

86633-3

Supreme Court No. _____
(COA No. 63559-0-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON OLLIVIER,

Petitioner.

RECEIVED
COURT OF APPEALS
DIVISION ONE

OCT 17 2011

FILED
OCT 23 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

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

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2011 OCT 17 PM 5:03

FILED
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON
[Signature]

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 3

E. ARGUMENT 5

 1. THE PUBLISHED COURT OF APPEALS DECISION
 MISAPPLIES THE SPEEDY TRIAL ANALYSIS
 REQUIRED BY THIS COURT IN INIGUEZ, THUS
 CONFLICTING WITH INIGUEZ AND CREATING
 CONFUSION 5

 a. The Court of Appeals decision conflicts with Iniguez by
 demanding a showing of actual, demonstrated
 prejudice 5

 b. The Court of Appeals’s focus on actual prejudice led it
 to misapply the remaining Iniguez factors 7

 c. The Court of Appeals decision conflicts with Division
 Two’s opinion in Saunders 10

 2. THE DOCUMENTED FALSEHOODS AND OMISSIONS
 FROM THE SEARCH WARRANT, AS WELL AS ITS
 IMPROPER EXECUTION, UNDERMINE THE
 LAWFULNESS OF THE SEARCH 13

 a. The conceded, deliberate “falsehoods by the detective”
 undermine the validity of the search warrant 13

 b. This Court should address the deliberate failure to
 provide a copy of a warrant to the person whose
 property is being searched 16

F. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009)..... 16

State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009) .2, 5, 6, 7, 9,
10

State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984)..... 13, 14

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009)..... 19

Washington Court of Appeals Decisions

State v. Angelone, 67 Wn.App. 555, 837 P.2d 656 (1992) 10

State v. Ettenhofer, 119 Wn.App. 300, 79 P.3d 478 (2003).... 17, 18

State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009).. 11, 12, 13

State v. Rodriguez, 53 Wn.App. 571, 769 P.2d 309 (1989) 14

State v. Saunders, 153 Wn.App. 209, 220 P.3d 1238 (2009) ..2, 10,
11, 12

United States Supreme Court Decisions

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723
(1964) 13, 16

Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101
(1972) 5, 7, 8

Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120
L.Ed.2d 520 (1992) 6, 7, 9

Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068
(2004) 18

<u>Lilly v. Virginia</u> , 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)	14
<u>Spinelli v. United States</u> , 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)	14, 16
<u>Vermont v. Brillion</u> , _ U.S. _, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009)	8

Federal Decisions

<u>United States v. Gantt</u> , 194 F.3d 98(9 th Cir. 1999)	18
<u>United States v. Williamson</u> , 439 F.3d 1125 (9 th Cir. 2006)	18

United States Constitution

Fourth Amendment	14, 16, 18, 20
Sixth Amendment	1, 5

Washington Constitution

Article I, section 7	14, 16, 17
Article I, section 22	5

Court Rules

CrR 2.3	3, 16, 17, 19
CrR 3.3	2, 11, 12
RAP 13.3(a)(1)	1
RAP 13.4(b)	1, 7, 13, 20

A. IDENTITY OF PETITIONER.

Brandon Ollivier, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Ollivier seeks review of the published Court of Appeals decision dated April 18, 2011, for which a motion to reconsider was denied on September 16, 2011. Copies are attached as Appendix A (opinion) and Appendix B (order denying reconsideration).

C. ISSUES PRESENTED FOR REVIEW

1. In Iniguez,¹ this Court ruled that consistent with the Sixth Amendment, a violation of the right to a speedy trial does not require the accused to demonstrate actual prejudice to his ability to mount a specific defense. Contrary to this rule, the Court of Appeals declared that “[a]ctual prejudice to the defense is required” for a speedy trial violation. Does the published Court of Appeals decision conflict with decisions of this Court and the United States Supreme Court, and muddle the proper speedy trial analysis, so that substantial public interest favors review?

2. The court continued Ollivier's trial 22 times while he waited in custody and despite his many objections. In Saunders,² the court ruled that CrR 3.3 requires the trial judge to protect an accused person's right to a timely trial such that when the defendant objects, the judge must determine on-the-record the legitimacy of a superficially permissible reason to delay the trial. Does the Court of Appeals decision conflict with Saunders by holding that the trial court has no obligation to assess whether defense counsel's requests for more time are permissible when the defendant objects to the delay?

3. When a search warrant is based on deliberate falsehoods and fails to explain the bias of the central informant, the warrant will be deemed invalid if these errors undermine the probable cause for the warrant under the Fourth Amendment and Washington Constitution, Article I, § 7. Here, the court found the detective lied in the warrant application but it disregarded the application's failure to explain the informant's lack of credibility. When a search warrant rests on claims made by an unreliable witness and the warrant application did not inform the judge of the

¹ State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009).

² State v. Saunders, 153 Wn.App. 209, 220 P.3d 1238 (2009).

witness's unreliability, did the warrant violate Article I, section 7 and the Fourth Amendment?

4. Before executing a search warrant, officers must give a copy to a present property's owner to show the police's authority to search and the limits of its authority. Ollivier was present but the police deliberately refused to give him a copy of the search warrant before the search. The Court of Appeals misconstrued this requirement as either meaningless or requiring prejudice. When the police violate a rule that they must give an individual a copy of a warrant to search his property before the search, does this disregard for the rules violate the Fourth Amendment and Article I, section 7? Does the lack of published case law discussing the requirements for executing warrants under CrR 2.3 show there is substantial public interest in reviewing the published decision?

D. STATEMENT OF THE CASE.

Brandon Ollivier's roommate Eugene Anderson was a registered sex offender on community custody. 9RP 34, 62. During an interview with then-detective Dena Saario, Anderson claimed Ollivier had viewed child pornography on the computer in their shared apartment. Cp 233. At the time of the interview,

Anderson had been arrested for violations of community custody and was in the psychiatric unit of the jail. 4RP 24.

Saario obtained a search warrant based on Anderson's accusations, but the affidavit did not established Anderson's veracity. CP 228. The affidavit did not mention Anderson's present predicament, including being accused of violating community custody or being in a psychiatric unit. 3RP 103-04. Additionally, Saario's affidavit contained material falsehoods about the claimed child pornography in Ollivier's apartment and the trial court deemed these falsehoods were intentionally made with reckless disregard for the truth. CP 233.

The search resulted in locating child pornography on a computer, and Ollivier charged with its possession. 8RP 125-26. He was housed in jail while awaiting trial. The court granted 22 continuance requests, 19 of which Ollivier personally objected to. See e.g., CP 271, 276; 1RP 34; Opening Brief at 9-10. The requests were largely based on Ollivier's attorney's complaint that she had not received the necessary information to proceed to trial.

The facts are further set forth in the Court of Appeals opinion, pages 1-2; Appellant's Opening Brief, pages 5-10, 16, 28-29, 34-36; Appellant's Reply Brief, pages 1-3; and Ollivier's

Statement of Additional Grounds for Review, passim. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT.

1. THE PUBLISHED COURT OF APPEALS DECISION MISAPPLIES THE SPEEDY TRIAL ANALYSIS REQUIRED BY THIS COURT IN INIGUEZ, THUS CONFLICTING WITH INIGUEZ AND CREATING CONFUSION

a. The Court of Appeals decision conflicts with Iniguez by demanding a showing of actual, demonstrated prejudice. In State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009), this Court “established the method of analysis” for whether pretrial delay violates the right to a speedy trial as guaranteed by article I, section 22, which in turn adopts the Sixth Amendment speedy trial analysis set forth in Barker v. Wingo, 407 U.S. 514, 516, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

Although the Court of Appeals acknowledged the general framework set forth in Iniguez, it disregarded these rules when assessing Ollivier’s case. Once “the length of the delay crossed a line from ordinary to presumptively prejudicial”-- as the State and Court of Appeals conceded applied to Ollivier’s case’s lengthy

delay -- the court analyzes the delay based on four predominant, although non-exclusive, factors. 167 Wn.2d at 283.

The four factors are (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) the prejudice caused the accused, which includes the impairment of the defense but it also includes weighing the harshness of pretrial detention and the anxiety caused by waiting for trial for a long time. 167 Wn.2d at 293-94.

One clear rule from Iniguez is that when evaluating a speedy trial claim, "a defendant is not required to substantiate actual prejudice to his ability to defend himself." Id. at 285. The Iniguez Court refused to require a showing of actual prejudice. Id. Excessive delay "compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Id. (quoting Doggett v. United States, 505 U.S. 647, 655, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). Accordingly, "no showing of actual impairment is required to demonstrate a constitutional speedy trial violation," and the court shall "presume such prejudice to the defendant intensifies over time," because actual prejudice is hard to prove. Id. at 295.

Contrary to Iniguez and Barker, the Court of Appeals declared that proof of “[a]ctual prejudice to the defense is required” to violate the right to a speedy trial. Slip op. at 5. For this proposition, it cited a dissenting opinion in Doggett, 505 U.S. at 659 (O’Connor, J., dissenting). Id. at n.17. But the Court of Appeals holding is not only directly contrary to Iniguez, it is expressly contrary to the Doggett. In Doggett, the majority held, “affirmative proof of particularized prejudice is not essential to every speedy trial claim.” 505 U.S. at 655. Because it is extremely difficult to identify, much less quantify, the prejudice resulting from the passage of time, the delay is presumed to impair the defense. Id. The Court of Appeals decision hinges on its contention that actual prejudice is required. This statement of the law is wrong and it undermines the Court’s ruling. It also creates confusion and, as a published decision, should be reviewed and reconsidered based on its precedential impact. RAP 13.4(b)(2), (3).

b. The Court of Appeals’s focus on actual prejudice led it to misapply the remaining *Iniguez* factors. Ollivier established an undue delay in violation of his right to a speedy trial. Nineteen of the 22 continuances were issued over Ollivier’s personal

objection. Because Ollivier objected, his attorney's requests for more time cannot be attributed to him.

Ollivier's objections stand in stark contrast to a case on which the prosecution relied, Vermont v. Brillon, __ U.S. __, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009). In Brillon, the defendant repeatedly complained about and fired his appointed attorneys, causing his case to languish while awaiting new counsel and giving time for counsel to prepare. Id. at 1292. The defendant's repeated demands for new counsel were granted, and these demands necessitated great delay. Id. The Brillon Court found his was a deliberate attempt to disrupt proceedings that should be "weighted heavily against the defendant" when assessing his speedy trial complaint on appeal. Id. at 1292. Ollivier wanted a trial, not to hamper proceedings, thus Brillon is not on point.

The delay denied Ollivier his right to a speedy trial because it was extremely long, over his own objection, and impaired his ability to present a defense. His main witness, Daniel Whitson, had a degenerative brain disorder, affecting his ability to provide needed testimony in ways that cannot be definitively proven. 1RP 65, 9RP 94, 98; see Barker, 407 U.S. at 532 "[l]oss of memory... is not always reflected in the record because what has been forgotten

can rarely be shown.”). Another witness, Shilo Edwards, was unavailable. The detectives could not recall critical information during pretrial hearings. CP 229 (court’s finding: “the officers . . . had no recollection of some of the events.”).

The delay impaired Ollivier’s release on bond, which Iniguez and Doggett recognize as significant prejudice.³ Ollivier was held for the entire 23 months he awaited trial, and he was refused bond at least twice based on the court’s mistaken belief he would be brought to trial in a timely manner, a clear manifestation of prejudice.⁴ Ollivier’s Statement of Additional Grounds (SAG) explained the memory loss of the three detectives who were unable to accurately recall details of the warrant. SAG, at 8. His defense

³ Ollivier was denied release at a bond hearing on November 19, 2007. Defense counsel explained (in her fifth motion for continuance a few days later):

Part of the judge’s ruling in that [bond hearing] was based upon my assertion that the case would not be continued because at that time I did not think that I would be asking for a continuance.

1RP 27. Counsel admitted this was “not realistic” and did not “have a very good explanation” why she had made such an assertion, except that she was trying to manage a difficult caseload and thought she might have based her statement on her decision not to use the expert (suggesting she had not given sufficient thought to other aspects of the investigation) or might have been confused about the speedy trial date. 1(a)RP 2-3.

Then, while making his 19th objection to a continuance on January 21, 2009, Ollivier told the court he had been denied release on bond in March 2008 “under [the] single understanding [that] I was going to trial in May, guaranteed.” 2RP 8.

was impaired by his extremely overburdened defense attorney, of which he notified the court but received no relief. SAG, at 9-10; Correspondence to Court, attached as App. B to Opening Brief.

The Court of Appeals decision does not weigh the peculiar circumstances of Ollivier's case as Iniguez dictates: the impairment of his defense based on documented memory deficiencies of key witnesses and the inability to secure another witness's presence; his lengthy pretrial detention in which he was denied released based on the untrue claim he would receive a trial imminently; the unreasonableness of the defense attorney's excessive case load; and the unwarranted nature of two years of delay for a relatively straightforward case. By resting on the incorrect legal principle that "actual prejudice is required," and failing to properly assess the pertinent factors impacting Ollivier's speedy trial rights, the published decision should be reconsidered and should not stand as precedent because it will mislead courts in the future regarding the pertinent legal standards.

c. The Court of Appeals decision conflicts with Division Two's opinion in *Saunders*. When a defense attorney

⁴ See also State v. Angelone, 67 Wn.App. 555, 562, 837 P.2d 656 (1992) (prejudice was "clear" because the defendant lost the opportunity to have his federal prison term run concurrently with a sentence on state charges "due to the

seeks continuances without her client's consent, the court may not grant the request without documenting, on the record or in writing, the reason for the continuance and the prejudice caused by delay. State v. Saunders, 153 Wn.App. 209, 220, 220 P.3d 1238 (2009) (citing State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009)). If there is no "stated lawful basis for further continuances," after the original time for trial has expired, CrR 3.3 "requires dismissal and the trial court loses authority to try the case." Id. Under CrR 3.3, the trial court bears responsibility "to ensure that the defendant receives a timely trial" Id. (citing CrR 3.3(a)(1)-(2)). This rule requires the court to determine the lawfulness of the delay at the time it grants a continuance. Id.

In Saunders, the defendant himself objected to multiple continuances in his trial date, but his attorney did not object, and instead his lawyer either joined the requests for more time to negotiate the case or stood silent. The Court of Appeals faulted the trial court for simply accepting the requests to continue the trial date without looking behind those reasons when faced with the defendant's objections.

failure of the authorities to adhere to his requests for a speedy trial").

Saunders interprets Kenyon to dictate a burden on the trial court to weigh a defense attorney's duty to respect her client's wishes on matters such as a desire for a speedy trial. 153 Wn.App. at 217-18. Additionally, the court has a duty to see that the defendant receives "a timely trial." Id. The court must make a record that it weighed these interests at the time of the continuance request, if the defendant objects to an extension of the time for trial beyond the original period permitted.

Similarly to Saunders, Ollivier's counsel asked for more time for reasons that might be superficially permissible, but the sheer number of continuances in the face of Ollivier's objections prevented the trial court from simply deferring to a proffered basis for the request. Ollivier retained the right to a timely trial and the court was required to acknowledge the prejudice to his asserted right to a speedy trial and explore why his attorney was unable to prepare in a timely fashion. The court did not do so here.

The Court of Appeals disregarded Saunders. It summarily ruled that defense counsel offered facially valid reasons for requesting more time. It dismissed the court's obligation to ensure a timely trial under CrR 3.3 when the defendant repeatedly objects to the continuances. The Court of Appeals ruling conflicts with

Saunders, and Kenyon, and should be reviewed by this Court. See RAP 13.4(b).

2. THE DOCUMENTED FALSEHOODS AND OMISSIONS FROM THE SEARCH WARRANT, AS WELL AS ITS IMPROPER EXECUTION, UNDERMINE THE LAWFULNESS OF THE SEARCH

a. The conceded, deliberate “falsehoods by the detective” undermine the validity of the search warrant. In the Court of Appeals’ published decision, it upholds a search warrant even though the detective lied in her search warrant affidavit. But when the detective’s falsehoods are stricken, the search warrant rests on claims by an informant whose credibility is neither established in the warrant nor supported by the evidence.

An informant’s tip supports probable cause for a search warrant if the officer’s affidavit (1) sets forth circumstances under which the informant drew his conclusions so the magistrate can independently evaluate the reliability of the manner in which the informant acquired the information, and (2) sets forth the circumstances from which the officer concluded the informant or the information was credible. State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (citing Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United

States, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)); Wash. Const. art. I, § 7; U.S. Const. amend. 4.

The credibility and the basis of knowledge prongs must both be separately established in the search warrant affidavit. Jackson, at 437, 441. The affidavit must, within its four corners, establish the informant's credibility – why there are reasons to believe he is telling the truth. Id. at 433.

A known informant is presumed credible only when that person is “uninvolved” in the offense or a victim. State v. Rodriguez, 53 Wn.App. 571, 574, 769 P.2d 309 (1989). A heightened showing of credibility is required when the informant is a criminal informant or has a significant penal interest in the case. See Rodriguez, 53 Wn.App. at 575-76. A cohort or accomplice's allegations against another suspect are inherently suspicious. See Lilly v. Virginia, 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (suspect's statements alleging other's involvement have “presumptive unreliability”).

The Court of Appeals offered a brief explanation of the informant Anderson's basis of knowledge and bias, but it got these facts wrong, as Ollivier explained in his motion to reconsider, which the Court of Appeals denied without comment.

The decision asserts that “an informant who trades information for a favorable sentencing recommendation has a strong motive to be accurate.” Slip op. at 9. But Anderson did not trade information for a favorable sentencing recommendation, although he likely had his own motives for accusing Ollivier that the Court of Appeals did not acknowledge.

The warrant application did not explain that Anderson was not only in custody when then-detective Saario interviewed him, but he was in the psychiatric ward of the jail. 4RP 24; CP 65. He did not give a written statement to the detective, as this Court’s decision states. Anderson made his allegations against Ollivier to his community custody officer (CCO) while in custody for a community custody violation. CP 65. The obvious reasons to doubt his credibility were not provided in the search warrant and, because he was not proven credible, his allegations should have been stricken from the search warrant.

This Court’s decision jumps straight from acknowledging the challenge to Anderson’s credibility to finding Anderson had a basis of knowledge. Slip op. at 8-9. While Anderson had access to information about Ollivier, it was the credibility of the allegations that was highly suspect and not established by the warrant. The

reviewing judge could not properly determine Anderson's credibility. This critical omission requires further consideration of the case and undermines the warrant, as required by Aguilar-Spinelli.

b. This Court should address the deliberate failure to provide a copy of a warrant to the person whose property is being searched. Article I, section 7 of the Washington Constitution "is a jealous protector of privacy." State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).⁵ It is "well-settled" that Article I, section 7, provides greater protection to individual privacy than the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694, 76 P.3d 217 (2003).⁶ While the Fourth Amendment bars searches and seizures that are "unreasonable" based on evolving norms, Article I, section 7 "prohibits any disturbance of an individual's private affairs 'without authority of law.'" Buelna Valdez, 167 Wn.2d at 772.

CrR 2.3(d) requires that officers conducting a search provide the occupant with a copy of the warrant prior to commencing the search. It is undisputed that the police did not comply, deliberately,

⁵ Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

⁶ The Fourth Amendment provides,

with this requirement, even though Ollivier was present, was forced to wait outside while the police searched his home, and he tried to review the warrant during the search. CP 228, 230.

In State v. Ettenhofer, 119 Wn.App. 300, 308, 79 P.3d 478 (2003), the Court of Appeals explained that CrR 2.3 implements the authority of law to execute a search warrant under RCW 10.79.040. In Ettenhofer, the police obtained a telephonic warrant but it was not reduced to writing and CrR 2.3 requires a written warrant. Id. Because the rules attendant to searching a person's home establish the lawful authority for the police to intrude upon otherwise constitutionally protected private affairs, they "implement" article I, section 7. Id. Thus, the requirements of CrR 2.3 "must be interpreted with reference to the dictates" of article I, section 7.

This Court has not addressed whether the procedural dictates of the court rule are requisite parts of the authority of law under article I, section 7, to search a person's home. Because the Court of Appeals decision claims the rule is merely ministerial and has no significance in determining the lawfulness of the warrant

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons

and its execution, this Court should accept review based on the substantial public importance of the issue, and the conflict between the analysis in Ettenhofer and the case at bar.

Additionally, the Fourth Amendment requires the court enforce the deliberate or prejudicial violation of the warrant requirements, including the mandate that service be timely provided to a person whose home is being searched. See United States v. Gantt, 194 F.3d 987, 994 (9th Cir. 1999), overruled on other grounds, United States v. Grace, 526 F.3d 499 (9th Cir. 2008); U.S. Const. amend. 4. Prejudice is not required, only the deliberate failure to provide notice by giving the warrant to a present person whose property is to be searched.

An essential function of the warrant requirement is to “assure” the person whose property is being searched of the lawful authority of the search and seizure, as well as the limits of the police authority to search. United States v. Williamson, 439 F.3d 1125, 1132 (9th Cir. 2006). In Groh v. Ramirez, 540 U.S. 551, 562 n.5, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), the court noted that it may be unreasonable, and therefore violate the Fourth Amendment, to “refuse a request to furnish the warrant at the

or things to be seized.

outset of the search when, as in this case, an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission," although it did not resolve the issue.

The trial court concluded that the officers' failure to give Ollivier a copy of the warrant was deliberate and purposeful, although not done in bad faith. CP 230. Ollivier was present, forced to wait outside, and posed no threat. The officers' refusal to provide him with a copy of the warrant before the search was unreasonable and violated CrR 2.3.

Recently, in State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009), the Court recognized that our state constitution do not permit the introduction of evidence seized without the authority of law. The failure to comply with the notice and assurance rules, by deliberately not giving the warrant to Ollivier who was present and posed no threat, was unlawful. Article I, section 7 jealously guards and carefully draws any exceptions to its requirement that the authorities obtain "authority of law" before intruding into a person's private affairs, it mandates that "whenever the right is unreasonably violated, the remedy must follow." Id. at

632. The appropriate remedy is to suppress the evidence that was unlawfully seized.

This Court should grant review to explain the requirements of service of a warrant at the time of a search, under article I, section 7 and the Fourth Amendment, as well as to correct the Court of Appeals' disregard for the State's need to seek a warrant honestly and straightforwardly, acknowledging the weaknesses in its evidence rather than deliberately withholding them.

F. CONCLUSION.

Based on the foregoing, Petitioner Brandon Ollivier respectfully requests that review be granted because the decision of the Court of Appeals is inconsistent with prior decisions of this Court, contrary to other decisions of the Court of Appeals, and a violation of the state and federal constitutional rights to privacy and a speedy trial pursuant to RAP 13.4(b).

DATED this 17th day of October 2011.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 63559-0-I
Respondent,)	
)	DIVISION ONE
v.)	
)	PUBLISHED OPINION
BRANDON GENE OLLIVIER,)	
)	
Appellant.)	FILED: April 18, 2011

GROSSE, J. — It is not an abuse of discretion for the trial court to grant multiple continuances to ensure that defense counsel is adequately prepared even though the defendant objects to the majority of those continuances. Brandon Ollivier also raises additional issues, none of which have any merit. We affirm.

FACTS

Brandon Ollivier is a registered sex offender. In March 2007, he was living with two roommates both of whom were registered sex offenders. While in police custody for a community custody violation, Eugene Anderson, one of Ollivier's roommates, gave a taped interview to Detective Dena Saario. In that interview, Anderson stated that Ollivier had shown him a video of a young girl having sexual relations with a young boy. He also stated that Ollivier showed him other provocative photographs of young girls approximately 9 years old, who, although clothed, were provocatively posed.

Ollivier was arrested on April 13, 2007 and charged with possession of depictions of minors engaged in sexually explicit activity. He was arraigned on April 18, 2007. His initial speedy trial expiration date was June 29, 2007. A total of 22 continuances were granted before the trial took place 22 months later on March 9, 2009. Ollivier objected to 19 of the 22 continuances. There were primarily three reasons defense counsel sought the continuances: (1) need for an expert to review the computer content, (2) need to obtain information from the Washington State Department of Corrections (DOC), and (3) need to obtain information regarding the lead detective's resignation from the sheriff's office because an internal investigation found the detective dishonest.

Ollivier was convicted by jury of one count of possession of depictions of minors engaged in sexually explicit conduct and sentenced to 30 months.

Ollivier appeals contending that under the court rules and the state and federal constitutions, his right to a speedy trial was denied. Additionally, Ollivier argues that the informant's information was unreliable and that the search warrant was overbroad, not supported by probable cause, and improperly served.

ANALYSIS

Speedy Trial

Ollivier contends that the 22 continuances violated his constitutional right to a speedy trial under both the court rule and the federal and state constitutions. A trial court's decision to grant a continuance under CrR 3.3 will not be disturbed

absent a showing of manifest abuse of discretion.¹ Even when the defendant objects, the granting of a continuance to allow counsel to adequately prepare and ensure effective representation does not constitute an abuse of discretion.² As noted in Ollivier's own briefing, each of "the continuances, standing alone, would not be [an] abuse of discretion." Under these circumstances, the trial court did not abuse its discretion in granting each of the continuances under CrR 3.3. The risk of going to trial without the requested information, for which defense counsel was waiting, far outweighed any delay in going to trial. There was no violation of the court rule.

CrR 3.3 was enacted for the purpose of enforcing a defendant's constitutional right to a speedy trial.³ But it is a court rule and, as noted in State v Iniguez,⁴ compliance therewith does not necessarily guarantee that there has been no constitutional violation. Ollivier claims his constitutional rights were violated because he was incarcerated for over 22 months. He argues that such a length of time is presumptively prejudicial and violated his speedy trial rights under article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution.

A denial of Sixth Amendment rights is reviewed de novo.⁵ In Iniguez, our Supreme Court held that article I, section 22 does not afford a defendant greater

¹ State v. Nguyen, 131 Wn. App. 815, 819, 129 P.3d 821 (2006).

² State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984).

³ State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009).

⁴ 167 Wn.2d 273, 287, 217 P.3d 768 (2009).

⁵ Iniguez, 167 Wn.2d at 280.

greater speedy trial rights than the federal Sixth Amendment does.⁶ The Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”⁷ The right to a speedy trial “is as fundamental as any of the rights secured by the Sixth Amendment.”⁸ When a defendant’s constitutional speedy trial rights are violated, the remedy is to dismiss the charges with prejudice.⁹

To determine whether a defendant’s constitutional speedy trial rights were violated, courts balance four interrelated factors.¹⁰ As a threshold matter, “a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial.”¹¹ Once the defendant meets the threshold determination, the remaining factors need to be addressed. Citing Barker v. Wingo,¹² the Iniguez court noted the relevant factors to be the length and reason for the delay, whether the defendant asserted his right, and the ways in which the delay may have caused prejudice to the defendant.¹³ Under the Barker inquiry, we consider the extent to which the length of delay stretches beyond the bare minimum required to trigger the inquiry.¹⁴ Stated another way, the longer the delay, the more scrutiny should be applied to the circumstances surrounding the

⁶ Iniguez, 167 Wn.2d at 289.

⁷ U.S. CONST. amend. VI.

⁸ Barker v. Wingo, 407 U.S. 514, 516 n.2, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (citation omitted).

⁹ Barker, 407 U.S. at 522.

¹⁰ Iniguez, 167 Wn.2d at 283..

¹¹ Iniguez, 167 Wn.2d at 283.

¹² Barker v. Wingo, 407 U.S. 514, 531-32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

¹³ Iniguez, 167 Wn.2d at 283-84 (citing Barker, 407 U.S. at 530).

¹⁴ Iniguez, 167 Wn.2d at 283-84 (citing Doggett v. United States, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)).

delay. The State agrees that under these circumstances, a 22-month delay here was presumptively prejudicial.¹⁵ However, merely the fact that the time is presumptively prejudicial does not constitute a constitutional violation.

Here, Ollivier was originally charged with multiple counts of possession of depictions of minors engaged in sexually explicit conduct which could have subjected him to a long sentence. However, in the middle of the trial, the additional counts were dismissed and only one count went to the jury, resulting in an indeterminate sentence with a minimum of 30 months and a maximum of 10 years. In Barker, a 10-month incarceration was not found to be sufficiently oppressive. Indeed, “[l]ower courts have reached the same conclusion as to substantially longer periods of imprisonment” than that involved in Barker.¹⁶

Moreover, the presumption of prejudice needed to reach the additional Barker factors is not sufficient in and of itself to find actual prejudice. Although Ollivier objected to his counsel's requests for continuance, he does not specify what prejudice he in fact suffered. Actual prejudice to the defense is required.¹⁷ None is present here.

¹⁵ Iniguez, 167 Wn.2d at 283.

¹⁶ See 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 18.2(e), at 129-130 n.76 (2007); Jackson v. Ray, 390 F.3d 1254 (10th Cir. 2004) (defendant incarcerated over 4 years); United States v. Herman, 576 F.2d 1139 (5th Cir. 1978) (defendant incarcerated during entire 22-month delay); Hartridge v. United States, 896 A.2d 198 (D.C. 2006) (27 months); Smith v. State, 275 Ga. 261, 263, 564 S.E.2d 441 (2002) (defendant incarcerated 19 months, but “no evidence that appellant's pre-trial incarceration was oppressive to a degree beyond that which necessarily attends imprisonment”). Compare Berry v. State, 93 P.3d 222, 237 (Wyo. 2004) (incarceration of defendant for 720 days, which “necessarily impacted his employment opportunities, financial resources and association,” alone established prejudice).

¹⁷ Doggett, 505 U.S. at 659 (O'Connor, J., dissenting).

Defense counsel requested each of the continuances. Five of the continuances were attributable to the defense's need to obtain an expert's opinion on the computer. On November 30, 2007, the basis of the continuances was the defense's need to obtain additional information from DOC and third parties. In September 2008, defense counsel discovered that the detective who had sworn out the warrant had resigned from the sheriff's office after facing allegations of dishonesty. The final seven continuances were entwined with obtaining the information from that internal investigation and briefing to suppress information obtained as a result of the warrant. Prejudice to Ollivier would have resulted had he gone to trial with an unprepared attorney. Although 22 months is a long time, that in and of itself does not establish actual prejudice, particularly, where, as here, the continuances were all requested by defense counsel. Our holding is in accord with the United States Supreme Court's holding in Vermont v. Brillon.¹⁸ There, the defendant, who was arrested on felony domestic assault and habitual offender charges, did not come to trial until three years later. The Brillon Court held that the delays incurred by Brillon's counsel and Brillon himself were not attributable to the State for speedy trial purposes. Although a delay from a systemic "breakdown in the public defender system" could be ascribed against the State, this was not the case either in Brillon or here.¹⁹ The Brillon Court found that the two years that defense counsel "failed to move the case

¹⁸ U.S. ___, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009).

¹⁹ Brillon, 129 S. Ct. at 1292 (citation omitted).

forward" were attributable to the defendant because the public defenders were not state actors.²⁰

Although Ollivier remained in custody for over 22 months, it was not necessarily an undue delay. This is particularly true because the continuances were all requested by defense counsel who asserted that she was not prepared to go to trial without the necessary information. None of the continuances can be described as unreasonable.²¹

Validity of Search Warrant

Ollivier argues that there was insufficient probable cause to issue a search warrant and that the informant's information was unreliable. An affidavit for a search warrant establishes probable cause if it sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity and that the police will find evidence of that criminal activity at the place to be searched.²² The issuance of a search warrant is a "highly discretionary" act.²³ Although the issue here was somewhat complicated with falsehoods by the detective, there was sufficient probable cause to issue the warrant even with all alleged falsehoods redacted therefrom. In State v. Coates²⁴ and State v. Gaines,²⁵ the Supreme Court held that a search warrant was still valid because, after the illegally obtained information was excluded, the remaining information

²⁰ Brillon, 129 S. Ct. at 1287 (citation omitted).

²¹ See Iniguez, 167 Wn.2d at 294.

²² State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

²³ State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

²⁴ 107 Wn.2d 882, 888-89, 735 P.2d 64 (1987);

²⁵ 154 Wn.2d 711, 718-20, 735 P.2d 64 (2005).

independently established probable cause. Here, the information remaining established probable cause. Eugene Anderson, a registered sex offender and Ollivier's roommate, told his Community Corrections Officer (CCO) that Ollivier was looking at pornographic images on his computer, and Anderson was living with Ollivier at the same address that Ollivier registered as a sex offender. Ollivier had a prior conviction for first degree child molestation. Additionally, Anderson supplied a written statement to his CCO in which he averred that he had seen Ollivier view multiple suggestive photographs of children less than 10 years of age, both on the computer and in print form. Anderson said the girls were children because they had no breasts. Detective Saario interviewed Ollivier after being informed by the CCO of Anderson's allegations.

When an informant's tip forms the basis for probable cause, Washington courts apply the Aguilar-Spinelli test.²⁶ Under Aguilar-Spinelli, an affidavit of probable cause to support a search warrant must set forth facts establishing an informant's veracity and basis of knowledge. Ollivier attacks the validity of the warrant on the ground that the informant was not credible. He argues that the warrant fails to set forth facts that establish the informant's veracity and basis of knowledge about criminal activity at Ollivier's home as required by Aguilar-Spinelli.

²⁶ Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984).

An informant who trades information for a favorable sentencing recommendation has a strong motive to be accurate.²⁷ Moreover, an informant's personal observations can satisfy the basis of the knowledge prong of Aguilar-Spinelli.²⁸ Here, Anderson told both his CCO and Detective Saario that he had seen child pornography on Ollivier's home computer. This was sufficient to establish knowledge.

Ollivier also contends that the warrant was invalid both because the physical items were not described with particularity and also that the search of the computer's contents was not sufficiently identified. Neither of these contentions have any merit. The search warrant specified a red lock box, computers, and the peripheral hardware associated with computers. The information obtained from the red lock box was suppressed.

The probable cause to seize the computer was established via Anderson's information. The warrant set forth with particularity the items that were to be seized. The affidavit for the search warrant set forth the reasons why the related computer items such as electronic storage media needed to be included. There was "a sufficient nexus between the targets of the search and the suspected criminal activity."²⁹ The officers could identify with reasonable certainty the items to be seized, computers, storage media, and related items. The actual search of the computer system was also included with specificity in the warrant, in

²⁷ State v. Bean, 89 Wn.2d 467, 469-71, 572 P.2d 1102 (1978).

²⁸ State v. Woken, 103 Wn.2d 823, 827, 700 P.2d 319 (1985).

²⁹ State v. Carter, 79 Wn. App. 154, 158, 901 P.2d 335 (1995).

particular with its citation to the statute which Ollivier was accused of violating.³⁰ As noted in State v. Riley,³¹ particularity can be achieved by the specification of the suspected crime. Viewing the warrant in a commonsense manner, it is sufficiently particular because it references the particular crimes being investigated in the case.

Execution of Search Warrant

Ollivier argues that the warrant was not shown to him as required by CrR

2.3(d). CrR 2.3(d) provides:

Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

Although the rule requires that officers conducting a search provide the occupant with a copy of the warrant prior to commencing the search, procedural noncompliance does not compel invalidation of an otherwise sufficient warrant or suppression of the fruits of the search absent a showing of prejudice.³² In State v. Aase,³³ this court held that procedural noncompliance does not invalidate an

³⁰ RCW 9.68A.070. Possession of depictions of minor engaged in sexually explicit conduct.

³¹ State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993).

³² State v. Aase, 121 Wn. App. 558, 567, 89 P.3d 721, 726 (2004).

³³ 121 Wn. App. 558, 567, 89 P.3d 721 (2004).

otherwise valid warrant or require suppression without a concomitant showing of prejudice.

A similar conclusion was reached in State v. Ettenhofer.³⁴ There, the court held a search unconstitutional where police had received telephonic approval to search but did not have a written warrant as required. Ettenhofer invalidated the search based on the lack of a written warrant. But the Ettenhofer court also noted that a ministerial mistake must be prejudicial to justify reversal, stating:

If our concern were only with these violations, we would next consider whether the violations prejudiced the defendant because, constitutional considerations aside, rules guiding the warrant procedure are ministerial and reversal, therefore, does not follow as a matter of course. See State v. Kern, 81 Wn. App. 308, 311, 914 P.2d 114, review denied, 130 Wn.2d 1003, 925 P.2d 988 (1996); see also State v. Wible, 113 Wn. App. 18, 25, 51 P.3d 830 (2002) (“ [A] ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown.”). But because we conclude that the written warrant failure violated Ettenhofer’s constitutional rights against unreasonable searches, which renders the search invalid as a matter of law, prejudice need not be shown. See State v. Clausen, 113 Wn. App. 657, 660, 56 P.3d 587 (2002) (Absent an exception, warrantless searches are invalid as a matter of law under the state and federal constitutions.).^[35]

Here, Ollivier has not shown any prejudice by the seizure of evidence subject to a valid warrant.

Ollivier relies on United States v. Gantt³⁶ to support his contention that because he was not given a copy of the warrant until the conclusion of the search, the evidence seized during the search of his apartment should be

³⁴ 119 Wn. App. 300, 79 P.3d 478 (2003).

³⁵ 119 Wn. App. at 307.

³⁶ 194 F.3d 987 (9th Cir. 1999).

suppressed. In Gantt, the court relied on former Rule 41(d) to suppress evidence seized under a search warrant when the occupant was not provided a copy of the search warrant until the search was completed and she had been arrested and transported to the Federal Bureau of Investigation headquarters. But as recently noted in United States v. Ortega-Barrera,³⁷ even the Gantt court recognized that evidence should not be suppressed unless there was a deliberate disregard of the rule or if the defendant was prejudiced.³⁸ Moreover, the Ortega-Barrera court noted that the continuing validity of Gantt is questionable.³⁹ See United States v. Mann,⁴⁰ in which the court stated:

We note that the continuing validity of our holding in Gantt has been directly called into question by at least one court. See People v. Ellison, 4 Misc.3d 319, 773 N.Y.S.2d 860, 868 & n.5 (S. Ct. 2004) (asserting that Gantt appears to have been “fully abrogate [d]” by the Supreme Court’s decisions in United States v. Banks, 540 U.S. 31, 124 S. Ct. 521, 524-25, 157 L. Ed. 2d 343 (2003), and Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 1292 & n.5, 157 L. Ed. 2d 1068 (2004)); see also United States v. Katoa, 379 F.3d 1203, 1205 (10th Cir. 2004) (“As the Supreme Court recently reaffirmed in Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004); the Fourth Amendment does not necessarily require officers to serve a warrant at the outset of a search”). While dicta in the Supreme Court’s recent decision in Groh v. Ramirez casts serious doubt both on our interpretation of Rule 41 and our reasoning in Gantt, it fails definitively to abrogate our holding.

Thus, Ollivier’s reliance on Gantt is misplaced.

Statement of Additional Grounds (SAG)

Ollivier’s SAG raises the same issues as counsel does in her briefing.

The only additional ground he raises is without merit. He disputes the

³⁷ No. CR10-5442RBL, 2010 WL 4718892 (W.D. Wash. 2010).

³⁸ Gantt, 194 F.3d at 994.

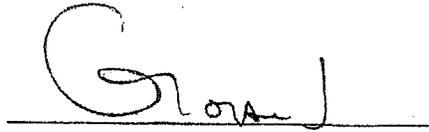
³⁹ 2010 WL 4718892, at *3 n.2.

⁴⁰ 389 F.3d 869, 875 n.1 (9th Cir. 2004).

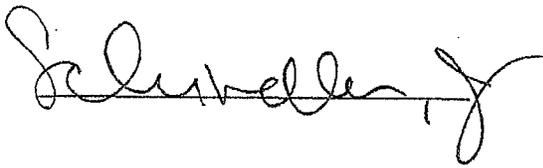
No. 63559-0-1 / 13

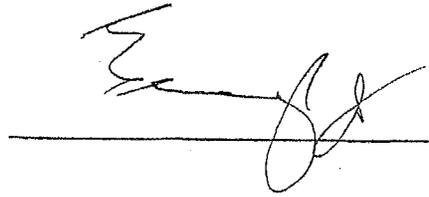
legislature's classification of this crime. However, his argument is based on crimes in another statute and therefore not comparable.

Accordingly, we affirm the judgment and sentence.



WE CONCUR:







APPENDIX B

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 BRANDON GENE OLLIVIER,)
)
 Appellant.)

No. 63559-0-1
ORDER DENYING MOTION
FOR RECONSIDERATION

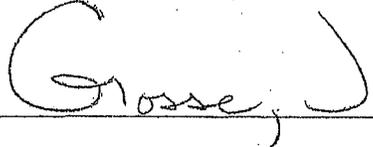
The appellant, Brandon Ollivier, has filed a motion for reconsideration herein.
The court has taken the matter under consideration and has determined that the motion
for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied

Done this 16th day of September 2011.

FOR THE COURT:



Judge

RECEIVED
COURT OF APPEALS
DIVISION ONE
OCT 17 2011

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 63559-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Stephen Hobbs, DPA
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 17, 2011

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 OCT 17 PM 5:03