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No. 66228-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RAY ABBETT,

Appellant.

2011-10-11 10:11 AM
B

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

The Honorable Kenneth L. Cowser

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT 5

 1. MR. ABBETT’S ABSENCE DURING THE DISCUSSION REGARDING A JURY INQUIRY VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO BE PRESENT 5

 2. THE TRIAL COURT VIOLATED MR. ABBETT’S CrR 3.3 RIGHT TO A SPEEDY TRIAL WHEN IT GRANTED THE STATE’S MOTION TO CONTINUE IN THE ABSENCE OF “GOOD CAUSE” 7

 a. Absent a finding of “good cause,” a defendant who is in custody must be tried within 60 days of arraignment..... 8

 b. The State failed to act with due diligence in attempting to obtain the presence of the material witnesses, thus vitiating the finding of “good cause.”. 9

 c. Mr. Abbett is entitled to reversal and dismissal as a result of the violation of his right to a speedy trial. ... 12

F. CONCLUSION 13

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 1, 5

U.S. Const. amend. XIV 1, 5

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22..... 1, 5

FEDERAL CASES

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d
705 (1967) 8

Rogers v. United States, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1
(1975)..... 6

Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330 (1934)..... 6

United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d
486 (1985) 6

WASHINGTON CASES

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775
(1971) 9

State v. Adamski, 111 Wn.2d 574, 761 P.2d 621 (1988) 10, 12

State v. Berrysmith, 87 Wn.App. 268, 944 P.2d 397 (1997), *review
denied*, 134 Wn.2d 1008 (1998) 5

State v. Branstetter, 85 Wn.App. 123, 935 P.2d 620 (1997) 8

State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) 6

State v. Day, 51 Wn.App. 544, 754 P.2d 1021, *review denied*, 111
Wn.2d 1016 (1988)..... 9

State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004) 9

<i>State v. Jenkins</i> , 76 Wn.App. 378, 884 P.2d 1356 (1994), <i>review denied</i> , 126 Wn.2d 1025 (1995)	8
<i>State v. Kenyon</i> , 167 Wn.2d 130, 216 P.3d 1024 (2009)	8
<i>State v. Kokot</i> , 42 Wn.App. 733, 713 P.2d 1121 (1986).....	11
<i>State v. Mack</i> , 89 Wn.2d 788, 576 P.2d 44 (1978).....	8, 9
<i>State v. Nguyen</i> , 68 Wn.App. 906, 915-16, 847 P.2d 936 (1993) .	10
<i>State v. Ralph G.</i> , 90 Wn.App. 16, 950 P.2d 971 (1998).....	12
<i>State v. Swenson</i> , 150 Wn.2d 181, 75 P.3d 513 (2003)	12
<i>State v. Toliver</i> , 6 Wn.App. 531, 494 P.2d 514 (1972).....	10
<i>State v. Wake</i> , 56 Wn.App. 472, 783 P.2d 1131 (1989).....	10
<i>State v. Warren</i> , 96 Wn.App. 306, 979 P.2d 915 (1999)	11
RULES	
CrR 3.3.....	passim
CrR 6.15.....	5

A. SUMMARY OF ARGUMENT

The trial court granted the State's motion to continue Robert Abbett's trial for almost two months based upon the financial constraints faced by the State in securing one the attendance of one of their witnesses. Later, while awaiting the jury's verdict, the trial court discussed a jury inquiry with the prosecutor and defense attorney but without Mr. Abbett being present. Mr. Abbett contends his right to a speedy trial was violated and his right to be present was violated requiring reversal of his convictions.

B. ASSIGNMENTS OF ERROR

1. Mr. Abbett's constitutionally protected right to be present at all critical stages of the proceedings was violated when the court discussed a jury inquiry with the attorneys in his absence.

2. Mr. Abbett's CrR 3.3 right to a speedy trial was violated when the court granted the State's motion to continue in the absence of "good cause."

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a Sixth and Fourteenth Amendment as well as art. I, 22 right to be present at all critical stages of the proceedings. Discussions regarding jury inquiries are critical stages of the proceedings. Where Mr. Abbett was excluded from

the discussion about a jury inquiry, was his right to be present violated entitling him to reversal of his convictions?

2. The right to a speedy trial under CrR 3.3 can be overcome by a finding by the trial court that a continuance is warranted in the administration of justice. The unavailability of a State's witness may be grounds for a continuance where the State has exercised due diligence in obtaining the presence of the witness. The court granted a continuance of Mr. Abbett's trial, finding the State's witness's unavailability warranted the continuance due to financial concerns of the county, despite the State's failure to show it had subpoenaed the witness or made any attempt to obtain the presence of the witness, and despite the rule that financial concerns cannot form the basis for a continuance. Did the trial court violate Mr. Abbett's right to a speedy trial requiring reversal and dismissal of the charges?

D. STATEMENT OF THE CASE

Robert Abbett was charged with one count of residential burglary and one count of taking a motor vehicle in the second degree. CP 58. On the date Mr. Abbett was arraigned on the amended information, the court set the trial date for June 18, 2010. CP Supp ____, Sub No. 26.

On June 17, 2010, the State moved to continue to the trial date until August 20, 2010:

MR. HENDRIX: Your Honor, this case involves property crimes against two victims that are charged, one that we were going to add for trial. The first victim, the owner of the stolen vehicle, is David Foye. Mr. Foye is in Alaska; he will not be back until the third week of August. So, we are requesting the continuance to that August 20th date.

THE COURT: Is he in Alaska for fun, or because he works there, or what?

MR. HENDRIX: He works there. He is working, fishing in Alaska.

...
As soon as I was able to get a hold of him – we had some trouble tracking him down – I did call Mr. Harrison and inform him of that. We did look into trying to find funds to fly him back, and we couldn't locate the funds to fly him back. He is unable to afford the air fare, which is about \$900.

The second witness is Robert Salmon. Mr. Salmon is in his 70s. He suffers from a cardiopulmonary disease. He is on oxygen. He just got out of the hospital from pneumonia. He is on oxygen and, according to him, he is not allowed to get out of his bed.

Both are necessary and material witnesses, as they are the ones who could identify the property and the fact that no one had permission to either enter the house or to take the vehicle or property from the house.

That's the reason we're requesting a continuance.

Over Mr. Abbett's objection, the court granted the trial continuance to August 13:

THE COURT: All right. In terms of [Mr. Abbett's] right to a speedy trial, I am required to conform to that unless there's a good reason not to. *I am aware that the financial situation for the county, the State, and just about every state in the Union is dire.* I don't believe there is any prejudice to [Mr. Abbett] to order a continuance regarding the count regarding the gentleman who is in Alaska and, quite frankly, I see no reason then not to continue the other count or the e proposed third count because I see no reason in having two or three trials, from standpoint of judicial economy.

So I will find good cause to continue the trial and do so until the third week of August.

RP 6-7 (emphasis added).

During deliberations, the jury sent the court an inquiry regarding the term "premises." CP 19. The court convened the parties in open court without Mr. Abbett's presence:

THE COURT: The record should reflect that the defendant is not present, but Mr. Harrison is here on his behalf.

RP 405. The parties and the court discussed a response to the inquiry and the court subsequently instructed the jury without Mr. Abbett being present. The jury found Mr. Abbett guilty as charged. CP 17-18.

E. ARGUMENT

1. MR. ABBETT'S ABSENCE DURING THE DISCUSSION REGARDING A JURY INQUIRY VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO BE PRESENT

Pursuant to the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment, and art. I, § 22 of the Washington Constitution, a criminal defendant has the right to be present during all critical stages of a criminal proceeding. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *Snyder v. Massachusetts*, 291 U.S. 97, 105-07, 54 S.Ct. 330 (1934); *State v. Berrysmith*, 87 Wn.App. 268, 273, 944 P.2d 397 (1997), *review denied*, 134 Wn.2d 1008 (1998).

The discussion of a jury inquiry is a critical stage of trial at which the defendant has a right to be present. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975). CrR 6.15(f)(1) provides that the court shall respond to jury inquiries "in the presence of, or after notice to the parties or their counsel." Communication between the court and the jury without defendant's presence is error, and the State must prove them harmless beyond

a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983).

Here the court noted on the record that Mr. Abbett was not present during the court's and the parties' discussion of the jury inquiry. RP 405. Thus, Mr. Abbett's constitutionally protected right to be present at all critical stages of the proceedings was violated.

On occasion, courts have found a defendant need not be present during technical legal discussions or discussions of procedural matters such as scheduling. But this jury inquiry does not qualify as such a minor or purely legal matter. The jury's questions about the meaning of a legal term went directly to the heart of the case. The jury had read the instructions and found them lacking, and thus asked for further information. Had Mr. Abbett been present during the discussion of how to respond to the jury's questions, he could have proffered a more complete response than telling the jury to read instructions it had already read. Excluding Mr. Abbett from any participation in or even awareness of the jury's inquiries denied him his right to be present during a material stage of the trial.

The error in discussing the jury inquiry in Mr. Abbett's absence was not a harmless error. A violation of the right to be

present requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State cannot make such a showing here.

As noted *supra*, Mr. Abbett could have provided additional information for framing a response to the jury's inquiry had he been present. Barring him from this proceeding effectively silenced him. The error in excluding him from the proceeding was not harmless and Mr. Abbett is entitled to reversal of his convictions.

2. THE TRIAL COURT VIOLATED MR. ABBETT'S CrR 3.3 RIGHT TO A SPEEDY TRIAL WHEN IT GRANTED THE STATE'S MOTION TO CONTINUE IN THE ABSENCE OF "GOOD CAUSE"

Over objections, the trial court granted the State's motion for a continuance after finding that the delay was required in the administration of justice. The trial court's reasons for finding that the delay was required in the administration of justice were not valid reasons and Mr. Abbett is entitled to reversal of his convictions for a violation of his right to a speedy trial.

a. Absent a finding of “good cause,” a defendant who is in custody must be tried within 60 days of arraignment. The purpose underlying CrR 3.3 is to protect a defendant's constitutional right to a speedy trial. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). 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. Branstetter*, 85 Wn.App. 123, 127, 935 P.2d 620 (1997). A criminal charge not brought to trial within the time limits of CrR 3.3 must be dismissed with prejudice. CrR 3.3(h); *State v. Mack*, 89 Wn.2d 788, 794, 576 P.2d 44 (1978).

CrR 3.3 requires the court to set a trial date within 60 days of arraignment for an in-custody defendant, like Mr. Abbett. CrR 3.3(b)(1)(i). While the State bears the primary duty to bring the defendant to trial in a timely manner, the trial court is ultimately responsible for ensuring compliance with the speedy trial period. CrR 3.3(a)(1); *State v. Jenkins*, 76 Wn.App. 378, 383, 884 P.2d 1356 (1994), *review denied*, 126 Wn.2d 1025 (1995).

A court may grant a continuance of the trial on motion of the court or party. CrR 3.3(f)(2). “[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169

(2004). An 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.*, quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

CrR 3.3(f) permits the court to grant continuances (1) upon written agreement of the parties or (2) *when a delay is required in the administration of justice and the defendant will not be prejudiced*, so long as the parties agree in writing or on motion from a party or the court. A trial court commits reversible error if it grants a continuance without “good cause.” *Mack*, 89 Wn.2d at 794.

b. The State failed to act with due diligence in attempting to obtain the presence of the material witnesses, thus vitiating the finding of “good cause.” A court may continue a case if a material state witness is unavailable to testify, if there is a valid reason for the unavailability, if the witness will become available within a reasonable time, and if the continuance will not substantially prejudice the defendant. *State v. Day*, 51 Wn.App. 544, 549, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988).

These requirements for a continuance are not satisfied where the State moves to continue in order to secure a material witness but fails to prove it acted with due diligence in seeking to secure the witness's presence at trial. *State v. Nguyen*, 68 Wn.App. 906, 915-16, 847 P.2d 936 (1993). “[A] party's failure to make ‘timely use of the legal mechanisms available to compel the witness' presence in court’ preclude[s] granting a continuance for the purpose of securing the witness' presence at a subsequent date.” *State v. Adamski*, 111 Wn.2d 574, 579, 761 P.2d 621 (1988), quoting *State v. Toliver*, 6 Wn.App. 531, 533, 494 P.2d 514 (1972). “[T]he issuance of a subpoena is a critical factor in granting a continuance.” *State v. Wake*, 56 Wn.App. 472, 476, 783 P.2d 1131 (1989).

The record here is devoid of any indication that a subpoena was issued, or that a good faith effort was made to overcome the hurdle posed by either witness's anticipated absence. *Wake*, 56 Wn.App at 475. The State's reasons for seeking the continuance were cursory at best and failed to state what efforts were made by the State to obtain the witnesses' attendance at trial.

The decision in *Wake* provides a framework for examining this issue. In *Wake*, the Court of Appeals held that the trial court

abused its discretion by granting the State's motion for a 30-day continuance because its expert witness from the crime lab was not available for trial. *Wake*, 56 Wn.App. at 473, 783 P.2d 1131.

There, the State had not maintained adequate staff to keep pace with the growing number of drug cases and congestion at the crime lab was a direct result of this failure. *Id.* at 475. The Court of Appeals ruled this sort of foreseeable administrative congestion is an insufficient basis on which to grant a continuance because “[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.

In a similar vein is the decision in *State v. Warren*, where this Court determined that unsubstantiated claims of court congestion were not “good cause” to continue a criminal trial beyond the prescribed time period. 96 Wn.App. 306, 309, 979 P.2d 915 (1999). *Accord State v. Kokot*, 42 Wn.App. 733, 737, 713 P.2d 1121 (1986).

The court here was solely concerned with the financial burden on the county in obtaining Mr. Foye’s presence from Alaska. This emphasis on the financial burden on the county as opposed to Mr. Abbett’s right to a speedy trial mirrors the myopic focus of the

courts in *Wake* with congestion in the crime lab. In addition, the court not only improperly focused on the county's costs but in doing so improperly shifted the burden of proof to Mr. Abbett to prove he would be prejudiced as opposed to the properly placed burden on the State to justify its actions and prove due diligence and good cause for a continuance.

c. Mr. Abbett is entitled to reversal and dismissal as a result of the violation of his right to a speedy trial. Failure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice. CrR 3.3(h); *State v. Swenson*, 150 Wn.2d 181, 186-87, 75 P.3d 513 (2003); *Adamski*, 111 Wn.2d at 582; *State v. Ralph G.*, 90 Wn.App. 16, 20-21, 950 P.2d 971 (1998).

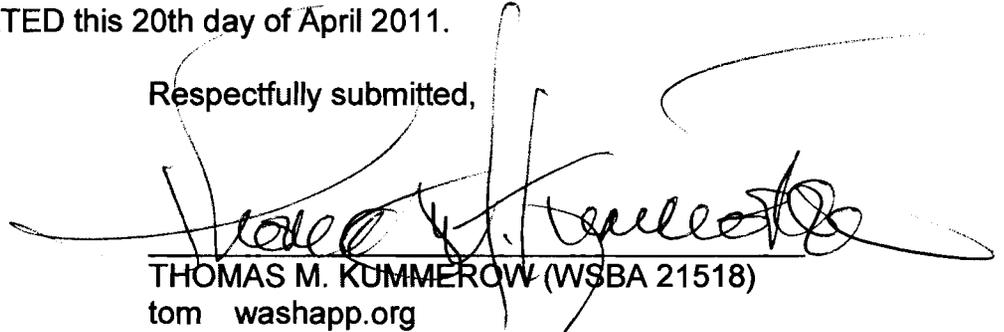
Since the State failed to establish "good cause" for the continuance, the trial court erred in granting the State's motion for a continuance. Mr. Abbett is entitled to reversal of his convictions. CrR 3.3(h).

F. CONCLUSION

For the reasons stated, Mr. Abbett request this Court reverse his convictions and either remand for a new trial or dismiss the matter for a violation of speedy trial.

DATED this 20th day of April 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)

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

STATE OF WASHINGTON,
Respondent,

ROBERT ABBETT,
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NO. 66228-7-I

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 20TH DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **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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