31, 2019. (RP 283; Pl.'s Ex. 20). Mr. Trigg testified he began his testing on August 14, 2019. (RP 283-284). He testified he signed the crime lab report on August 19, 2019. (RP 281; Pl.'s Ex. 21).

The jury found Mr. Curtiss guilty of possession of a stolen motor vehicle and second degree driving while license suspended or revoked. (CP 115, 117, 122-128; RP 404-407). The jury found him not guilty of possession of a controlled substance (methamphetamine). (CP 116; RP 405-407).

Mr. Curtiss appealed. (CP 129).

D. ARGUMENT

Issue 1: Whether Mr. Curtiss' right to a speedy trial was violated when the trial court granted the State's request for a continuance past August 23, 2019.

Mr. Curtiss' right to a speedy trial under CrR 3.3 was violated when the trial court granted the State's request for a continuance past August 23, 2019. The trial court erred in granting the State's request for a continuance of the trial date on August 9, 2019. Mr. Curtiss' convictions should be reversed and the charges dismissed with prejudice.

Under the speedy trial rule, CrR 3.3, a defendant who is in-custody must be brought to trial within 60 days after the date of his arraignment. CrR 3.3(b)(1)(i), (c)(1). The rule sets forth periods that are excluded in computing the time for trial, including continuances granted by the court, pursuant to CrR 3.3(f).

CrR 3.3(e). The trial court may grant a continuance upon a motion filed by a party, under the following circumstances:

On motion of the court or a party, *the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.* The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2) (emphasis added).

If any period of time is excluded pursuant to CrR 3.3(e), “the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.” CrR 3.3(b)(5); *see also State v. Guzman Nunez*, 160 Wn. App. 150, 165 n.7, 248 P.3d 103 (2011), *aff’d and remanded*, 174 Wn.2d 707, 285 P.3d 21 (2012) (recognizing this 30-day buffer period).

An alleged violation of the speedy trial rule is reviewed de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). “[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.” *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (alteration in original) (quoting *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). The appellate court “will not disturb the trial court’s decision unless the appellant or petitioner makes a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* (internal quotation marks omitted) (alterations in original) (quoting

Downing, 151 Wn.2d at 272). The remedy for a violation of the speedy trial rule is dismissal of the charges with prejudice. *Kenyon*, 167 Wn.2d at 139; *see also* CrR 3.3(h) (stating “[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice.”).

Here, Mr. Curtiss, held in custody, was arraigned on June 24, 2019, so he had to be brought to trial within 60 days of this arraignment date, August 23, 2019. *See* CrR 3.3(b)(1)(i), (c)(1); *see also* CP 9, 13-14, 22-23, 51; RP 6, 32. On August 9, 2019, the State requested, and the trial court granted, a continuance of the trial date past August 23, 2019, to September 30, 2019. (CP 14; RP 5-11). The State gave two reasons for its request: (1) the unavailability of the assigned deputy prosecutor, due to involvement in other cases, and a “pre longstanding vacation plan” from August 22-28, 2019; and (2) to give the crime lab more time to test the alleged controlled substance. (RP 5-6). The trial court granted the State’s request for the continuance, finding good cause for the continuance. (CP 14; RP 7-8).

The trial court abused its discretion in granting the State’s request for a continuance on August 9, 2019. *See Flinn*, 154 Wn.2d at 199 (quoting *Downing*, 151 Wn.2d at 272). Neither reason set forth by the State supported the trial court granting a continuance under CrR 3.3(f)(2).

First, the unavailability of the assigned deputy prosecutor prior to August 23, 2019 was not a valid basis for granting a continuance.

“A prosecutor’s responsibly scheduled vacation is a valid basis for granting a continuance.” *State v. Heredia-Juarez*, 119 Wn. App. 150, 153, 79 P.3d 987 (2003). “[T]here is not a per se requirement of reassignment when a prosecutor becomes unavailable.” *Id.* at 155. However, “[i]n exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors.” *Id.*

“[T]he trial court is entitled to determine whether reassignment is feasible and necessary in a particular situation.” *State v. Chichester*, 141 Wn. App. 446, 455, 170 P.3d 583 (2007). “In doing so the court may take into consideration the complexity of the case and the seriousness of the charge.” *Id.* (citing *Heredia-Juarez*, 119 Wn. App. at 155-56).

In *Heredia-Juarez*, the court found the following factors supported the trial court granting a continuance to accommodate a prosecutor’s previously scheduled vacation:

First, the State's requested continuance was necessitated by [the defendant’s] earlier request for a continuance. The deputy prosecutor's vacation did not conflict with the originally scheduled trial date. We also note that the deputy prosecutor acted responsibly in promptly notifying the court of the conflict. Second, [the defendant] was charged with three separate counts involving two victims. Two of the charges, rape in the first degree and kidnapping in the first degree, are serious class A felonies. The complexity of the case is a factor the trial court may consider in determining the feasibility of reassignment. In addition, the prosecutor in this case had been assigned to the case since before the arraignment. The State argues that in cases such as this, it is important for the prosecutor to establish a rapport with the victims. The necessity to build rapport with victims,

especially those involved in serious crimes, may properly be considered by the trial court in determining whether to require reassignment.

Heredia-Juarez, 119 Wn. App. at 155-56.

Here, these factors do not support the trial court granting a continuance to accommodate the assigned deputy prosecutor's vacation. *See Heredia-Juarez*, 119 Wn. App. at 155-156; *see also Chichester*, 141 Wn. App. at 455. The case should have been reassigned to a different deputy prosecutor so that Mr. Curtiss could have his trial on or before the August 23, 2019 deadline.

First, the defense did not request a continuance; defense was ready for trial when the State requested the continuance. (RP 7-8). The assigned deputy prosecutor did not act responsibly in promptly notifying the court of the conflict (scheduled vacation), but rather, waited until the trial readiness hearing, three days before the scheduled trial date. (RP 5). The assigned deputy prosecutor's vacation conflicted with the originally scheduled trial date.

Second, this is not a complex case. It was feasible to reassign this case to a different deputy prosecutor.

Finally, this is not a serious case where developing rapport with a victim was important, but rather, involved two non-violent felonies and a gross misdemeanor. *See* RCW 9.94A.030(34) (defining non-violent offense); RCW 9.94A.030(56) (defining violent offense); *see also* CP 7. There is no evidence that the assigned deputy prosecutor had developed a relationship with the victim

that would counsel against reassignment to a different deputy prosecutor. *Cf. State v. Kindell*, 181 Wn. App. 844, 855, 326 P.3d 876 (2014) (upholding the trial court’s decision to grant a continuance based upon the unavailability of the assigned prosecutor “who had a relationship with the victim making it difficult to transfer the case to another prosecutor.”).

The trial court erred in granting the State’s request for a continuance based upon the unavailability of the assigned deputy prosecutor, because it failed to consider these relevant factors. *Heredia-Juarez*, 119 Wn. App. at 155.

Second, the delay in the crime lab testing the alleged controlled substance was not a valid basis for granting a continuance.

In *State v. Wake*, the State moved for a continuance the day before trial, because its expert witness from the State crime lab was not available for trial. *State v. Wake*, 56 Wn. App. 472, 473, 783 P.2d 1131 (1989). The court found the trial court abused its discretion in granting the continuance. *Id.* at 476. The court stated “[i]f congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem.” *Id.* at 475. The court noted “the State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony and, as a result, a logjam is being created.” *Id.*

The court further found:

[T]he prosecutor knew of the conflict almost 2 weeks before trial was scheduled, and had an opportunity to make alternative

arrangements. Thus, this was not an unavoidable circumstance beyond control of the State.

Id. at 475-76.

Here, congestion at the crime lab, resulting in a delay in testing the alleged controlled substance, cannot excuse a violation of Mr. Curtiss' speedy trial rights. *See Wake*, 56 Wn. App. at 475. Further, the State knew it needed to test the alleged controlled substance prior to the trial, but it did not submit the substance for testing until July 29, 2019 (received by the crime lab on July 31, 2019), over six weeks after the charges were filed, and five weeks after Mr. Curtiss was arraigned on the charges. (CP 7, 9, 25, 31-32; RP 283; Pl.'s Ex. 20). Thus, the delay in testing the alleged controlled substance was not an unavoidable circumstance beyond the control of the State. *See Wake*, 56 Wn. App. at 475-76.

The State did not exercise due diligence in sending the alleged controlled substance to the crime lab. *See State v. Yuen*, 23 Wn. App. 377, 378-80, 597 P.2d 401 (1979); *cf. State v. Howell*, 119 Wn. App. 644, 648-49, 79 P.3d 451 (2003) (upholding a four-day continuance to allow the crime lab to test fire a gun; the State was diligent in requesting the continuance, and the crime lab congestion was for an unusual situation, the investigation of the Green River murders). Once the State finally sent to the alleged controlled substance to the crime lab and requested testing, the substance was tested, and it was completed prior to the August 23, 2019 speedy trial deadline. (CP 25, 31-32; RP 281, 283-284; Pl.'s Exs. 20, 21).

Mr. Curtiss was not brought to trial within 60 days of his arraignment, in violation of CrR 3.3(b)(1)(i). The trial court erred in granting the State's request for a continuance of the trial date past August 23, 2019. The unavailability of the assigned deputy prosecutor prior to August 23, 2019 was not a valid basis for granting a continuance. This was not a complex nor a serious case, and it was feasible to assign the case to a different deputy prosecutor. The delay in the crime lab testing the alleged controlled substance was not a valid basis for granting a continuance. The State waited over six weeks after these charges were filed to submit the alleged controlled substances for testing at the crime lab. Because his right to a speedy trial was violated, Mr. Curtiss' convictions should be reversed and dismissed with prejudice. *See Kenyon*, 167 Wn.2d at 139; *see also* CrR 3.3(h).

E. CONCLUSION

Mr. Curtiss' convictions should be reversed and the charges dismissed with prejudice, because his right to a speedy trial was violated when the trial court granted the State's request for a continuance past August 23, 2019.

Respectfully submitted this 7th day of May, 2020.


Jill S. Reuter, WSBA #38374

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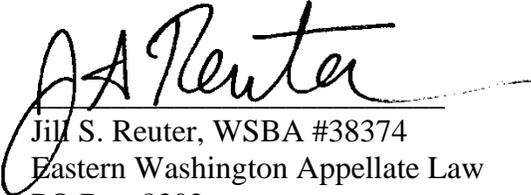
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Plaintiff/Respondent)
vs.) Yakima Co. No. 19-1-01028-8
)
SHANE MICHAEL CURTISS) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 7, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Dated this 7th day of May, 2020.


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