

FILED

MAR 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 29021-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

REX GREGORY,

Defendant/Appellant.

REPLY BRIEF

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ARGUMENT

I. Time-for-trial

The State conflates Mr. Gregory's two cases. It is easy to understand how that can occur. Considerable activity was occurring in each case.

The State had moved to consolidate the cases. Cause No. 09 1 00177 6 was set to commence trial on January 19, 2010. Cause No. 09 1 00150 4 had not yet been reset for trial.

When the State indicates that Mr. Gregory sought to strike the trial date of January 19, 2010, it only pertains to Cause No. 09 1 00177 6 since the cases were not yet consolidated.

Even though the trial court granted consolidation on January 11, 2010, the State failed to have an order of consolidation entered until February 22, 2010. This was beyond the time-for-trial period in Cause No. 09 1 00150 4.

... [A] superior court acquires subject matter jurisdiction only "[f]rom the time an action is commenced." *State v. Sponburgh*, 84 Wn. 2d 203, 206, 525 P. 2d 238 (1974). A criminal action is commenced by the filing of an indictment or information. CrR 2.1 (a); *see*: Washington Const. art. I, § 25. Thus, a superior court acquires subject matter jurisdiction over a criminal action only at such time as an indictment or information is filed.

State v. Corrado, 78 Wn. App. 612, 615, 898 P. 2d 860 (1995).

The trial court had jurisdiction over both cause numbers. Unfortunately for the State, the time-for-trial period elapsed under Cause No. 09 1 00150 4 prior to its consolidation with Cause No. 09 1 00177 6.

Once the trial court granted consolidation, the State had an obligation to file an order of consolidation and make certain that the case was brought to trial within the appropriate time for-trial-period.

Mr. Gregory contends that he could not object to the time-for-trial until consolidation was completed. *See: State v. Moen*, 129 Wn. 2d 535, 547, 919 P. 2d 69 (1996).

The State's argument that Mr. Gregory waived any objection he may have had to the March 22, 2010 trial date is not well-taken.

II. Instructional Error

The State tries to distinguish *State v. Bashaw*, 169 Wn. 2d 133, 234 P. 3d 195 (2010) by citing to *State v. Nunez, slip opinion 28259-7-III* (2/15/2011).

In essence, the State is asking the Court to ignore the ruling in *Bashaw*. It is obvious that Division III disagrees with the *Bashaw* decision. It appears to be asking the Supreme Court to accept another case in order to reconsider the *Bashaw* ruling.

Mr. Gregory's position is particularly apropos based upon the following quote:

Finally, we recognize that it might be asked why, if this instructional error was not manifest constitutional error, the issue was reviewed in *Bashaw*...

It was our prerogative to hear and resolve the issue in Ms. Bashaw's case notwithstanding her failure to preserve the error and the Supreme Court's prerogative to accept review and correct this court when we misapprehended *Goldberg*. [*State v. Goldberg*, 149 Wn. 2d 888, 72 P. 3d 1083 (2003)].

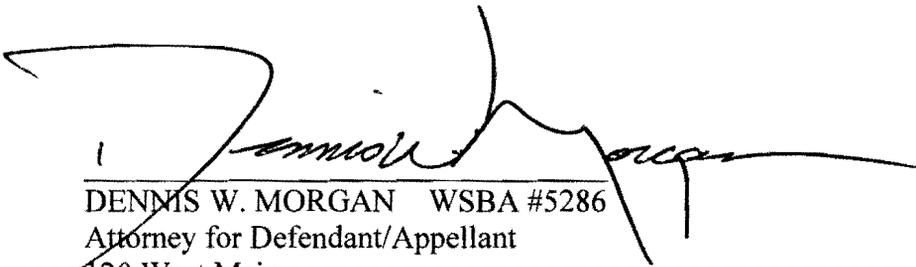
State v. Nunez, supra.

It is unknown whether the *Nunez* case will be going before the Supreme Court. However, Mr. Gregory intends to take his case before the Supreme Court if the Court of Appeals relies upon *Nunez* as opposed to *Bashaw* and *Goldberg*.

Mr. Gregory otherwise relies upon the argument contained in his original brief.

DATED this 17th day of March, 2011.

Respectfully submitted,



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