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COURT OF APPEALS

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STATE OF WASHINGTON

No. 33813-1-II

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CITY

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

MIKAH RICHINS

REPLY BRIEF

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ORIGINAL

PM 9/26/04

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A. Argument

Mr. Richens appeals his convictions for multiple counts of Violation of No Contact Order on the ground that his right to speedy trial was violated. The State rebuts this assignment of error with several arguments. The sixtieth day following Mr. Richens' arraignment was August 8, 2005. He went to trial on August 24, 2005. This was a violation of CrR 3.3 and his constitutional right to a speedy trial.

First, the State argues that the trial court did not abuse its discretion by continuing the case from July 27 to August 1, 2005. Mr. Richens did not raise this continuance in his Brief of Appellant, nor does he now argue that this short continuance was unlawful. It is clear from the record that this sort continuance was needed by both parties. Although defense counsel expressed "frustrat[ion]" with the lateness of discovery, he did not object to the continuance. RP, 2 (July 27, 2005). More importantly, however, the continuance was from the original trial date to a later date that was still within Mr. Richens' original speedy trial expiration. The State is correct, therefore, that there is no prejudice to Mr. Richens by continuing the trial five days to August 1, 2005.

But the fact that the short continuance was not objected to and was not prejudicial does not end the inquiry. At the time of the continuance request on July 27, the State had information that its police officer witness

was pending a vacation. Defense counsel requested that the trial commence the next day, which would have been Thursday, July 28, 2005. RP, 3 (July 27, 2005). This request would have allowed the police officer to have testified prior to leaving on his vacation. The court never specifically addressed this request, instead continuing the case to August 1, a date on which the prosecutor believed the trial could not start.

The final point that needs to be emphasized about the July 27, 2005 hearing is that all parties (defense counsel, prosecutor, and court) recognized that the continuance was within speedy trial and that nothing about the continuance was changing the speedy trial expiration date. Defense counsel said, "I don't think this is technically a defense continuance, which would extend speedy trial. I think we're forced into this position." RP, 3 (July 27, 2005). The prosecutor said, "We thought we were going to get [the officer's] portion of the trial done today and tomorrow, so we can put it on for call and revisit the potential dates." RP, 3 (July 27, 2005). The court said, "But we're setting it Monday, which is still within the current speedy." RP, 3-4 (July 27, 2005).

The State's second argument is that the continuance from August 1 to August 24 was justified by the officer's vacation. The State is correct that a pre-planned vacation is a justifiable reason to extend speedy trial. State v. Torres, 111 Wn. App. 323, 44 P.3d 903 (2002). But the need for

this continuance could have been averted entirely had the trial court scheduled the trial on July 28 as requested by defense counsel. There is nothing in the record to indicate why July 28 was not a viable trial date. Mr. Richens' relies on his Brief of Appellant for other arguments on this issue.

The State's third argument is that the continuance from July 27 to August 1 extended speedy trial by thirty days. This argument, which deserves more careful treatment, should be summarily rejected by this Court. It is also worth noting that the interpretation of CrR 3.3(b)(5) has caused a great deal of confusion and disparate treatment in the trial courts since its inception on September 1, 2003. The proper interpretation of CrR 3.3(b)(5) is an issue of first impression.

The amended CrR 3.3(b)(5) says, "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 excludable period." The State argues that the trial court excluded the period from July 27 to August 1 from the time for trial. Therefore, according to the State's logic, the new expiration date was August 31 (thirty days following August 1). If the State's argument is correct, this is the exception that swallows the rule. It effectively renders meaningless the entirety of CrR 3.3.

Short continuances are routine in criminal courts. They occur because of last minute discovery, witness unavailability, lawyer unavailability, judge unavailability, and a plethora of other reasons. The continuance in Mr. Richens' case from July 27 to August 1 is an unremarkable example of this. Under the State's analysis, any continuance would result in an extension of speedy trial by thirty days, regardless of how routine or short the continuance, and even if the continuance was within the original sixty days of CrR (b)(1) for an in custody defendant. Imagine a hypothetical where the trial is scheduled for the fifty-ninth day following arraignment. On the day of trial, however, defense counsel is ill and is unable to make it to court. The defendant asks for a one day continuance to determine the health of the attorney. The next day (the sixtieth), defense counsel appears and reports he is prepared for trial. Under the State's interpretation of CrR 3.3(b)(5), the court would be free to continue the case for an additional sixty days.

This interpretation is belied by the overall structure of CrR 3.3. CrR 3.3(e) contains nine excluded periods. Although it is possible to envision a thirty day addition to some of the nine excluded periods of CrR 3.3(e), it is impossible to reconcile the specific language of CrR 3.3(b)(5) with many of the excluded periods of CrR 3.3(e).

CrR 3.3(e)(3) makes continuances granted by the court pursuant to CrR 3.3(f) an excluded period. CrR 3.3(f) permits a continuance “to a specified date” upon written agreement of the parties. If the continuance is to a specified date, and the continuance acts as an excluded period, then the speedy trial expiration is actually thirty days beyond the specified date.

CrR 3.3(e)(9) excludes a five-day period after a judge has become disqualified from a case. What is unclear is what must occur at the end of that five-day period. Does the State then have an additional thirty days in which to commence the trial, or must the trial commence at the end of the five-day period? If the former, then the language specifying that the excluded period is five-days is surplusage, because the extension of speedy trial is actually thirty-five days, not five days.

Possibly the most overused excluded period, and the one that arguably applies in Mr. Richens’ case, is CrR 3.3(e)(8), which excludes unavoidable or unforeseen circumstances. Under the case law, almost anything qualifies as an unavoidable or unforeseen circumstance, such as Mr. Richens’ request for a one day continuance to review last minute discovery. But under the State’s interpretation of CrR 3.3(b)(5), the court may bring a person to trial up to thirty days after the unavoidable or unforeseen circumstance has been ameliorated.

CrR 3.3(e)(8) references CrR 3.3(g), titled the “Cure Period.” This rule permits an extension of speedy trial for fourteen days or twenty-eight days (depending on the custody of the defendant) upon a finding that the defendant will not be prejudiced. The rule specifically limits its use to one time. But under the State’s logic, if the fourteen day period of CrR 3.3(g) is an excluded period under CrR 3.3(e)(8), then the State has an additional thirty days for a total of forty-four days under CrR 3.3(b)(5). This interpretation is in conflict with the overall structure of the rule.

There is another problem with the State’s interpretation of CrR 3.3(b)(5): its application is unlimited. This stands in stark contrast to CrR 3.3(g), the Cure Period, which may be applied “only once.” Using Mr. Richens’ case as a hypothetical, suppose that on August 24 defense counsel was ill and unable to proceed. The trial court found an unavoidable or unforeseen circumstance and continued the case for one day to August 25. Under the State’s interpretation of CrR 3.3(b)(5), the speedy trial expiration would be September 24, thirty days beyond August 25. This scenario could continue ad infinitum.

CrR 3.3(a) states, as it has since its inception, that the responsibility to ensure a speedy trial rests with the court. If the State’s interpretation of CrR 3.3(b)(5) is correct, then the court’s role is reduced to a de minimus one. The court has the discretion to grant or deny a

continuance. That discretion, which may be exercised repeatedly, acts as an extension of speedy trial for as long as the court is willing to tolerate it.

It is not necessary in Mr. Richens' case for this Court to determine every possible scenario that might result in an extension of speedy trial pursuant to CrR 3.3(b)(5). While the rule is clearly subject to abuse by courts and prosecutors, Mr. Richens simply asks this Court to declare that, in the context of his case, a short, routine continuance within the original speedy trial period does not extend speedy trial to a date thirty days after the continuance.

B. Conclusion

Mr. Richens' convictions should be dismissed.

Dated this 26th day of September, 2006.

A handwritten signature in black ink, appearing to read 'T. Weaver', with a long, sweeping horizontal line above it.

Thomas E. Weaver, WSBA #22488
Attorney for Appellant

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STATE OF WASHINGTON

BY WM
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	Case No.: 05-1-00843-0
)	Court of Appeals No.: 33813-1-II
Respondent,)	AFFIDAVIT OF SERVICE
vs.)	
MIKAH RICHINS,)	
Defendant.)	

STATE OF WASHINGTON)
)
 COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On September 26th, 2006, I sent an original and a copy, postage prepaid, of the REPLY BRIEF to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

On September 26th, 2006, I sent a copy, postage prepaid, of the REPLY BRIEF to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-4683.

1 On September 26th, 2006, I sent a copy, postage prepaid, of the REPLY BRIEF to Mr.
2 Mikah Richins, 2007 2nd Avenue W., Bremerton, WA 98312.

3 Dated this 26th day of September, 2006.



4
5
6 Thomas E. Weaver
WSBA #22488
Attorney for Defendant

7
8 SUBSCRIBED AND SWORN to before me this 26th day of September, 2006.



9
10 Christy McAdoo
11 NOTARY PUBLIC in and for
12 the State of Washington.
13 My commission expires: 7/31/2010