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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

85789-0

No. 28259-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE NUNEZ,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

WHERE MR. NUNEZ'S RIGHT TO A SPEEDY TRIAL PURSUANT TO CrR 3.3 WAS VIOLATED, REVERSAL OF THE CONVICTION AND DISMISSAL OF THE ACTION IS REQUIRED.

1. The trial court's order failed to meet the requirements of CrR 3.3(g) to exclude time. Under CrR(g), CrR 3.3(g) requires the court to make a finding that the defendant will not be substantially prejudiced. The court in this case failed to make such a finding concerning the continuance on June 25, 2009. RP6/29/09. In fact, the court made no effort to discover whether Mr. Nunez would suffer prejudice. The court did not ask Mr. Nunez's attorney at the June 29, 2009 hearing whether Mr. Nunez would suffer prejudice from a delay beyond the speedy trial expiration date. Id. The court candidly stated on the record that it had not read Mr. Nunez's file in preparation for the hearing. Id. at 4. Because the court made no finding regarding prejudice to Mr. Nunez, the court extended the speedy trial expiration date without authority under CrR 3.3(g). The requirement that the court find no prejudice to the defendant on the record or in writing is unequivocal. CrR 3.3(g).

Further, the superior court erroneously applied CrR 3.3(g) to extend the speedy trial date on June 29, when the speedy trial

period had not yet expired. CrR 3.3(g) allows the court to extend the speedy trial date “within five days after the time for trial has expired.” Since the time for Mr. Nunez’s speedy trial had not expired, the court should have looked to CrR 3.3(e) instead to determine whether the court could exclude time. See CrR 3.3(e) (giving nine categories of excluded periods).

2. The court did not extend time based on CrR 3.3(e) and none of the CrR 3.3(e) provisions apply to the period after June 29, 2009. The court explicitly noted that it was applying CrR 3.3(g) and not CrR 3.3(e) to exclude time. RP6/29/09 at 4. Yet, the delay here fits into none of the categories of excluded periods in CrR 3.3(e). The only periods of categories that could conceivably apply are CrR 3.3(e)(3) and (8).

CrR 3.3(e)(3) permits the court to exclude time for a continuance pursuant to CrR 3.3(f). CrR 3.3(f)(2) provides that:

[o]n 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 court must state on the record or in writing the reasons for the continuance.

(emphasis added). Here, the court made no statement on the record or in writing either that (i) the continuance was required in

the administration of justice or that (ii) defendant would not be prejudiced. RP6/29/09; CP 79 (July 1, 2009 Order). Therefore, there was no valid CrR 3.3(f) continuance and CrR 3.3(e)(3) does not apply to exclude the time between June 29 and July 1.

CrR 3.3(e)(8) permits the court to exclude time for “[u]navoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties.” Here, there is nothing on the record indicating that the parties could not have proceeded with trial on June 26, 2009 or June 29, 2009.

RP6/29/2009. This Court should find that the unsupported whims of the trial court or prosecutor do not constitute “[u]navoidable or unforeseen circumstances.” See CrR 3.3(e)(8); see also State v. Kenyon, 167 Wn. 2d 130, 136-37, 216 P.3d 1024 (2009) (en banc) (holding that court congestion was not an “unavoidable or unforeseen” circumstance).

3. Mr. Nunez need not prove actual prejudice for reversal to be required. The trial court bears the ultimate responsibility to ensure that trial is held within the speedy trial period. CrR 3.3(a)(1); State v. Raschka, 124 Wn. App. 103, 110, 100 P.3d 339 (2004). On appeal, “[f]ailure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the

defendant can show prejudice.” Raschka, 124 Wn. App. at 112. Mr. Nunez need not show prejudice to be entitled to a reversal of his conviction and a dismissal of all charges.

4. This Court must reverse and order dismissal of the charges against Mr. Nunez with prejudice. Where the trial court violates a defendant’s speedy trial rights and the defendant is convicted, the appellate court must reverse the conviction and order dismissal. Kenyon, 167 Wn.2d at 139; State v. Saunders, 153 Wn. App. 209, 211, 220 P.3d 1238 (2009). There is no de minimis exception to the speedy trial rule. See CrR 3.3(g) (although court may “cure” late trial within five days of expiration of speedy trial period, it may only do so “upon a finding on the record or in writing that the defendant will not be substantially prejudiced”); State v. Warren, 96 Wn.App. 306, 979 P.2d 915 (1999) (reversing trial court and dismissing convictions where court, in ordering two-day continuance, did not make detailed explanation on the record as to why each superior court department was unavailable).

This Court should not reverse the conviction with an order to the superior court to determine prejudice retrospectively. See Raschka, 124 Wn. App. at 112 (“[f]ailure to strictly comply with the

speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice”).

F. CONCLUSION

For the foregoing reasons, Mr. Nunez respectfully requests this Court reverse his conviction and remand the matter to the superior court for dismissal of the charges with prejudice.

Respectfully submitted this 28th day of May, 2010.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28259-7-III
v.)	
)	
ENRIQUE NUNEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ERIC BIGGAR, DPA	(X)	U.S. MAIL
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