

NO. 33813-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MIKAH RICHINS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00843-0

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

✓ JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

ORIGINAL

SERVICE

Thomas McAllister
P.O. Box 1056
Bremerton, WA 98337

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 11, 2006, Port Orchard, WA
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

Delora Annes

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Richins' right to a speedy trial was violated when: (1) the trial court did not abuse its discretion in granting Richins' July 27 motion to continue; (2) the trial court did not abuse its discretion in granting the State's August 1 motion to continue due to the unavailability of an officer; and, (3) Richins' right to a speedy trial under the criminal rules was not violated?

2. Whether Richins' constitutional right to a speedy trial was violated when: (1) he was brought to trial 79 days after he was charged; (2) previous cases have held that delays of five months (and even up to one year) were not sufficiently prejudicial to trigger a constitutional inquiry; and, (3) Richins has failed to demonstrate any prejudice?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mikah Richins was originally charged by information filed in Kitsap County Superior Court with one count of assault in the second degree (DV) and one count of violation of a court order (DV). CP 1. An Amended information was filed on July 27, 2005 charging Richins with one count of burglary in the first degree (DV), and seven counts of violation of a court order (one felony count and six gross misdemeanor counts). CP 9. All of the counts included a special allegation of domestic violence. CP 9. After a jury

trial, Richins was convicted of the six gross misdemeanor counts of violation of a court order, and acquitted of the other counts. CP 57. This appeal followed.

B. FACTS

On June 6, 2005, Tina Posadas reported that her ex-boyfriend, Mikah Richins had threatened her and “choked” her to the point that she could not breathe. CP 5. A sheriff’s deputy observed that Ms. Posadas had red marks on her neck and two witnesses heard Richins tell Ms. Posadas that she was going to die. CP 5. A no contact order had previously been issued prohibiting Richins from contacting Ms. Posadas. CP 5-8. Richins was arrested and originally charged with assault in the second degree (DV) and violation of a court order (DV). CP 1-5.

Trial was originally set for July 27, 2005, with a speedy trial expiration of August 8, 2005. RP (7/27) 2. At the trial call on July 27, defense counsel asked for a brief continuance of the trial date because he was not prepared to start the trial. RP (7/27) 2. Defense counsel asked that the trial be reset for the following Monday, August 1. RP (7/27) 2. Defense counsel stated that the request was due to late disclosures from the State. RP (7/27) 2. Defense counsel briefly addressed the late disclosure by the State, stating, “It is a little frustrating on the lateness of this, but I understand the reasons, pretty much unavoidable.” RP (7/27) 2. Defense counsel, however,

also indicated that he himself had just provided the State with some photographs that morning, and that the continuance was, therefore, in everyone's best interest. RP (7/27) 2. Specifically, defense counsel stated,

I also was finally able to get into the residence yesterday and take some pictures, and I just delivered those to Mr. Mitchell this morning, so it's probably not fair to be prepared at 1:30. All parties may be best served by moving it to Monday.

RP (7/27) 2.

After the defense request to continue the trial to Monday, the State immediately stated that it had a witness that was to start a preplanned vacation on the proposed date and, therefore, asked that the matter be set for "on call" Monday and "revisit" the potential dates at that time because he did not have all of the information with him in court. RP (7/27) 2-3.

The trial court then suggested that the matter be set for a trial status Monday morning with a potential trial start at 1:30, and defense counsel agreed. RP (7/27) 3. The trial court reserved making any rulings regarding whether the continuance had an effect on speedy trial, and stated that that issue could be argued Monday if necessary. RP (7/27) 4. The court then stated that it was setting the matter over until Monday because, "Both attorneys need a little more time, last minute issues that have arisen." RP (7/27) 4.

On Monday August 1, the State asked the court to continue the trial to

August 24, because an officer (who was the main 3.5 witness) had a scheduled vacation until August 22. RP (8/01) 2. The State also reviewed why the trial date had originally been bumped, stating,

The State had received some phone records from the jail which showed some recent phone activity to a protected party. So as of – the night before was somewhat crucial in obtaining these records for potential subsequent charges. I wasn't able to give to give those to Mr. Kelly until that particular morning.

RP (8/01) 2.

Richins objected to a continuance outside of the August 8, and argued that August 8 should remain the date of the expiration of speedy trial. RP (8/01) 3. Richins argued that the phone records had been kept by the jail since his incarceration on June 4, and could have been discovered earlier. RP (8/01) 4. The trial court, however, noted that many of the charges stemmed from allegation after June 4, and asked if the allegation was that these violations occurred while Richins was in custody. RP (8/01) 5. The State confirmed that this was the case. RP (8/01) 5. The amended information included charges of violation of a court order (stemming from phone calls made from the jail to the victim) with the following offense dates from 2005: June 6, June 29, July 8, July 12 (two counts), July 16, and July 25. CP 9.

At trial, Tina Posadas stated Richins was her boyfriend and that they have a child in common. RP (8/25) 60-61. On June 6, Ms Posadas and

Richins were living together at a house on Madison Street in Suquamish, and Ms. Posadas' phone number was 697-3296. RP (8/25) 60, 61. There was, however, a no contact order in place prohibiting Richins from contacting Ms. Posadas. CP 6-8, RP (8/25) 63. On June 6, the two argued, and Ms. Posadas told Richins to pack his stuff because she did not want to be with him anymore. RP (8/25) 62-63. Richins said he wasn't going anywhere with out the baby, and called Ms. Posadas names. RP (8/25) 64. Posadas, however, denied on the stand that Richins physically touched her. RP (8/25) 64.

Posadas did admit, however, that she had told a responding officer that Richins had pushed her into a wall and slammed her head. RP (8/25) 68. She denied, however, telling the officer that Richins had grabbed her around the neck with both hands and that she couldn't breathe when Richins did this. RP (8/25) 68.

Posadas also denied getting phone calls from Richins from the jail. RP (8/25) 70. She stated she had received phone calls from other inmates; specifically Kedron Henderson and Jeremy Baldwin. RP (8/25) 77. She stated that she spoke with Mr. Henderson quite a bit, and also stated that she had spoken with Stavis Daignault. RP (8/25) 77.

Posadas admitted that in 2004 Richins had argued with her and called her names, grabbed her, and choked her. RP (8/25) 65-66. As a result of that

incident, the no contact order was put in place. RP (8/25) 66. Posadas also admitted that she had a previous conviction for making a false statement to a public servant. RP (8/25) 77-78.

Deputy Andrew Ejde with the Kitsap County Sheriff's office responded to the Madison Street residence at approximately 2:22 pm on June 6. RP (8/25) 87, 89. He spoke with Ms. Posadas, who was upset and said she was afraid of her boyfriend. RP (8/25) 91. She described a physical altercation with Richins. RP (8/25) 91.

Later, Deputy Ejde returned to Ms. Posadas' residence to see if Richins was there, and as Ejde was leaving he saw Richins as a passenger in a car that drove by the residence. RP (8/25) 94. Deputy Ejde stopped the car and arrested Richins. RP (8/25) 94-95. Richins admitted that he had been at the house earlier, and admitted there had been an argument, but denied that an assault occurred. RP (8/25) 95. Richins also admitted he knew there was a no contact order in place. RP (8/25) 96. The no contact order was admitted at trial as Exhibit 17. RP (8/26) 135.

George Geyer, a telephone communications systems manager with Kitsap County, testified that as a part of his job he manages the inmate telephone system. RP (8/25) 103. He explained how the phone system at the jail works, and that computerized records are kept anytime a call is made

from the jail. RP (8/25) 104. Mr. Geyer explained that the records indicated calls were made on the relevant dates from the jail to 697-3296, and that the calls originated from the “B” or “Bravo” pod. RP (8/25) 108-11.

Lieutenant Roxanne Payne, an administrator at the jail, testified that the jail records indicated that Richins was in the “B” pod on the relevant dates. RP (8/25) 114-15, 117. Furthermore, Jeremy Baldwin was not in the jail at all on the relevant dates, and Kedron Henderson was not in the jail for three of the five relevant dates, and was not in the “B” pod on the other two relevant dates. RP (8/25) 117-20, 123. Stavis Daignault, however, was in the B pod on the relevant dates. RP (8/25) 119.

III. ARGUMENT

- A. RICHINS’ RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED BECAUSE: (1) THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING RICHINS’ JULY 27 MOTION TO CONTINUE; (2) THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE’S AUGUST 1 MOTION TO CONTINUE DUE TO THE UNAVAILABILITY OF AN OFFICER; AND, (3) RICHINS’ RIGHT TO A SPEEDY TRIAL UNDER THE CRIMINAL RULES WAS NOT VIOLATED.**

Richins argues his speedy trial rights were violated. This claim is without merit because there was no violation of Richins’ rule-based or constitutional right to a speedy trial.

In the present case, the trial was originally set for July 27, 2005. On July 27, the trial court granted a defense motion to continue, and reset the trial for August 1. On August 1, the trial court granted the State's motion to continue the trial and reset the trial for August 24. These two continuances are examined below.

1. *The trial court did not abuse its discretion in granting Richins' July 27 motion to continue.*

The trial court's decision to grant a continuance "will not be disturbed absent a showing of a manifest abuse of discretion." *State v. Williams*, 104 Wn. App. 516, 520-21, 17 P.3d 648 (2001). An abuse of discretion occurs when the trial court relies on untenable grounds or reasons. *State v. Teems*, 89 Wn. App. 385, 388, 948 P.2d 1336 (1997).

When the case below was called for trial on July 27, Richins moved for a brief continuance of the trial date to August 1. RP (7/27) 2. Although Richins counsel indicated that one of the reasons for the continuance was the State's late disclosure of information that this was "a little frustrating," counsel stated that he understood the reasons for the lateness of the disclosure and stated it was "pretty much unavoidable." RP (7/27) 2. This concession by Richins' attorney was an accurate statement, given the fact that the phone records in question were records of phone calls made after Richins was arrested and charged, and included calls made right up until the eve of trial.

See, for instance, RP (8/25) 108-11.

In addition, Richins' counsel indicated that he himself had just the State with some discovery that morning, and that the continuance therefore, was in everyone's best interest. RP (7/27) 2. Specifically, defense counsel stated,

I also was finally able to get into the residence yesterday and take some pictures, and I just delivered those to Mr. Mitchell this morning, so it's probably not fair to be prepared at 1:30. All parties may be best served by moving it to Monday.

RP (7/27) 2.

Although Richins stated the late discovery was a little frustrating, there was claim of prosecutorial mismanagement, nor was there a motion to dismiss, or a motion to preclude the filing of the amended information. Rather, Richins indicated that the continuance was in everyone's interest, and was also based on his own late disclosure of evidence to the State.

The trial court, therefore, did not err in granting the defense motion to continue on July 27. In addition, any argument that the trial court erred in granting the motion was invited error, and was harmless in any regard, as the new trial date was set within the original speedy trial period.

2. *The trial court did not abuse its discretion in granting the State's August 1 motion to continue.*

As mentioned above, a trial court's decision to grant a continuance

“will not be disturbed absent a showing of a manifest abuse of discretion.” *Williams*, 104 Wn. App. at 520-21. An abuse of discretion occurs when the trial court relies on untenable grounds or reasons. *Teems*, 89 Wn. App. 385 at 388.

To preserve the dignity of officers who would otherwise not be able to take vacations, Washington courts consider scheduled vacations of investigating officers good cause for a continuance. *State v. Torres*, 111 Wn. App. 323, 331, 44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005 (2003); *See also, State v. Grilley*, 67 Wn. App. 795, 799, 840 P.2d 903 (1992); *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). Although *State v. Torres* interpreted former CrR 3.3(h)(2) (2003) allowing an extension for fairness in the administration of justice, the current CrR 3.3(f)(2) contains the same language and therefore *Torres* should still remain a valid statement of the law. In addition, the unavailability of a material witness is valid ground for a continuance if there is no substantial prejudice to the defendant and the witness has a valid reason for being unavailable. *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936, *review denied*, 122 Wn.2d 1008 (1993).

In the present case, the State’s motion to continue on August 1 was based on a preplanned vacation of an investigating officer, and was, therefore, a valid basis for continuance under Washington law. In addition, Richins made no claim that he would suffer any prejudice from the short delay. The

trial court, therefore, did not abuse its discretion in granting the continuance.

3. *Richins' right to a speedy trial under the criminal rules was not violated.*

CrR 3.3 provides that a defendant detained in jail shall be brought to trial within 60 days or the time specified in subsection (b)(5). CrR 3.3(b)(1). Subsection (b)(5), in turn, provides that 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 the excluded period. CrR 3.3(b)(5).

CrR 3.3(3) provides that continuances granted pursuant to CrR3.3(f) and unavoidable circumstances are excluded periods. CrR 3.3(e)(3)and (8).

In the present case, on July 27, Richins moved to continue the trial date. As this was a continuance made on a motion of the party, it was an excluded period, and the allowable time for trial, therefore, did not expire until 30 days after the end of the excluded period pursuant to CrR3.3(b)(5). As the trial in this matter began on August 24, it started within 30 days of the end of the excluded period, and was, therefore, timely.

Even if this court were to find that Richins' motion to continue was not an excluded period, there still was not a speedy trial violation, because the trial court properly granted the State's motion to continue on August 1 due to unavoidable circumstances.

In the present case, the State's motion to continue on August 1 was

based on a preplanned vacation of an investigating officer, and the trial court, therefore, did not abuse its discretion in granting the continuance. Under either CrR 3.3(e)(3) or (8), this continuance constituted an excluded period. As the trial commenced within 30 days of the end of the excluded period, there was no violation of the speedy trial rules in this case.

4. *Richins has failed to demonstrate that the State did not act with due diligence*

Richins, however, also appears to argue that the State did not act diligently in providing the phone records to the defense because the phone records had been “accessible to the State since the time Mr. Richins was first incarcerated on June 4, 2006[sic].” App.’s Br. at 5. It does not appear that this issue was adequately preserved, but even if it was preserved, the record does not establish that the State failed to act with due diligence.

As mentioned above, Richins never asked the court to find that the State had failed to exercise due diligence, never moved to suppress the phone records, never moved to dismiss the case due to a discovery violation, and never claimed prosecutorial mismanagement. It thus appears that the claim on appeal that the State failed to exercise due diligence was not preserved, as the trial court was never asked to make a ruling in this regard.

Richins now claims that the State failed to act with due diligence because the phone records had been “accessible to the State since the time

Mr. Richins was first incarcerated on June 4, 2006[sic].” App.’s Br. at 5. Common sense, however, demonstrates that records of phone calls through late July would not have been available in early June under any circumstance. Defense counsel below was apparently aware of this when he stated that the lateness of the discovery was “pretty much unavoidable.” RP (7/27) 2. In addition, there is nothing in the record that indicates that State was aware of the phone calls from the jail until just before the original trial date. Rather, the State could not have been aware of some of the records until immediately prior to the July 27 trial date. The record, therefore, does not support Richins’ claim that the State was not diligent. Rather, the records themselves indicate that, under any circumstances, roughly half of the records would not have been available until late July due to the timing of the calls themselves.

Richins, however, did make a similar argument below when he claimed that the State could have had the phone records in its possession “at any time,” and that the phone records have been available “throughout the entire process.” RP (8/01) 3. Richins also claimed that, “the phone records have been kept since the day Mr. Richins was incarcerated, I believe, on June 4.” RP (8/01) 4. The trial court, however, pointed out that the relevant charges stemmed from factual allegations of violations of the no contact order that occurred after June 6. RP (8/01) 5. This fact was readily apparent, as the amended information included charges of violation of a court order

(stemming from phone calls made from the jail to the victim) with the following offense dates from 2005: June 6, June 29, July 8, July 12 (two counts), July 16, and July 25. CP 9.

Although Richins now claims that the State did not exercise due diligence, the trial court was never asked to make such a finding. In addition, there was no claim of prosecutorial mismanagement made below, and no objection was made to the filing of the amended information. As these issues were not raised below, the record does not indicate on what exact date the State came into possession of the phone records. The records themselves, however, indicate that the State could not possibly have come into possession of the records as early on as Richins claims. Rather, many of the records could not have been obtained prior to late July. The record, therefore, is insufficient to establish that the State failed to exercise due diligence.

Furthermore, the appropriate remedy, even if the State had failed to act with due diligence, would have likely been a brief continuance, especially in light of the fact that Richins himself also provided late discovery to the State and given the fact that there was no claim below that the late discovery would have prevented Richins from being adequately prepared within the then existing speedy trial period. *See, for instance*, CrR 4.7(h)(7)(i) and *State v. Ramos*, 83 Wn. App. 622, 637-38, 922 P.2d 193 (1996).

For all of the reasons, Richins failed to adequately preserve the issue of the State's exercise of due diligence, and has failed to demonstrate that the State failed to exercise due diligence.

B. RICHINS' CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED BECAUSE: (1) HE WAS BROUGHT TO TRIAL 79 DAYS AFTER HE WAS CHARGED; (2) PREVIOUS CASES HAVE HELD THAT DELAYS OF FIVE MONTHS (AND EVEN UP TO ONE YEAR) WERE NOT SUFFICIENTLY PREJUDICIAL TO TRIGGER A CONSTITUTIONAL INQUIRY; AND, (3) RICHINS HAS FAILED TO DEMONSTRATE ANY PREJUDICE.

Richins next claims that his constitutional right to a speedy trial was violated. App.'s Br. at 1. This claim is without merit because Richins has failed to establish that there was a constitutional violation.

Criminal defendants are constitutionally guaranteed the right to a speedy trial. Const. art. I, sec. 22; U.S. Const. amend. VI. CrR 3.3 does not purport to mark the bounds of the constitutional guarantees. *See State v. Hoffman*, 116 Wn.2d 51, 77, 804 P.2d 577 (1991). As discussed above, Richins' rule-based speedy-trial rights were not violated. Our Supreme Court has previously ruled that, where there is no violation of CrR 3.3, there is no violation of the speedy trial guaranties of either the United States or the Washington Constitutions. *See State v. Carson*, 128 Wn.2d 805, 820-21, 912

P.2d 1016 (1996). Even were that not the case, Richins would be unable to show any constitutional violation.

The constitutional speedy-trial provisions require that defendants be brought to trial within a “reasonable time” and does not mandate a fixed time limit. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997); *State v. Higley*, 78 Wn. App. 172, 184-85, 902 P.2d 659, *review denied*, 128 Wn.2d 1003, 907 P.2d 296 (1995). The threshold for a constitutional violation is “much higher than that for a violation of the superior court rules.” *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); *State v. Whelchel*, 97 Wn. App. 813, 823, 988 P.2d 20 (1999), *review denied*, 140 Wn.2d 1024 (2000). Generally, no set time is applicable, and Washington courts have held that a court must examine the facts to determine whether a reasonable time has elapsed. *Higley*, 78 Wn. App. at 185 (*citing Barker v. Wingo*, 407 U.S. 514, 537, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (White, J., concurring)).

Washington courts have adopted the four part test outlined in *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 2187, 33 L. Ed. 2d 101 (1972) to determine when a criminal defendant's right to a speedy trial is violated. *See, for instance, Whelchel*, 97 Wn. App. at 824. The Court identified four major factors to consider in this balance: the length of the delay, the reason for the delay, whether or not the defendant asserted the right, and the

prejudice to the defendant. *Barker*, 407 U.S. at 530, 92 S. Ct. 2182.

The first factor, the length of delay, is "a triggering mechanism" because "until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors." *Barker v. Wingo*, 407 U.S. at 530; *see also Doggett v. United States* 112 S. Ct. at 2690 ("[s]imply to trigger speedy trial analysis, accused must allege that interval between accusation and trial crossed threshold dividing ordinary from 'presumptively prejudicial' delay") (*quoting Barker v. Wingo*, 407 U.S. at 530-31); *Cain v. Smith*, 686 F.2d 374, 381 (6th Cir. 1982) (length of delay is triggering mechanism).

If the defendant makes this threshold showing of a delay which is presumptively prejudicial, only then does the Court consider the extent of the delay. *State v. Corrado*, 94 Wn. App. 228, 233, 972 P.2d 515, *review denied*, 138 Wn.2d 1011 (1999), *citing Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

In *Corrado*, the court found that there was some consensus that delays greater than eight months have been held "presumptively prejudicial." *Corrado*, 94 Wn. App. at 233-34. Other courts have held that delays of approximately six months are sufficiently lengthy to presume prejudice and trigger further inquiry. *See, for example, Takacs v. Engle*, 768 F.2d 122, 127-28 (6th Cir. 1985) (six and one half month pretrial delay sufficient to necessitate further inquiry into speedy trial violations); *United States v.*

Simmons, 536 F.2d 827, 831 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976) (a six month delay before trial for forgery charges was sufficient to trigger a speedy trial analysis); *Wells v. Petsock*, 941 F.2d 253, 257-58 (3d Cir. 1991) (217-day delay and incarceration triggered Barker inquiry); *United States v. Woolfolk*, 399 F.3d 590, 597-98 (4th Cir. 2005) (8-month delay triggered Barker inquiry); *United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992) (8 1/2-month delay triggered Barker inquiry); *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004).

Other courts, however, have held that delay of less than five months, and sometimes even longer delays, do not trigger constitutional inquiry. *See, Virgin Islands v. Birmingham*, 788 F.2d 933, 936 (3d Cir. 1986) (less than five month delay not sufficiently prejudicial to trigger constitutional inquiry); *United States v. Otero-Hernandez*, 743 F.2d 857, 858 n.3 (11th Cir. 1984) (seven month delay for charge of importing and possessing marijuana with intent to distribute not presumptively prejudicial enough to trigger speedy trial analysis); *United States v. Lugo*, 170 F.3d 996, 1002 (10th Cir. 1999) (7-month delay not presumptively prejudicial; court need not consider other Barker factors); *United States v. Derosé*, 74 F.3d 1177, 1184 (11th Cir. 1996) (8-month delay not presumptively prejudicial; court need not consider other Barker factors); *United States v. White Horse*, 316 F.3d 769, 774 (8th Cir. 2003) (9 1/2-month delay too short to be presumptively prejudicial); *United*

States v. Gerald, 5 F.3d 563, 566 (D.C. Cir. 1993) (11-month delay not presumptively prejudicial because no showing of actual prejudice and several months of delay attributable to defendant's pretrial motions; court need not consider other Barker factors); *United States v. Schreane*, 331 F.3d 548, 559 (6th Cir. 2003) (13 1/2-month delay attributable to government not presumptively prejudicial because delay was not "shockingly long").

In the present case, Richins was charged on June 7, 2005, and his trial began 79 days later on August 24, 2005. CP 1, RP (8/24) 1.

Although delays for periods of as low as six months have been held to be sufficient to trigger inquiry under a constitutional speedy trial claim, the State has found no cases in which a total time to trial period of only 79 days was held to be sufficient to even trigger a constitutional inquiry. Furthermore, it is worth noting that under the Federal Speedy Trial Act, a defendant must be brought to trial within seventy days of the indictment or his initial appearance before a judicial officer. 18 U.S.C. § 3161(c)(1). In addition, the courts have held that the time limits set in the Federal Speedy Trial Act and more restrictive than the broader constitutional speedy trial limits. *United States v. Pollock*, 726 F.2d 1456, 1459-60 (9th Cir.1984). Given all of these facts, a delay of 79 days is insufficient to even trigger an inquiry regarding an alleged constitutional speedy trial violation, and further inquiry is not required.

Even assuming, however, that Richins could meet the threshold inquiry and show a delay that was “presumed prejudicial,” the length of the delay would be only one factor to be considered in determining whether he was brought to trial within a constitutionally reasonable time. *Corrado*, 94 Wn. App. at 234. In examining the other factors, courts have held that the most important factor is whether there has been a demonstration that the delay caused prejudice. *See, e.g., United States v. Molina*, 407 F.3d 511, 533 (1st Cir. 2005) (defendant's failure to demonstrate that delay caused prejudice to defense weighs heavily against defendant); *United States v. Williams*, 372 F.3d 96, 113 (2d Cir. 2004) (most important in *Barker* analysis was defendant's failure to articulate prejudice with any specificity); *Hakeem v. Beyer*, 990 F.2d 750, 761-64 (3d Cir. 1993) (defendant must show actual prejudice; 14 1/2-month incarceration did not give rise to presumption sufficient to establish speedy trial violation absent showing of oppressive conditions not normally attendant to incarceration); *United States v. Goodson*, 204 F.3d 508, 515 (4th Cir. 2000) (prosecution's failure to find witnesses in timely manner does not establish speedy trial violation in absence of prejudice to defendant); *United States v. Tannehill*, 49 F.3d 1049, 1054 (5th Cir. 1995) (defendant must show actual prejudice though there was extraordinarily long delay of 5 1/2 years); *Norris v. Schotten*, 146 F.3d 314, 328 (6th Cir. 1998) (defendant must establish prejudice if length of delay less

than 1 year and defendant faces serious charges such as rape and kidnapping); *United States v. Brown*, 325 F.3d 1032, 1035 (8th Cir. 2003) (defendant must show actual prejudice despite 3-year delay because government acted reasonably and defendant failed to diligently assert his right); *United States v. Gregory*, 322 F.3d 1157, 1163 (9th Cir. 2003) (defendant must show actual prejudice because presumption of prejudice for 22-month delay was not, by itself, enough to establish speedy trial violation); *Jackson v. Ray*, 390 F.3d 1254, 1263-66 (10th Cir. 2004) (no speedy trial violation where defense not prejudiced); *United States v. Harris*, 376 F.3d 1282, 1290 (11th Cir. 2004) (speedy trial rights not violated in conviction for fraudulent use of Social Security number because no prejudice from delay; defendant failed to show delay resulted in "specific prejudice to his defense"); *United States v. Register*, 182 F.3d 820, 827 (11th Cir. 1999) (defendant must show actual prejudice unless first 3 factors weigh heavily enough against government).

In the present case, there was no showing of any prejudice caused by the delay, and this fact must weigh heavily against a claim of a constitutional violation.

Another factor to be considered is the reason for the delay. Even assuming that the reason for the delay was limited to only the State's late disclosure of the phone records (and ignoring Richins own late disclosure of evidence), the fact that the records in question were of calls shown to have

been made by Richins in the days and weeks leading up to the trial, and were not records in the possession of the State for a long period, and were thus not deliberately withheld is noteworthy. *See Barker*, 407 U.S. at 531 (stating that a deliberate attempt to delay trial in order to hamper defense "should be weighted heavily against the government"; a "more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered because the ultimate responsibility for such circumstances must rest with the government"; and "a valid reason, such as a missing witness, should serve to justify appropriate delay"); *U.S. v. Schreane*, 331 F.3d 548, 554-56 (6th Cir. 2003) (delay not weighted against government because motivation not bad faith and defendant equally responsible for delay); *U.S. v. Gregory*, 322 F.3d 1157, 1162 (9th Cir. 2003) (delay due to negligence weighted against government, though less heavily than deliberate delay); *U.S. v. Clark*, 83 F.3d 1350, 1353 (11th Cir. 1996) (per curiam) (delay due to government attempt to impede defense weighted more heavily against government than delay due to negligence).

The final step is to balance all the factors together. *Corrado*, 94 Wn. App. at 235. In the present case the length of delay does not rise to the level of a constitutional violation, Richins has shown no specific prejudice, and Richins claims that the State did not exercise due diligence, even if true, was mitigated by the fact that the delay was unintentional and not done

maliciously, and by the fact that the defense also made a late discovery disclosure. For these reasons, the record does not support a finding of a violation of Richins' constitutional right to a speedy trial.

IV. CONCLUSION

For the foregoing reasons, Richins' conviction and sentence should be affirmed.

DATED September 11, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

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