

THE
COURT OF APPEALS
SEP 27 PM 4:55
STATE OF WASHINGTON
BY *SM*

No. 33813-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

MIKAH RICHINS

BRIEF OF APPELLANT

Thomas W. McAllister
WSB# 35832
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

ORIGINAL

TABLE OF CONTENTS

A. Assignment of Errors.....	1
B. Statement of Facts.....	1
C. Argument.....	3
D. Conclusion.....	6

TABLE OF AUTHORITIES

Cases

<u>Barker v. Wingo</u> , 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).....	3, 4
<u>Moore V. Arizona</u> , 414 U.S. 25, 26, 94 S.Ct. 188, 189, 38 L.Ed. 2d 183 (1973)	5
<u>State v. Earl</u> , 97 Wn.App. 408, 410, 984 P.2d 427 (1999)	3, 4, 6
<u>State v. Guttierrez</u> , 92 Wn.App. 343, 346, 961 P.2d 974 (1998).....	4
<u>State v. Purdom</u> , 106 Wn.2d 745, 748-49, 725 P.2d 622 (1986)	3
<u>State v. Ralph Vernon G.</u> , 90Wn.App. 16, 21-22, 950 P.2d 971 (1998)	4
<u>State v. Ross</u> , 98 Wn.App. 1, 5, 981 P.2d 288, (1999)	4

A. Assignment of Errors.

Mikah Richins' constitutional right to "speedy trial" was violated by improper continuance of the trial date.

Issues pertaining to Assignment of Errors

1. Was Mr. Richins' constitutional right to a "speedy trial" violated when the State motioned to continue due to the unavailability of their witness?
2. Was the defendant unfairly prejudiced by his denial of speedy trial which was a result of the State's failure to exercise due diligence in presenting discovery to the defense?

B. Statement of Facts

The original Information was filed by the prosecutor in Kitsap Superior Court on June 07, 2006 alleging one count of assault in the second degree contrary to RCW 9A.36.021(1)(a) and one count of violation of court order (gross misdemeanor) contrary to RCW 26.50.110(1). CP, 1-3. He entered a plea of not guilty and proceeded to trial. Amended Information filed on July 27, 2005 in Kitsap Superior Court with one count of burglary in the first degree in violation RCW 9A.52.020. CP, 9. The Amended Information also contained one count violation of court order (felony) contrary to RCW 26.50.110, and six counts of violation of court order (gross misdemeanor) contrary to RCW 26.50.110(1). CP, 9-13. A trial by jury resulted in a verdict of not guilty as to burglary in the first degree and violation of court order (felony). CP, 57. A guilty verdict was reached with regards to the six counts of violation of court order (gross misdemeanor). CP, 57-59. Mr. Richins appeals.

A jury trial was originally scheduled to commence on July 27, 2006. RP (8/01/06), 2. The defense petitioned and the court agreed to a continuance when the State presented an Amended Information alleging new charges and issues of late discovery arose. RP (8/01/06), 3. A three day continuance was granted with trial set to commence on August 1, 2006 within the speedy trial period. RP (8/01/06), 3. On August 1, 2006 the State moved to continue with a new trial date on August 24, 2006 based solely upon the unavailability of one witness. RP (8/01/06), 2-3. Speedy trial period was scheduled to expire on August 8, 2006. RP (8/01/06), 4.

Defense counsel timely objected to the State's motion to continue. RP (8/01/06), 4. State's witness was available on the original trial date, July 27, 2006. RP (8/01/06), 5. Due to the delay in receiving discovery to the Amended Information, defense counsel was forced to motion for a three day continuance. RP (8/01/06), 5. None of the discovery in the Amended Information "... was recently discovered,..." RP (8/01/06), 5. Defense counsel articulated that the basis for the State's motion to continue was actually due to a "...failure to provide that discovery in a timely fashion..." which now results in the unavailability of the State's witness until August 24, 2006. RP (8/01/06), 5. State acknowledged to the court the delay in delivering discovery to defense counsel. RP (8/01/06), 6. Defense counsel affirmed to the court that no jeopardy to Mr. Richins would have resulted had the case proceeded on the original two charges with a delay in the charges related to the new discovery. RP (8/01/06), 7. But for the delay in the original trial date due to late discovery from the State, defense would have proceeded to trial and the State's witness would have been available to testify. RP (8/01/06), 5.

Court granted State's motion to continue beyond the expiration of speedy trial. RP (8/01/06), 7. The record does not reflect the standard used to grant the motion nor is there any analysis provided in the record to sustain the motion.

C. Argument

Is a defendant's right to speedy trial violated where the state failed to act with due diligence when it amended the information the day of trial and acknowledges that it was in possession of evidence necessary to charge the defendant at least three weeks prior to trial?

The State is allowed to amend an information prior to trial as long as a substantial right of the defendant has is not prejudiced. CrR 2.1(d). Under Washington case law, the court interpreted a "substantial right" to include the right to speedy trial. State v. Purdom, 106 Wn.2d 745, 748-49, 725 P.2d 622 (1986); State v. Earl, 97 Wn.App. 408, 410, 984 P.2d 427 (1999). Court procedure in the state of Washington requires a defendant stand trial before the expiration of 60 days following arraignment. CrR 3.3(c)(1). The right to a speedy is guaranteed to all criminal defendants in this state by the Sixth and Fourteenth Amendments to the United States Constitution. The United States Supreme Court addressed the right to speedy trial in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972). In Barker, the Court said that states are free to prescribe a reasonable period of time consistent with constitutional standards and found there is "...no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days..." Id at 514. The Supreme Court listed four factors to be considered by trial courts in determining claims of failure to provide a

speedy trial: 1) length of delay; 2) reason for delay; 3) defendant's assertion of the right to speedy trial; and 4) prejudice to the defendant. *Id.* at 530.

A Washington court specifically addressed the issue of the sixty day time clock with regards to additional charges filed before the expiration of the speedy trial period. In State v. Ross, 98 Wn.App. 1, 5, 981 P.2d 288, (1999), the court stated, "When multiple crimes arise from the same criminal episode, the time within which trial must begin on all crimes is calculated from the time that the defendant is held to answer any charge with respect to that episode."

The burden is upon the defendant to show prejudice where amending the information infringes his right to speedy trial. State v. Gutierrez, 92 Wn.App. 343, 346, 961 P.2d 974 (1998). However, failure to comply with CrR 3.3(c) will remove the requirement that the defendant demonstrate prejudice as a result of speedy trial being violated. Earl, 97 Wn.App. at 410 (citing State v. Ralph Vernon G., 90Wn.App. 16, 21-22, 950 P.2d 971 (1998)). Mr. Richins right to speedy trial was violated when the State presented the Amended Information, forcing the defense to motion for a brief continuance within speedy trial period which had the collateral consequence of the State seeking a continuance when its witness became unavailable until after the expiration of speedy trial period. Mr. Richins counsel made a timely objection to the State's continuance past August 8, 2006. Failure to bring a defendant to trial before the expiration of the speedy trial period results in dismissal with no proof of prejudice required. The United States Supreme Court in Moore v. Arizona rejected the idea that an affirmative demonstration of prejudice is necessary to prove a denial of the

constitutional right to speedy trial. Moore V. Arizona, 414 U.S. 25, 26, 94 S.Ct. 188, 189, 38 L.Ed. 2d 183 (1973).

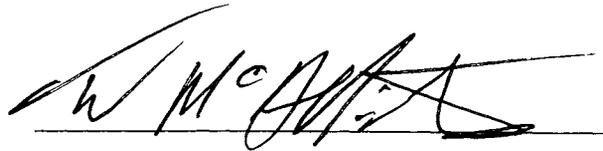
In the alternative, Mr. Richins could demonstrate substantial prejudice by the State's actions. His right to a speedy trial was violated when the State failed to demonstrate due diligence in amending the information and furnishing discovery until the day of trial. The phone records used to support the Amended Information had been accessible to the State since the time Mr. Richins was first incarcerated on June 4, 2006. Despite the ready access to phone records, the State delayed amending the information until the day of trial and with only eight business days remaining before the expiration of speedy trial. Mr. Richins was put in the unfavorable position of choosing between having his counsel fully apprised and briefed on the amended information or proceeding with his original trial date. Mr. Richins suffered severe prejudice by being forced to choose between two vital rights. In State v. Earl, the court found that the lack of due diligence on the State's part in providing information to the defense will be sufficient to demonstrate prejudice to the defendant. Earl, 97 Wn.App. at 409. In Earl, the State presented an amended information to the court on the day of trial despite the fact that evidence of the new charge had been known for at least an eight month period. Earl, 97 Wn.App. at 411. Earl had only 6 days remaining prior to expiration of speedy trial. *Id.* The defendant in Earl, like Mr. Richins was put in the unfavorable position of choosing between his right to speed trial or being allowed the right to effective assistance of counsel. The trial court should have denied the State's motion to continue past the expiration of speedy trial given the substantial prejudice faced by the defense.

The State could have considered the availability of their witness prior to amending the information. A court may extend the speedy trial period if there is a showing that unavoidable or unforeseen circumstances beyond the control of the court or parties which results in a delay. CrR 3.3(e)(8). In the instant case, the record reflects that the State's witness had been, "...available for a month-and-a-half since the arrest." RP (8/01/06), 5. The witness's unavailability for trial was easily foreseen and avoidable had the State exercised some degree of due diligence.

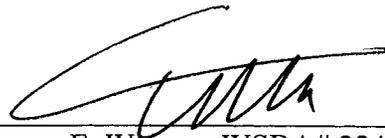
D. Conclusion

This Court should reverse and dismiss.

Dated this 26th day of April, 2006.



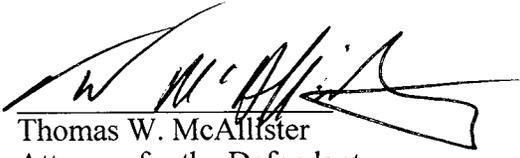
Thomas W. McAllister, WSB# 35832
Attorney for the Appellant.



Thomas E. Weaver, WSBA# 22488
Attorney for the Appellant.

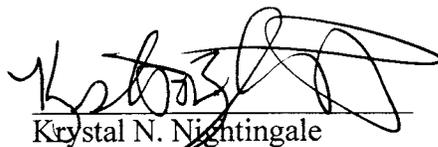
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Dated this 27th day of April, 2006.



Thomas W. McAllister
Attorney for the Defendant
WSBA# 35832

SUBSCRIBED AND SWORN to before me this 10th day of April, 2006.



Krystal N. Nightingale
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 2/22/10