

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JARROD VEILLEUX,

Appellant.

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

The Honorable Tari Eitzen

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
MEGAN R. KAPAUN
Attorneys for Appellant

NICHOLS LAW FIRM, PLLC
P.O. Box 19203
Spokane, WA 99219
(509) 280-1207

TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT1

II. ASSIGNMENTS OF ERROR2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....5

(Issue 1): Whether the trial court abused its discretion when it violated Mr. Veilleux’s right to a speedy trial.....5

(Issue 2): Whether the trial court abused its discretion by failing to grant Mr. Veilleux’s request for a downward departure, thus imposing a sentence that was clearly excessive.....8

VI. CONCLUSION.....11

TABLE OF AUTHORITIES

United States Supreme Court

Klopper v. North Carolina, 386 U.S. 213, 223, 87 S. Ct, 988,
18 L.Ed.2d 1 (1967).....5

Washington Supreme Court

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....7

State v. Adamski, 111 Wn.2d 574, 580, 761 P.2d 621 (1988).....8

State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).6

State v. Jackson, 150 Wn.2d 251, 273, 76 P.3d 217 (2003).....9

State v. Kenyon, 167 Wn.2d 130, 135-39, 216 P.3d 1024 (2009).....8

State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989).....9

Washington Courts of Appeals

State v. Franulovich, 18 Wn. App. 290, 567 P.2d 264 (1977),
review denied, 90 Wn.2d 1001 (1978).....6

State v. Nguyen, 131 Wn. App. 815, 129 P.3d 821 (2006).....7

State v. Perdang, 38 Wn. App. 151, 684 P.2d 781 (1984).....10

Washington Statutes and Court Rules

CrR 3.3.....6, 7, 8

CrR 4.4.....6, 7

RCW 9.94A.0108

RCW 9.94A.535.....9

Washington State Constitution

Washington Constitution, Art. I, Section 22.....6

I. SUMMARY OF ARGUMENT

In January 2013, Jarrod Veilleux was tried and convicted of first-degree unlawful possession of a firearm and sentenced to 116 months confinement. Although incarcerated prior to trial and fully prepared to defend against the charges on the dates set by the court, Mr. Veilleux was continuously denied his right to a speedy trial.

On July 12, 2012, Mr. Veilleux was arraigned and given a trial date of September 5, 2012, with a speedy trial expiration date of October 10, 2012. Mr. Veilleux's case was continued numerous times, over his objections, simply because the State and co-defendant's counsel were unprepared to proceed. Mr. Veilleux attempted to sever his case in order to be tried within his speedy trial deadline. The court refused to sever the cases, finding that judicial economy outweighed any prejudice to Mr. Veilleux.

Ultimately, Mr. Veilleux's trial did not begin until January 7, 2013, almost six months after he was arraigned on the charges and three months after the speedy trial expiration date set by the Court. At sentencing, Mr. Veilleux was given the maximum sentence within his sentencing guidelines, 116 months.

Mr. Veilleux was deprived of his right to a speedy trial and, as a result, his conviction for unlawful possession of a firearm should be

overturned. The numerous continuances granted by the trial court, along with its refusal to sever the cases so that Mr. Veilleux could be tried before his speedy trial date expired, constitute an abuse of discretion. The trial court also abused its discretion by failing to grant Mr. Veilleux's request for a downward departure in sentence, resulting in a maximum sentence of 116 months that is clearly excessive.

II. ASSIGNMENTS OF ERROR

1. The court abused its discretion when it violated Mr. Veilleux's right to a speedy trial.

2. The court abused its discretion by failing to grant Mr. Veilleux's request for a downward departure in sentence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(Issue 1): Whether the trial court abused its discretion, violating Mr. Veilleux's right to a speedy trial, by granting numerous continuances over Mr. Veilleux's objection and compelling Mr. Veilleux to be tried with co-defendant Terrance Riley.

(Issue 2): Whether the trial court abused its discretion in failing to grant Mr. Veilleux's request for a downward departure, thus imposing an excessive sentence.

IV. STATEMENT OF THE CASE

Defendant Jarrod Veilleux was arraigned in Spokane County Superior Court on July 12, 2012, on one count of attempted murder in the first degree, one count of first degree assault, and one count of first degree unlawful possession of a firearm. (CP 1-2) The trial was originally set for September 5, 2012, but later moved to September 10, 2012, because of a scheduling conflict with the counsel of Mr. Veilleux's co-defendant, Terrance Riley. (CP 174)

On September 6, 2012, just four days before the trial was scheduled to commence, Mr. Riley's attorney again moved for another continuance. (CP 184) The continuance was granted over Mr. Veilleux's objection. (09/06/12 RP 6) In granting the second continuance, the Court stated that "[a]ny prejudice to Mr. Veilleux in continuing the trial [sic] date is outweighed by concerns for judicial economy." (CP 185) The court noted that Mr. Veilleux's speedy trial period was set to expire on October 10, 2012. (CP 185)

On October 4, 2012, four days before the trial was scheduled to commence, a third continuance motion was heard because Mr. Riley's counsel would be unavailable on October 8, 2012. (10/04/12 RP 20) Mr. Veilleux agreed to move the trial two days to October 10, which was still within the speedy trial period. (10/04/12 RP 20) However, the State's

lead detective was scheduled to take a vacation beginning October 12, 2012. Thus, over Mr. Veilleux's objection, the trial was continued to November 5, 2012, almost four weeks after Mr. Veilleux's speedy trial expiration date. (10/04/12 RP 24)

On October 18, 2012, the trial was again continued a fourth time to November 26, 2012, in order to accommodate a defense expert that was previously available for the October trial dates, but unavailable to testify on November 5. (10/18/12 RP 26)

On November 26, 2012, 47 days after the speedy trial expiration date and the day upon which trial was scheduled to proceed, the case was continued for a fifth time, over Mr. Veilleux's objection to January 7, 2013. (CP 448) The State requested the continuance because one of their lay witnesses was unavailable on the day of trial. (CP 461) Mr. Veilleux filed a Motion for Reconsideration on November 28, 2012, requesting at the very least that the trial be moved up to December 17, 2012. (CP 444) The motion was denied. (CP 477)

After five continuances, the trial began on January 7, 2013, approximately three months after the speedy trial date had expired. (RP 88) Mr. Veilleux was acquitted of two charges, but during the trial conceded to and was convicted of unlawfully possessing a firearm. (RP 808-811, CP 835)

At sentencing, the court calculated an offender score of fourteen: counting thirteen points from some Montana burglary convictions in 2002, stating that even though they occurred on the same day they had separate victims, and one point from a 2008 burglary. (RP 1187-1188) With an offender score of fourteen, Mr. Veilleux was sentenced to 116 months confinement, the ceiling of the sentencing guidelines for first degree unlawful possession of a firearm. (RP 1190)

Mr. Veilleux filed a motion for reconsideration on his conviction, but the motion was denied. (RP 1221) Mr. Veilleux timely appealed this judgment and sentence. (CP 1037)

V. ARGUMENT

Issue 1: The trial court abused its discretion, violating Mr. Veilleux’s right to a speedy trial, by compelling Mr. Veilleux to be tried with co-defendant Mr. Riley.

The Sixth Amendment of the United States Constitution guarantees all criminal defendants the right to a speedy and public trial, which is “as fundamental as any of the rights secured by the Sixth Amendment.” *Klopper v. North Carolina*, 386 U.S. 213, 223, 87 S. Ct, 988, 18 L.Ed.2d 1 (1967). The Sixth Amendment right to a speedy trial is enforceable against the states through the Fourteenth Amendment. *Klopper*, 386 U.S. at 222-223.

In addition, Article 1, Section 22 of the Washington Constitution also guarantees the right to a speedy trial. Wash. Const. art. I § 22 (“In criminal prosecutions the accused shall have the right...to a speedy public trial.”). “Courts will not presume a waiver of the fundamental constitutional right to a speedy trial from a silent record.” *State v. Franulovich*, 18 Wn. App. 290, 567 P.2d 264 (1977), *review denied*, 90 Wn.2d 1001 (1978).

Absent compelling circumstances, a criminal defendant should be tried within the speedy trial time period set out by court rule. CrR 3.3. Mr. Veilleux objected to the trial court’s setting of his trial beyond his CrR 3.3 speedy trial time limit. The lower court’s reason for setting the trial date beyond Mr. Veilleux’s speedy trial limit was to preserve judicial economy by keeping his trial joined with that of co-defendant Mr. Riley. However, CrR 4.4 provides that criminal trials should not be continued over a speedy trial objection simply to maintain a joint trial of joined co-defendants. CrR 4.4. The trial court abused its discretion by continuing Mr. Veilleux’s trial beyond speedy trial and, as a result, his conviction should be reversed.

The trial court’s decision to continue a trial beyond a defendant’s speedy trial date is reviewed for abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court abuses its

discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Veilleux was arraigned on this offense on July 12, 2012. Because he was in custody, he should have been tried within 90 days of his arraignment. CrR 3.3(b)(1). It was the responsibility of the trial court to ensure that Mr. Veilleux was tried within the speedy trial limits. CrR 3.3(a)(1). But Mr. Veilleux's trial did not start until January 7, 2013, six months after his arraignment and three months after the speedy trial limit recognized by the court.

Mr. Veilleux's first trial date was September 10, 2012. On September 6, Mr. Riley's defense counsel moved for a continuance of the trial because he needed more time to prepare. Mr. Veilleux's counsel objected to the continuance and made a motion to sever the trials. The court declined to grant the severance and reset the trial on October 8, 2012, two days before Mr. Veilleux's speedy trial limit was set to expire. In refusing to sever the case, the court improperly cited the judicial economy of a single trial.

Under CrR 4.4(c)(2)(i), a co-defendant should be severed for trial to protect his individual speedy trial right. *State v. Nguyen*, 131 Wn. App. 815, 129 P.3d 821 (2006). While severance of co-defendants is not

mandatory under the rule, it has been noted that if “administration of justice” can be invoked at any time to grant a continuance, then “there is little point in having the speedy trial rule at all.” *State v. Adamski*, 111 Wn.2d 574, 580, 761 P.2d 621 (1988). Severance to protect Mr. Veilleux’s speedy trial rights weighed in favor of Mr. Veilleux and should have been granted because Mr. Riley’s counsel requested the continuance and Mr. Veilleux’s counsel was prepared for trial in September. The trial court abused its discretion by continuing Mr. Veilleux’s trial to accommodate his co-defendant’s attorney.

Had the trial court properly granted the severance, the last day on speedy trial for Mr. Veilleux was October 10, 2012. When speedy trial rights are violated under CrR 3.3, the remedy is dismissal with prejudice. CrR 3.3(h). No showing of prejudice to the defendant is required. *State v. Kenyon*, 167 Wn.2d 130, 135-39, 216 P.3d 1024 (2009). Mr. Veilleux’s conviction for unlawful possession of a firearm should be dismissed with prejudice.

Issue 2: The trial court abused its discretion by failing to grant Mr. Veilleux’s request for a downward departure, thus imposing an excessive sentence.

RCW 9.94A.010 provides, in pertinent part:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself;
- (6) Make frugal use of the state's and local government's resources; and
- (7) Reduce the risk of re-offending by offenders in the community.

An exceptional sentence above or below the standard range may be imposed for substantial and compelling reasons. RCW 9.94A.535; *State v. Jackson*, 150 Wn.2d 251, 273, 76 P.3d 217 (2003). Washington courts may consider a nonexclusive statutory list of mitigating factors that support an exceptional sentence downward. RCW 9.94A.535(1).

Generally an exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category. *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989). The appellate courts review whether a sentence is clearly excessive or too lenient under an abuse of discretion standard. *Jackson*, 150 Wn.2d at 273-74; *Pennington*, 112 Wn.2d at 608.

A trial court is held to the duty to exercise its discretion based on all the facts and circumstances present. *State v. Perdang*, 38 Wn. App. 151, 684 P.2d 781 (1984). In *Perdang*, the District court refused to dismiss a prosecution under the Compromise of Misdemeanor Statute. The Superior Court for King County upheld the refusal. The Court of Appeals, however, held that the District court judge had failed to properly exercise its discretion, and reversed the judgment remanding it for further consideration. In its decision the Court of Appeals stated, “[T]he fact that the abuse of discretion standard applies does not insulate decisions...from appellate review.” *Id.* at 145.

The sentencing court erred in failing to grant Mr. Veilleux’s request for a downward departure as the ultimate sentence in this matter was clearly excessive. In Mr. Veilleux’s case, a standard range sentence was not proportionate given his criminal history and it did not promote a just punishment.

The facts in this case simply do not support Mr. Veilleux receiving a sentence of 116 months for unlawful possession of a firearm, given the statutory purpose of the Sentencing Reform Act. Mr. Veilleux’s sentence did not ensure that his punishment for this criminal offense was proportionate to the seriousness of the offense and his criminal history. Of the 14 points in Mr. Veilleux’s calculated offender score, 12 of them were

from a single burglary crime spree in 2002. The trial court in Montana recognized the disproportionateness of Mr. Veilleux's offender score to a standard sentence and sentenced Mr. Veilleux to a concurrent sentence because they were part of a single crime spree. The gravity of Mr. Veilleux's prior offenses that brought his offender score to 14 is not commensurate of someone with a similar offender score of 14. Additionally, Mr. Veilleux's sentence of 116 months is not commensurate with the punishment imposed on others committing similar offenses of unlawful possession of a firearm.

The trial court abused its discretion by failing to grant Mr. Veilleux's request for a downward departure and instead ordering an unfairly excessive sentence.

VI. CONCLUSION

Mr. Veilleux's speedy trial right was violated by the numerous continuances, which were granted over his objection and by the trial court's improper refusal to sever his case to ensure that a speedy trial could be had. As a result of this speedy trial violation, Mr. Veilleux's conviction should be dismissed with prejudice. Alternatively, Mr. Veilleux respectfully requests that the Court of Appeals act in the interest of justice and remand the case for an appropriate sentence.

Respectfully submitted this 18th day of October, 2013.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

/s/ Megan R. Kapaun
Megan R. Kapaun, WSBA #43967
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 31480-4-III
vs.)
JARROD VEILLEUX) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 18, 2013, I deposited for mail by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Jarrood Veilleux
#2046702
700 CONLEY LAKE ROAD
DEER LODGE, MT 59722

Having obtained prior permission from Spokane County Prosecutor's Office, I also served Mark Lindsey at kowens@spokanecounty.org by e-filing electronic e-mail service.

Dated this 18th day of October, 2013.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 280-1207
Wa.Appeals@gmail.com