

NO. 63003-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MELVIN TALLEY, JR.,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Delays that are due to unavoidable circumstances are excluded from the allowable time for trial period under CrR 3.3(e)(8). When counsel for either party is in another trial, that is an unavoidable circumstance. Talley's trial date was set nine days before the end of the original time for trial period. Starting on the trial date and until the trial began, counsel for the State was in other trials and unavailable. Did Talley's trial occur within the prescribed time limits of CrR 3.3?

2. Under CrR 3.3(b)(5), if there is any period excluded from the time for trial period under CrR 3.3(e), the allowable time for trial expires no less than 30 days after that excluded period ends. On the date Talley's trial was set and for the next six days, counsel for Talley and counsel for the State were both unavailable because they were in other trials. That interval became an excluded period under CrR 3.3(e)(8). Talley was tried less than 30 days later. Did Talley's trial occur within the prescribed time limits of CrR 3.3?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On July 29, 2008, Melvin Talley Jr. was charged with two counts of violating court orders and one count of tampering with a witness. CP 1-2. A trial date was set for November 6, 2008, with the time for trial period ending November 15, 2008. CP 297.

On November 6, 2008, counsel for the defendant, Sacha Marley, and counsel for the State, Benjamin Santos, both were unavailable for trial because they were in other trials. CP 298; 2RP 34-35.¹

On December 8, 2008, the case was assigned to the Honorable Richard Eadie for consideration of a motion to dismiss for violation of CrR 3.3. 2RP 3. After several hearings, the motion was denied on December 10, 2008. 2RP 88. The matter proceeded to trial immediately. Id.

On December 15, 2008, the State, by amended information, charged Talley with one count of Intimidating a Witness on July 15, 2008, with aggravating circumstances that the crime occurred in the presence of the victim's and the defendant's minor children and that

¹ The verbatim report of proceedings is referenced as follows: 1RP – 12/3/08; 2RP – one volume containing 12/8/08-12/10/08, 12/15/08, 12/16/08, and 1/23/09.

the crime was part of an ongoing pattern of abuse of the victim. CP 37-38. Counts 2 and 3 of the amended information both charged Domestic Violence Misdemeanor Violation of a Court Order, on July 15, and July 24, 2008, respectively. CP 38.

On December 16, 2008, the court found Talley guilty of these charges and aggravators after a stipulated facts trial. 2RP 111-12; CP 290-95. Talley was sentenced on January 23, 2009. 2RP 115.

2. SUBSTANTIVE FACTS

Talley and the adult victim of his crimes, SY,² had a 15-year relationship and three children in common. CP 290. Talley has a history of domestic violence against SY, leading to more than 15 incidents involving the police since 1997. CP 291. The details of the prior incidents are included in the trial court's findings but are not relevant to this appeal. CP 291-94.

The basis of the conviction for Intimidating a Witness is Talley's threat to chop SY into pieces so that she could not appear in court to testify as to a pending assault charge. CP 37, 291.

² This victim is referenced by initials in an attempt to protect the identity of her children.

Talley also tried to hit SY on that occasion but SY blocked the blow. CP 291. All three children were present. Id. The contact with SY and each child was in violation of a prior no contact order; that was the basis for the conviction on Count 2. CP 38, 291. Count 3 was based on Talley's returning to SY's home nine days later. CP 38, 291-92.

3. FACTS RELATING TO TIME FOR TRIAL

The trial date in this case originally was set for November 6, 2008, with the time for trial period ending November 15, 2008. CP 297. On November 6, 2008, counsel for the defendant, Sacha Marley, and counsel for the State, Benjamin Santos, both were unavailable for trial because they were in other trials. CP 298; 2RP 34-35, 38-39, 45.

Defense counsel Marley completed the other trial that she was handling on November 12, 2008. 2RP 45. Marley was in another trial again on November 17, 2008. Id.

The trial that deputy prosecutor Santos was in on November 6, 2008, was completed on November 20, 2008. 2RP 38-39. Santos was immediately assigned to another trial, State v. Sepulveda. 2RP 39. Santos completed that trial on November 25,

2008, and was immediately assigned to trial on State v. Morey. Id. That case was completed on December 1, and Santos was assigned to trial on State v. Koehler on December 2; that case resulted in a plea. Santos was assigned out again on December 2, on State v. Dei. Id. He was still in trial in the Dei case on December 3, 2008. 1RP 3, 8-9. Then Santos was assigned to trial on the case of State v. McKinney, on which he still was in trial on the date of the second hearing on the motion to dismiss, December 9, 2008. 2RP 41.

Because of a clerical error, on November 6, 2008, this case did not appear on the working document prepared each day and used by the court in assigning cases for trial, referred to as the "trial calendar." 2RP 32-34, 36. No court action was taken regarding the trial date until December 3, 2008, when the State requested a continuance because of counsel's unavailability. 1RP 3-5.

At the hearing on December 3, 2008, Judge Cheryl Carey concluded that the case had been on standby status since the original trial date and put the case on standby status again. CP 335; 1RP 8-10. Standby status is a local term used to indicate that a case is on the trial calendar, pending assignment.

2RP 24-29. The court explicitly reserved any ruling on a defense motion to dismiss for violation of CrR 3.3. CP 335.

Angela Lang, the Criminal Department Manager, oversees trial court assignments in King County Superior Court. 2RP 19. She testified at the hearing on the motion to dismiss and explained the court's trial assignment procedures. When a trial date is set, that date is entered into a computer database. 2RP 20-21. Each day, a calendar is printed showing the cases set for trial the next day, and it is circulated to counsel. 2RP 21-22.

Cases on the trial calendar are placed on standby status if it is possible that they could be assigned to a trial court. 2RP 24-25. It is common for a prosecutor to have four or five cases on standby status. 2RP 29. If both attorneys are available for trial, the cases are assigned to trial courts in the order of their arraignment dates, the oldest being assigned to trial first. 2RP 23. If a case that is on standby is not assigned to a trial court, at the end of the day the court signs a written order continuing the trial date. 2RP 28-31.

Lang testified that even if Talley's case had appeared on the circulated calendar on November 6th, it would not have been assigned to a trial court because the attorneys were unavailable. 2RP 37. The case still would not have been sent to a trial court as

of December 9th, because of the relative ages of the attorneys' other cases on the trial calendar. 2RP 37, 42, 49, 59.

The parties stipulated to the accuracy of the record of trials each attorney handled during this period of time, as set out in Exhibit 1 of the State's brief in response to the motion to dismiss. 2RP 66-67; CP 334. That record is consistent with Lang's testimony as to the trial assignments.

In the trial court, Talley agreed that his case would not have been assigned out any sooner even if it had appeared on the trial calendar on November 6, 2008. 2RP 75. Talley agreed that there were proper reasons to delay the trial, but he claimed that the lack of a written order doing so before November 21, 2008, violated CrR 3.3. Talley did not claim any prejudice or any constitutional violation. CP 7-8; 2RP 75-76.

The trial court found that Talley's case would not have been assigned to trial any sooner under any circumstances. CP 299. The court found that the unavailability of the attorneys due to their trial schedules and mistaken belief that the case was on the daily calendar was unavoidable, and were excluded time periods for purposes of computing time for trial. Id. The court found that failure to include the matter on the working calendar was harmless

administrative error that was corrected without prejudice to Talley.
CP 299-300.

C. ARGUMENT

1. THE TRIAL OCCURRED WITHIN THE TIME FOR TRIAL PERIOD SPECIFIED BY CrR 3.3.

Talley argues that the court did not have authority to extend the period of time for trial in this case because the court did not act before the initial time for trial period (plus the cure period in the rule) expired. That argument should be rejected. Periods excluded from the computation of the time for trial under CrR 3.3 are subtracted in calculation of the allowable time for trial by operation of the rule and do not require contemporaneous endorsement by the trial court. Applying the rule to the facts of this case, the trial was within the time for trial period specified by CrR 3.3.

CrR 3.3 governs the proper time for trial of criminal cases in Superior Court. A defendant must be brought to trial within 60 days of arraignment if he or she is detained on the pending charge, but if time is tolled under the rule, the time limit is 30 days after the end of any excluded period. CrR 3.3(b)(1), (5). The period of time allowed for trial tolls during nine specified periods. CrR 3.3(e).

If a trial does not begin within "the time limit determined under the rule, taking into account any applicable resets or exclusions," the charge will be dismissed with prejudice. State v. George, 160 Wn.2d 727, 733-34, 158 P.3d 1169 (2007) (discussing application of parallel rule, CrRLJ 3.3); CrR 3.3(h). CrR 3.3(e) provides that:

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

...
(8) *Unavoidable or Unforeseen Circumstances.* Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

CrR 3.3(e).

Court rules are interpreted using the rules of statutory construction and that interpretation is reviewed de novo. Id. at 735. Courts give effect to the plain language of court rules, in the context of the rule as a whole. Id. The plain meaning of a statute or rule is determined based on the language at issue, the context of the statute, related provisions, and the statutory scheme as a whole. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

The plain meaning of "the following periods shall be excluded in computing the time for trial,"³ is that the listed time periods are excluded automatically, by operation of the rule. CrR 3.3 includes no requirement that the trial court approve exclusions from the allowable time for trial as they occur; it provides that trial must be within the limits calculated under the rule.

For example, in George, supra, the Supreme Court calculated the allowable time for trial by subtracting an excluded period that was not addressed by the lower courts. George, 160 Wn.2d at 740-41. The court excluded time that the defendant was detained on unrelated charges under CrRLJ 3.3(e)(2), although the district court never addressed the speedy trial issue and the court of appeals did not apply any excluded period. Id. at 732, 740-41.

The unavailability of counsel for either party may be an unavoidable circumstance beyond the control of the parties for purposes of the time for trial rule. State v. Carson, 128 Wn.2d 805, 814-16, 912 P.2d 1016 (1996) (interpreting identical language in former CrR 3.3(d)(8) (2002)); State v. Williams, 104 Wn. App. 516, 522-23, 17 P.3d 648 (2001) (listing cases). The prior rule provided:

³ CrR 3.3(e).

When a trial is not begun on the date set because of unavoidable or unforeseen circumstances beyond the control of the court or the parties, the court, even if the time for trial has expired, *may extend* the time within which trial must be held....

CrR 3.3(d)(8) (2002) (emphasis added). Under that rule, the extension was within the discretion of the court. The mandatory language of the new rule eliminates the need for a trial court to grant an extension – the time is automatically excluded if the delay was due to unavoidable circumstances.

The trial court in the case at bar entered a finding of fact that both counsel were unavailable for trial on this case on November 6, 2008. CP 298, Finding M. The court found that as of the date of its ruling, "both counsel have not been available at the same time to be able to [go] forward on the matter because either both or one of the attorneys have been in trial." *Id.*, Finding N. Talley stipulated to the facts relating to trial assignments that were the basis of these findings. 2RP 66-67. Talley has not assigned error to these findings in this appeal, so they must be treated as verities. State v. Ross, 141 Wn.2d 304, 309-11, 4 P.3d 130 (2000); RAP 10.3(g).

Talley does not argue that the delay was not unavoidable, but only that the court did not have authority to exclude any time after the original allowable time for trial expired. App. Brief at

13, 16. In the trial court, Talley conceded that the unavailability of the attorneys constituted unavoidable circumstances delaying the trial. 2RP 75. Talley attempts to graft the limits of the cure period under the current rule, CrR 3.3(g), to the rule of Carson, supra, that multiple 5-day extensions of speedy trial could be granted retroactively under the former rule. 2RP 75-76; App. Brief at 14-16. However, under the plain language of the current rule, delays due to unavoidable circumstances are automatically excluded from the calculation of the allowable period for trial – no court action is needed to extend the period.

Talley cites no authority for the proposition that a court order must be entered identifying each excluded period as it occurs. The language in section (g) of the rule, relating to the cure period, applies only to a continuance "beyond the limits specified in section (b)." CrR 3.3(g). The trial below occurred within the limits set by section (b), which provides:

(b) Time for Trial

(1) *Defendant Detained in Jail*. A defendant who is detained in jail shall be brought to trial within the longer of

- (i) 60 days after the commencement date specified in this rule, or
- (ii) the time specified under subsection (b)(5).

...

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

CrR 3.3(b). By its plain language, section (b) provides that the allowable time for trial ends 30 days after the end of any excluded period. As Talley has conceded below and does not dispute here that the time between November 6 and December 9, 2008, was properly excluded, the trial was within the time set by CrR 3.3(b).

There is no provision of CrR 3.3 that provides any reason to conclude that a trial court must identify a new expiration date based on an excluded period before the previously existing expiration date has passed. The other excluded periods listed in the rule illustrate that there can be no such requirement. For example, CrR 3.3(e)(1) excludes time relating to competency proceedings, which includes all time until the defendant is found competent—short of returning to court every 30 days during competency restoration periods of up to six months, RCW 10.77.086, the court could not approve new expiration dates before the last existing expiration date passed. CrR 3.3(e)(4) is perhaps the most dramatic illustration—the time between dismissal and refiling of a charge is excluded. Certainly the trial court can not recognize the excluded period until the case

is refiled, and at that point in virtually every case the originally set time for trial period would have passed.

The trial court properly found that the unavailability of the attorneys and the mistaken belief that the case was on the working trial calendar constituted unavoidable circumstances and, therefore, the time was an excluded period under CrR 3.3(e)(8). CP 299, Conclusion (4)(C). The court cited Carson, supra, in support of that finding; Carson included a mistake in calculating time for trial as one factor in the determination that a delay was unavoidable. Carson, 128 Wn.2d at 816. Talley does not challenge the finding, only the court's authority to act after November 21, 2008.

Talley's own attorney was unavailable to try the case on the original trial date and from November 6-12, 2008. CP 334; 2RP 45. This caused an unavoidable delay independent of the prosecutor's availability, and constituted an excluded period ending November 12, 2008. Based on the unavailability of Talley's own attorney during just that trial, the 30-day extension of time for trial after an excluded period in CrR 3.3(b)(5) established allowable time for trial ending December 12, 2008. Talley's trial began on December 10, 2008. 2RP 88.

Talley unaccountably claims on appeal that "no one disputed his expiration date was November 15, 2008" and "no one disputed Talley was not brought to trial by his speedy trial expiration date." App. Brief at 12. There was no dispute that as of November 6, 2008, the allowable time for trial ended on November 17, 2008. CP 297-98; 2RP 63-64. However, on December 3, 2008, Judge Cheryl Carey stated her understanding of CrR 3.3, that when the trial date is delayed because of unavailability of counsel, the expiration date automatically is extended 30 days. 1RP 8. The State's argument was that no court order was necessary to extend the time for trial based on an excluded period. 2RP 77-79. The trial court's finding on the motion to dismiss was that the time when the attorneys were unavailable was an excluded period under CrR 3.3(e)(8). CP 299. That conclusion results in a computation of the time for trial that changes the expiration date to January 7, 2009, 30 days after the last day that the prosecutor was in another trial.⁴

⁴ The trial court's oral remarks refer to extension of speedy trial, apparently inadvertently referring to the framework of the former rule. 2RP 84-87. Its written findings reflect the calculation of time for trial based on excluding the period of unavoidable delay, as provided in the current version of CrR 3.3, which applies to Talley's case. CP 299.

Finally, even if this court concludes that the trial court's failure to act before November 21, 2008, would constitute a violation of CrR 3.3, Talley's failure to object to the inaction of the court while the attorneys were unavailable should preclude his time for trial objection. The trial court found that the clerical error that resulted in this case not appearing on the working trial calendar was "easily ascertainable and discoverable." CP 299, Finding S.

When Marley was asked by the court when she had discovered the error, Marley represented that she became aware that the case was not on the trial calendar when Talley called her to ask about the status of the case and she checked the calendar; Marley did not specify whether this was before November 21, 2008; she does state that later the prosecutor asked her about the status of the case and she then stated her intent to move to dismiss. 2RP 74. If she did not know of the mistake before November 21st, that Marley easily discovered the mistake when asked by her client establishes that it was easily discoverable.

Defense counsel has an obligation to object when action could still be taken to avoid violation of the speedy trial rule. State v. Becerra, 66 Wn. App. 202, 206, 831 P.2d 781 (1992). It is the defendant's responsibility to provide to the appellate court a record

as to the specific date when a defense attorney learned of a potential violation of the rule. State v. Malone, 72 Wn. App. 429, 434, 864 P.2d 990 (1994). Talley has not established that Marley was unaware of this problem before the date when he claims it could no longer be cured. Talley's failure to raise the claim in a timely fashion waived that claim. Becerra, 66 Wn. App. at 206; Malone, 72 Wn. App. at 434.

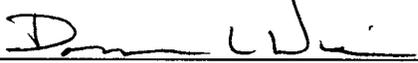
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's order denying the motion to dismiss and affirm the convictions in this case.

DATED this 5TH day of August, 2009.

Respectfully submitted,

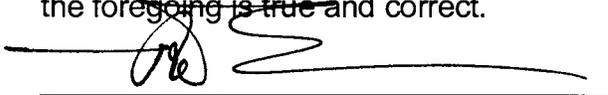
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to DANA LIND, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MELVIN TALLEY, JR., Cause No. 63003-2-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Done in Seattle, Washington

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