

64969-8

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No. 64969-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SCOTT INGRAM,

Appellant.

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

The Honorable Brian Gain
The Honorable Cheryl Carey

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Ingram's motion to dismiss the matter for a violation of his CrR 3.3 right to a speedy trial.

2. In the absence of substantial evidence, the trial court erred in entering finding 1 in the court's order denying the motion to dismiss, that Mr. Ingram intended to waive his right to speedy trial at the case scheduling hearing on October 7, 2009.

3. In the absence of substantial evidence, the trial court erred in entering finding 2 in the court's order denying the motion to dismiss, that disqualification of counsel reset the commencement date for trial.

4. In the absence of substantial evidence, the trial court erred in entering finding 3 in the court's order denying the motion to dismiss, that the court's practice is to warn defendants that appointment of new counsel would necessitate a continuance because the new attorney would not be prepared for trial.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Since he was in-custody awaiting trial, under CrR 3.3 Robert Ingram had a right to a trial within 60 days of his arraignment. The trial date was set for a date beyond the 60 days. Mr. Ingram moved

to dismiss for a violation of his right to a speedy trial, but the court denied the motion, finding several exceptions to the rule allowing for resetting the trial date applicable. Where the exceptions relied upon by the trial court are either not factually supported or were erroneously applied, is Mr. Ingram entitled to reversal of his conviction with instructions to dismiss?

C. STATEMENT OF THE CASE

Robert Ingram was charged with taking a motor vehicle. CP 12/16/2009RP 3. Mr. Ingram was arraigned on September 2, 2009, thus under CrR 3.3, the last day to try him within 60 days was November 21, 2009. 12/16/2009RP 3. Since that day was a Saturday, the next possible date for the commencement of trial was November 23, 2009. *Id.* The trial date was subsequently set by the court for November 24, 2009, one day beyond the expiration of speedy trial. 12/16/2009RP 3.

On December 16, 2009, prior to the beginning of trial, Mr. Ingram moved to dismiss the matter for a violation of his right to a speedy trial under CrR 3.3. 12/16/2009RP 3, 7-8. Mr. Ingram noted that in the case scheduling order of October 7, 2009, his signature was not present on the waiver of speedy trial, thus constituting an ineffective waiver under the rule. CP 133;

12/16/2009RP 7-8. The State argued that the discharge of Mr. Ingram's counsel, Amy Parker, on October 28, 2009, provided another valid basis for resetting the commencement of the trial date, in addition to Mr. Ingram's October 7 waiver. 12/16/2009RP 7.

The court denied Mr. Ingram's motion to dismiss, finding the waiver of October 7 a valid waiver, and finding the discharge of Ms. Parker on October 28 reset the trial date under the rule. CP 130-31; 12/16/2009RP 8. The court *sua sponte* also found that it was the court's practice to tell a defendant when it discharged counsel, that the new attorney would not be prepared to go to trial, and thus the defendant would be required to waive his speedy trial right in order to have new counsel appointed. CP 130-31; 12/16/2009RP 8-9. The court was confident this practice occurred with Mr. Ingram as well. CP 130-31; 12/16/2009RP 8-9.

Trial ultimately began on January 4, 2010. Following the jury trial, Mr. Ingram was convicted as charged. CP 30.

D. ARGUMENT

THE FAILURE TO BRING MR. INGRAM TO TRIAL WITHIN 60 DAYS OF HIS ARRAIGNMENT MANDATED DISMISSAL

1. A defendant has a right to a speedy trial. In Washington, a defendant's constitutional right to speedy trial is protected by a court rule establishing standard time limits and final start days for trial and requiring dismissal with prejudice if the speedy trial period lapses without a trial. CrR 3.3(b), (h); *State v. Kenyon*, 167 Wn.2d 130, 135-37, 216 P.3d 1024 (2009) (to preserve the right to a speedy trial and the integrity of the judicial process, the trial court must strictly apply the rule's speedy trial requirements under CrR 3.3(h)).

A defendant who is detained in jail has the right to be brought to trial within "60 days after the commencement date . . ." CrR 3.3(b)(1)(i). The initial commencement date for trial is set at the date of arraignment. CrR 3.3(c)(1). A charge not brought to trial within 60 days shall be dismissed with prejudice. CrR 3.3(h); *State v. Saunders*, 153 Wn.App. 209, 220, 220 P.3d 1238 (2009). It is the responsibility of the trial court to enforce the speedy trial rule under CrR 3.3. CrR 3.3(a)(1); *Saunders*, 153 Wn.App. at 220.

The application of the speedy trial rule to a particular set of facts is a question of law which is reviewed *de novo*. *State v. Carlyle*, 84 Wn.App. 33, 35, 925 P.2d 635 (1996).

2. The October 7, 2009, waiver of time for trial was not effective since it was not signed by Mr. Hall as required by CrR 3.3(c)(2)(i). The commencement date may be reset, and the elapsed time reset to zero, under certain enumerated circumstances. CrR 3.3(c)(1), (2); *State v. Carney*, 129 Wn.App. 742, 748, 119 P.3d 922 (2005). One of these circumstances includes a written waiver signed by the defendant. CrR 3.3(c)(2)(i); *Carney*, 129 Wn.App.at 748. A new 60-day period begins on the date specified in the waiver. *Id.*

As with a statute, if a court rule's meaning is plain on its face, this Court must give effect to that plain meaning. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996). CrR 3.3(c)(2)(i) plainly states that the written waiver must be *signed* by the defendant:

Waiver. The filing of a written waiver of the defendant's rights under this rule *signed by the defendant*. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(Emphasis added).

The case scheduling order contains Mr. Ingram's signature at the very end but does not contain his signature in the portion waiving his right to a trial within 60 days as required by CrR 3.3(c)(2)(i). CP 133-35.

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“intended” to waive his right to a speedy trial as part of the submission of the October 7 order. CP 130. But there is nothing in the record to substantiate this finding, even if it could overcome the express language of the rule. The only evidence in the record is the case scheduling order and Mr. Ingram’s signature is glaringly absent. The trial court erred in finding Mr. Ingram waived his right to a speedy trial when the order plainly shows he did not.

3. The trial court’s discharge of Mr. Ingram’s prior attorney was in error, thus it could not authorize resetting the commencement date for trial. The commencement date may also be reset where either the prosecutor or the defense attorney are disqualified:

Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of disqualification.

CrR 3.3(c)(2)(vii).

A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) (*Stenson I*). The factors to

be assessed regarding a motion to discharge counsel are: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (*Stenson II*). Counsel and defendant must be at such odds as to prevent presentation of an adequate defense. *State v. Lopez*, 79 Wn.App. 755, 766, 904 P.2d 1179 (1995).

At the October 28, 2009, hearing, Mr. Ingram expressed merely a general loss of confidence in Ms. Parker, something that courts have routinely found insufficient to warrant discharge of counsel.

Um, there's basically a communication breakdown between us. We can't seem to get on the same page. And I don't feel secure going to trial with this person, I mean.

10/28/2009RP 2. Ms. Parker did not concede a conflict of interest, or irreconcilable conflict, or complete breakdown in communication: she did concede that the court might nevertheless want to replace her. 10/28/2009RP 2 ("it seems he lacks trust in my abilities and I think it would be appropriate . . . to discharge me as counsel so you can permit new counsel to . . . represent him, and maybe . . . establish trust with that lawyer.").

But, the fact the defendant may lose confidence or trust in his attorney is not a sufficient basis on which to substitute new counsel. *Stenson I*, 132 Wn.2d at 734. Since that was the sole basis for Mr. Ingram's desire to replace Ms. Parker, it was an insufficient basis to discharge counsel.

In addition, an attorney-client conflict may justify granting a substitution motion only when the defendant and counsel "are so at odds as to prevent presentation of an adequate defense." *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004); *Stenson*, 132 Wn.2d at 734. Ms. Parker's concession that new counsel was probably appropriate was *not* based on any allegations that she and Mr. Ingram were so at odds as to prevent her presenting an adequate defense.

Since there was no basis to disqualify Mr. Ingram's counsel, the exception to CrR 3.3 for disqualification of counsel could not apply.

4. The record fails to substantiate that trial court followed its usual practice in admonishing Mr. Ingram of the need to continue the trial when it discharged counsel. In denying the motion to dismiss, the court relied upon its "practice" of warning defendants prior to relieving counsel that a continuance would be required to

allow new counsel to prepare for trial. CP 130-31; 12/16/2009RP 8-9. In fact, the record shows the court did not admonish Mr. Ingram despite the court's usual "practice."

Although the court may have had such a "practice," the court did not follow it in Mr. Ingram's case. The court's statement in relieving Ms. Parker was very simple and did *not* contain the admonition it thought it had given:

I, I'm going to grant the request (to relieve Mr. Parker). We'll set it on a week, a week from today for confirmation of counsel.

10/28/2009RP 3. Nowhere in the record from the October 28 hearing did the court admonish Mr. Ingram about the necessity for a continuance to allow new counsel to prepare. Thus, the court erred in relying on its "practice" to deny Mr. Ingram's motion to dismiss.

5. The cure period in CrR 3.3(g) does not apply as more than five days after the time for trial has expired has elapsed.

During the hearing on the motion to dismiss, the State conceded that it could not invoke the cure period in CrR 3.3(g) to overcome dismissal for a violation of speedy trial. 12/16/2009RP 3-4. Hence neither the State nor this Court may rely on the cure period to

defeat the dismissal for a violation of Mr. Ingram's right to a speedy trial.

CrR 3.3(g) provides that the trial court may grant a one-time extension which cannot be for more than 14 days. But, this cure period may only be granted if the motion is made within five days of the expiration of the time for trial period. *Id.*

Cure Period. The court may continue the case beyond the limits specified in section (b) *on motion of the court or a party made within five days after the time for trial has expired.* Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

CrR 3.3(g) (emphasis added).

Under CrR 3.3, once the 60 or 90 day time for trial expires without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case. CrR 3.3(b), (f)(2), (g), (h). *Saunders*, 153 Wn.App. at 220.

Here, the hearing on the motion to dismiss occurred well in excess of the five days allowed for a motion for the cure period after the 60 days had expired. A request for the cure period had

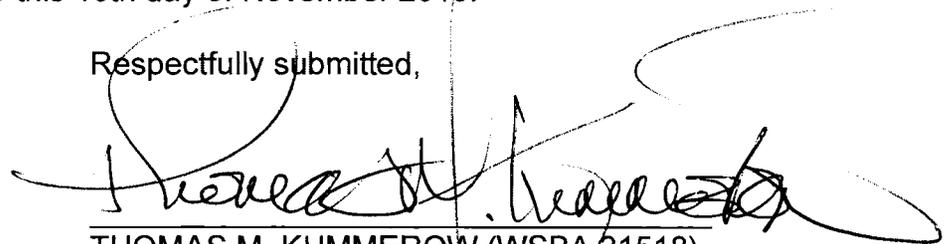
not been requested prior to the hearing. Once again, under the plain wording of the rule, the State cannot now seek the advantage of the 14 day cure period.

E. CONCLUSION

For the reasons stated, Mr. Ingram requests this Court reverse his conviction for a violation of his right to a speedy trial.

DATED this 10th day of November 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas M. Kummerow", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 64969-8-I
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)	
ROBERT INGRAM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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DIVISION ONE

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