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Court of Appeals
Division III
State of Washington

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,) NO. 30231-8 & 30239-3
Appellant/Cross Respondent,)
)
vs.)
)
EDWIN TROY HAWKINS,)
Respondent/Cross Appellant.)

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION

Douglas County, Appellant/Cross-Respondent responds to the brief of Edwin Troy Hawkins, Respondent/Cross-Appellant appealing the trial court's order denying his motion to dismiss for speedy trial violation.

II. ISSUES

- 2.1 Has the defendant's speedy trial rights under CrR 3.3 been violated?
- 2.2 Which speedy trial rule controls in this case; CrR 3.3(c)(2)(iii) or CrR 3.3(c)(2)(iv)?
- 2.3 Did the trial court's "Decision on Motion for New Trial" constitute an order?

III. STATEMENT OF FACTS

On March 20, 2009 the defendant was convicted at trial of two counts of Possession of Stolen Property in the First Degree. (CP 19, 20). The defendant appealed his conviction to this Court (Court of Appeals No. 28118-3).

On August 25, 2010, while his appeal was still pending with this Court, defendant filed a motion for new trial. (CP 1096-1103). On October 7, 2010 the court filed its "Decision on Motion for New Trial" granting a new trial. (CP 1127-1131). No formal order was entered by the court at that time.

On November 29, 2010 the case was before the trial court to address trial setting. (RP 35). At that hearing the State argued that the speedy trial commencement date did not commence until a formal order was entered granting new trial, or the mandate was received from this Court. (RP 39).

On April 13, 2011 this Court issued the mandate affirming defendant's convictions. (CP 1132-1149). On July 11, 2011 a new trial date was set by the trial court although no formal order granting new trial had been entered. (CP 1253, RP 46). At that hearing the prosecution again advised defendant's attorney and the court that no formal order granting new trial had yet been entered. (CP 42). On July 18, 2011 the Defendant filed an objection to the trial date arguing that speedy trial had run, and requesting dismissal of the charges. (CP 1254-1257). The hearing on defendant's motion to dismiss was held on August 8, 2011. (RP 50). The court noted at the onset of the hearing that :

The Court: It's good to see you.

I would advise that I most likely will take this under advisement. I looked at the memorandums and read the memorandums, but I kind of have to sit down and look at that and look at the rule and prepare and all that sort of stuff. *I also will advise that it generally has been this Court's feeling that I don't do orders; I do decisions*

and the attorneys do orders, so you might want to consider that.

(Emphasis added). (RP50). The trial court denied the defendant's motion by order dated August 29, 2011. (CP 1276-1278). On August 30, 2011 the Court entered its formal order granting defendant a new trial. (CP 1279-1281).

The defendant herein cross-appeals the trial court's order denying his motion to dismiss.

IV. ARGUMENT

4.1 The defendant's speedy trial rights under CrR 3.3 were not violated.

The State urges this Court to hold that the defendant's speedy trial rights under CrR 3.3 were not violated under either CrR 3.3(c)(2)(iii) or CrR 3.3(c)(2)(iv).

CrR 3.3(b) generally provides the applicable time periods for trial. It is well understood that incarcerated defendant's must be brought to trial within 60 days after commencement date, and out of custody defendants within 90 days after commencement date. CrR 3.3(c)(1) sets the initial commencement date as the date of arraignment. However, the commencement date may be reset under provisions outlined in CrR 3.3(c)(2):

(i) 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.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

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

(Emphasis added). The question presented to this Court involves the interplay between CrR 3.3(c)(2)(iii) and (c)(2)(iv), and whether the defendant's speedy trial rights were violated under application of either rule. The State argues no violation occurred as the new trial date established by the court fell within time for trial periods under both rules.

Under CrR 3.3(c)(2)(iv) (Appellate Review or Stay) the commencement date is reset to the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate. The defendant argues for a distorted interpretation of the rule and asserts that a previous court appearance by the defendant (November 29, 2010) constituted an "appearance" thus rendering the date of the mandate as the new commencement date. This interpretation is contrary to the clear language in the rule. The November date asserted by defendant actually precedes receipt of the mandate by the court clerk (April 13, 2011). The rule expressly provides that the "appearance" under the rule for commencement of

speedy trial is the date defendant appears in court that next follows receipt of the mandate by the clerk of the court. The rule is not ambiguous. The more accurate application of CrR 3.3(c)(2)(iv) to the facts in this case set the commencement date to July 11, 2011. That is the date the defendant actually "appeared" after receipt of the mandate by the court clerk on April 13, 2011. The court's order setting trial established the new commencement date as July 11, 2011. Accordingly, under CrR(c)(2)(iv) the defendant's time for trial rights were not violated and the court properly denied defendant's motion to dismiss.

In the court's order denying defendant's motion to dismiss the court expressly declined to apply CrR 3.3(c)(2)(iv) in setting the new commencement date. The court concluded ". . . that because the necessity of a new trial does not stem from the decision from the Court of Appeals (convictions affirmed), but rather from the defendant's motion for new trial, CrR 3.3(c)(2)(iii) controls." (CP 1273). The court's order further concluded that because no order for new trial had been entered the speedy trial period had not commenced, and ". . . the new commencement date shall be the date the order is entered." (CP 1273). Under the court's ruling the new commencement date was the date the formal order

granting new trial was entered. The court's application of the rule was appropriate as applied. The formal order granting new trial was entered on August 30, 2011, and thereby establishing the commencement date.

Under CrR 3.3(c)(2)(iii) the defendant's speedy trial rights were not violated.

4.2 Although defendant's speedy trial rights were not violated under application of either CrR 3.3(c)(2)(iii) and CrR 3.3(c)(2)(iv), the court correctly ruled that CrR 3.3(c)(2)(iii) controlled.

The State argues the court's determination that CrR 3.3(c)(2)(iii) controls in setting the commencement date is supported by the rule.

CrR 3.3(c)(2) expressly states that:

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. *If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.*

(Emphasis added). Under this provision, since the commencement date under CrR 3.3(c)(2)(iii) results in a later commencement date (August 30, 2011) than would be established under application of CrR 3.3(c)(2)(iv) (July 11, 2011), the commencement date under (c)(2)(iii) controls. Accordingly,

once the court entered its formal order for new trial on August 30, 2011 that date became the effective commencement date in this case.

The trial court did not error in ruling that CrR 3.3(c)(2)(iii) controlled in this case.

4.3 The Court's "Decision on Motion for New Trial" Did Not Constitute a Formal Order

The court recognized that its "Decision on Motion for New Trial" was not intended as its order and that it contemplated entry of a formal order at some later date. (RP 50). Defendant argues that the court's decision letter constituted a formal order for new trial.

In State v. Knox, 86 Wn. App 831, 939 P. 2d 710 (1997), a Superior Court's "Memorandum Decision" addressing review of a District court decision, which stated the nature of the matter and date the matter was before the court, described the facts and issue before the court, provided a legal analysis of the issue, specifically reversed a prior decision, and remanded the matter back to a lower court for further proceedings, was held to not constitute an order. The court stated:

Although the memorandum decision appears to satisfy the RALJ and contains most of the necessary

elements of an order or judgment, it does not contain a caption entitling it an order or judgment. Nor does it order that any action take place. While these omissions may seem insignificant, CR 54(e), requires a formal order or judgment. Department of Labor & Indus. V. City of Kennewick, 99 Wash.2d 225, 228, 661 P.2d 133 (1983). Further, this case illustrates how the absence of a formal order leaves the parties and court uncertain as to whether a court-filed document is a final reviewable decision.

The *Kennewick* court determined that a memorandum decision entered by a superior court acting in its appellate capacity is not a "final decree," as that term was used in former RCW 51.48.140. (1989). 99 Wash.2d at 229-31, 661 P.2d133. In reversing the Court of Appeals, the *Kennewick* court applied CR 54(e), reasoning that "Application of CR 54(e)... promotes uniformity and certainty. We see no apparent hardship on the prevailing party to present a formal order." 99 Wash.2d at 229, 661 P.2d 133. The *Kennewick* court then quoted from Judge Munson's dissent in the appellate court. We also find Judge Munson's words persuasive:

As a practical matter, the bar should not have to act as soothsayers to determine when a written trial court opinion or decision might be a final judgment. For the sake of uniformity, the better practice is to follow CR 54; the prevailing party should submit a proposed judgment, decree or order, with appropriate notice and service upon the opposing party. All parties are then aware of the status of the proceeding and can consider the applicability of post-judgment motions such as motions for reconsideration, CR 59(b), appeals under RAP 2.2, and other time-limited procedures hinging upon entry of judgment.

In Nicacio v. Yakima Chief Ranches, Inc., 63 Wn. 2d 945, 948, 389 P.2d 888 (1964) the Supreme Court held that a "memorandum

opinion" is not an order, rather that it is an expression of the Court's intention relative to the issue. Citing Chandler v. Doran Company, 44 Wash.2d 396, 267 P.2d 907 (1954), the Court stated, "The issue is not resolved until an order is entered."

Likewise, the Court's October 7, 2010 "Decision on Motion for New Trial" is not an order as anticipated that will be entered pursuant to CrR 7.5(d) (New Trial). The "Decision" is not captioned "order", and does not set forth findings of fact and conclusions of law. The Court's "Decision" leaves the parties guessing whether it is a final order from which appropriate appeal rights are applicable, and whether the time constraints of appeal under the Rules of Appellate Procedure apply. The State's position is bolstered by the fact the State at several times throughout the proceedings advised the court and defendant that no formal order had been entered, and that the court also expressed that its decision letter was not intended to be an order.

The court did not error in ruling that its opinion letter did not constitute an order thereby establishing a trigger date for speedy trial. In another strained reading of CrR 3.3 the defendant asserts that if the court's opinion letter constitutes a valid order, the date the mandate was entered becomes the effective commencement date.

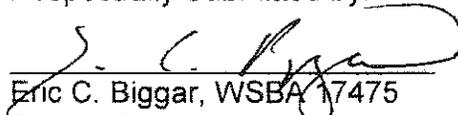
Again, this position is not supported by any provision of CrR 3.3, and is an incorrect interpretation of the rule.

V. CONCLUSION

The trial court's opinion letter did not constitute a formal order for new trial thereby triggering the commencement date under CrR 3.3(c)(2). The court properly set the commencement date for new trial under CrR 3.3(c)(2)(iii) as the date the formal order granting new trial was entered, or August 30, 2011. However, even if this Court sets the commencement date under CrR 3.3(c)(2)(iv), July 11, 2011 would be the new commencement date as it was the date defendant appeared that next followed receipt of the mandate by the court clerk. The new commencement date under application of either rule did not result in a violation of defendant's speedy trial rights. The court should affirm the trial court's order denying defendant's motion to dismiss for speedy trial violation.

Dated: 10/3/12

Respectfully Submitted by:


Eric C. Biggar, WSBA 17475
Deputy Prosecuting Attorney
Attorney for Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,) NO. 30231-8-III
Appellant/Cross-Respondent,) 30239-3-III
)
vs.) AFFIDAVIT OF MAILING
)
EDWIN TROY HAWKINS,)
Respondent/Cross-Appellant.)

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 3rd day of October, 2012, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of this Affidavit and the copies of the Reply Brief of Appellant/Cross-Respondent addressed to:

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SUBSCRIBED AND SWORN to before me this 3rd day of October,
2012.

Jan Schell

NOTARY PUBLIC in and for the State
of Washington, residing at East
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02/26/2015.