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STATE OF WASHINGTON
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Nº. 34362-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Appellant,

v.

CLYDE WALSH,
Respondent.

RESPONSE BRIEF

Appeal from the Superior Court of Pierce County,
Cause No. 05-1-01211-9
The Honorable Jay B. Roof, Presiding Judge

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A. INTRODUCTION

Clyde Walsh hereby responds to Brief of Appellant, State of Washington.

B. COUNTERSTATEMENT OF THE CASE

On August 10, 2005, Clyde Walsh was charged with one count of stalking and one count of violation of a civil anti-harassment order. CP 1-11. Also on August 10, 2005, the State filed a Motion for Initial Evaluation for Competency, Insanity, or Diminished Capacity, and Other Ancillary Matters, in which the State moved the court for an order “committing [Mr. Walsh] to Western State Hospital for a period not to exceed fifteen (15) days for examination by a qualified professional, and that Western State Hospital submit a report to the Court regarding [Mr. Walsh’s] mental condition in the manner specified by RCW 10.77.060.” CP 13. The trial court granted the motion. CP 14-20.

The trial court appointed the Crawford law firm to represent Mr. Walsh. RP 7, 8-10-05.¹ On August 25 2005, the Crawford firm filed a motion to withdraw as counsel. CP 28-32. The trial court granted the motion and the law firm of Case & Hemstreet was appointed to represent Mr. Walsh. CP 28-32. On August 30, 2005, the Case firm received the

¹ The report of proceedings is made up of several volume which are not numbered contiguously. Reference to the record will be made by giving the page number followed by the date the hearing was held.

discovery from the Crawford firm. CP 28-32. Included in the discovery was a letter informing new trial counsel that Mr. Walsh had a pending Western State Hospital evaluation. CP 28-32. The Case firm was not informed who made the motion for the evaluation or whether Western State Hospital had been notified of the Order. CP 28-32.

The Case firm received no updates from Western State Hospital on the status of Mr. Walsh's evaluation. CP 28-32. On September 16, 2005, the Case firm faxed a letter to Western State Hospital asking the status of the case. CP 28-32.

Status hearings were held on September 8, 2005, and October 11, 2005. RP 3, 9-8-05, RP 2-3, 10-11-05. At both hearings, trial counsel for Mr. Walsh informed the Court that he had not received any information from Western State Hospital. RP 3, 9-08-05, RP 2, 10-11-05. At both hearings the State acknowledged that it, too, had received nothing from Western State. RP 3, 9-08-05, RP 2, 10-11-05.

On October 19, 2005, trial counsel for Mr. Walsh contacted the prosecuting attorney and asked her to contact Western State Hospital regarding the status of Mr. Walsh's case. CP 28-32. On October 21, 2005, the prosecuting attorney informed Mr. Walsh's counsel that Western State Hospital did not list Mr. Walsh as having a pending evaluation. CP-28-32.

The prosecuting attorney informed trial counsel for Mr. Walsh that she did not have copies of the motion and order for an evaluation in her file and did not believe the State had sent them to Western State Hospital. CP 28-32. On October 26, 2005, trial counsel for Mr. Walsh faxed the motion, order, and discovery to Western State Hospital. CP 28-32.

On November 1, 2005, trial counsel for Mr. Walsh moved that the case be dismissed under CrR 8.3. RP 2, 11-01-05. The prosecuting attorney informed the trial court that it was "not clear from [her] file who made the motion for the competency evaluation." RP 3, 11-01-05. Because the motion to dismiss had not been noted, the trial court declined to rule on the motion to dismiss. RP 4-5, 11-01-2005.

On November 2, 2005, Western State Hospital sent a letter to the trial court and to the prosecuting attorney, but not to trial counsel for Mr. Walsh, stating that the referral was considered complete on October 28, 2005. CP 28-32, RP 2, 11-29-05.

At a status hearing held on November 29, 2005, trial counsel for Mr. Walsh informed the court that he had spoken with the prosecutor about the case and they agreed that Mr. Walsh had been in custody for 112 days. RP 2, 11-29-05. Trial counsel for Mr. Walsh moved to set a motion to dismiss under CrR 8.3 and the trial court set the hearing for December 14, 2005. RP 2-3, 11-29-05.

On December 5, 2005, trial counsel for Mr. Walsh filed a Motion to Dismiss and Defendant's Memorandum in Support of Dismissal arguing that the State's misconduct in mismanaging Mr. Walsh's case had deprived Mr. Walsh of his right to a speedy trial under CrR 3.3. CP 28-32.

On December 13, 2005, the State filed a response to Mr. Walsh's Motion to Dismiss, titled Memorandum of Authorities Re: defendant's [sic] Motion to Dismiss. CP 33-39. In this Memorandum, the State conceded that it had neglected to fax the paperwork to Western State Hospital and that the only reason why the State took any action to inform Western State Hospital that Mr. Walsh required an evaluation was that trial counsel for Mr. Walsh informed the State that the evaluation had not occurred. Memorandum, p. 3, CP 33-39.

At the hearing on December 14, 2005, the State agreed that the State's failure to send the paperwork to Western State Hospital was negligence. RP 8-9, 12-14-05. The trial court reserved ruling on the motion to dismiss but entered another Order for Initial Evaluation for Competency. RP 18, 12-14-05, CP 42-48. Mr. Walsh was transferred to Western State following the entry of this order. RP 2, 12-30-05.

On December 30, 2005, the trial court granted Mr. Walsh's Motion to Dismiss and dismissed the case with prejudice. RP 7, 12-30-05, CP 50.

Notice of Appeal was filed by the State on January 27, 2006.

C. ARGUMENT

A court's decision on a motion to dismiss a criminal prosecution due to governmental misconduct is reviewed for abuse of discretion. *State v. McReynolds*, 104 Wn.App. 560, 579, 17 P.3d 608, *amended on denial of reconsideration, review denied*, 144 Wn.2d 1003, 29 P.3d 719 (2000).

In its Opening Brief, the State presents seven arguments why this court should reverse the trial court's dismissal of the charges against Mr. Walsh: (1) because Mr. Walsh's right to speedy trial under CrR 3.3 was not violated, under CrR 3.3(a)(4), the trial court lacked the authority to dismiss the case absent a showing that Mr. Walsh's constitutional right to a speedy trial had been violated; (2) under CrR 3.3(e)(1) the time for speedy trial was tolled when the trial court entered the order for Mr. Walsh to be examined at Western State Hospital; (3) under CrR 3.3(a)(4) and CrR 3.3(h) a trial court cannot dismiss a case for violation of a defendant's right to speedy trial without a showing that the defendant's Constitutional speedy trial right had been violated; (4) it was error for the trial court to apply CrR 8.3 to an alleged speedy trial speedy trial violation because CrR 3.3 (a)(4) and CrR 3.3(h) prohibit a dismissal based upon speedy trial delay unless there has been a violation of a defendant's Constitutional or statutory right to speedy trial; (5) that *State v. Michielli* was implicitly

overruled by the amendments to CrR 3.3; (6) that the delay in this case did not rise to the level of a violation of the Constitutional right to speedy trial; (7) the trial court erred in finding that the governmental misconduct in this case was sufficient to warrant dismissal under CrR 8.3(b).

The State's interpretation of CrR 3.3 is incorrect and the State's arguments fail.

1. Mr. Walsh's right to a speedy trial under CrR 3.3 was violated

Persons accused of crimes have a right to a speedy public trial. Wash. Const. I, § 22. Although Washington's Constitution does not prescribe a specific time period for a speedy trial, the Washington Supreme Court has adopted the Superior Court Criminal Rules (CrR) to govern all criminal proceedings, including the time for trial. CrR 1.1.

For purposes of tolling the time for trial under CrR 3.3(e)(1), whether or not evaluation of a defendant's competency to stand trial must be **initiated** as soon as possible following the trial court's order for an examination is an issue of first impression in Washington.

CrR 3.3(e)(1) provides,

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

(1) *Competency Proceedings.* All proceedings relating to the competency of a defendant to stand trial on pending charge, beginning on the date when the competency

examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

Several of the State's arguments rely on the conclusion that Mr. Walsh's right to speedy trial under CrR 3.3 was not violated because the time for speedy trial was tolled under CrR 3.3(e)(1) beginning on the day the trial court ordered Mr. Walsh's evaluation. The State interprets CrR 3.3(e)(1) as tolling the time for trial as soon as the trial court enters the order to determine the defendant's competency, requiring no other actions to be taken for the time for speedy trial to be tolled. Opening Brief, p. 12. The State misinterprets CrR 3.3(e)(1).

a. The State's interpretation of CrR 3.3(e)(1) is contrary to the intent of the Court Rules

CrR 1.2 states that, "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, **and the elimination of unjustifiable expense and delay.**" (Emphasis added).

In *State v. Cornwall*, the court held that, "In promulgating CrR 3.3, the Supreme Court exercised its rule-making power **in aid of the constitutional imperative that there be prompt disposition of criminal cases.** The purpose of the rule is to insure speedy justice in criminal cases

insofar as is reasonably possible.” *State v. Cornwall*, 21 Wn.App. 309, 312, 584 P.2d 988 (1978), *review denied*, 91 Wash.2d 1022 (1979) (emphasis added). It is clear that the purpose of the criminal rules in general, and of CrR 3.3 specifically, is to ensure that a defendant is brought to trial as quickly as reasonably possible.

CrR 1.2’s statement that the purpose of the rules is to eliminate unjustifiable delay belies the State’s argument that CrR 3.3(e)(1) allows the party seeking evaluation of a defendant to have entered an order for evaluation, and then to do nothing to see that the evaluation is initiated.

The State has conceded that it was mismanagement for the State to fail to forward the order for evaluation to Western State. The State’s failure to do so created an unjustifiable delay in Mr. Walsh’s trial. CrR 3.3(e)(1) should not be interpreted to allow the party who moves for an order of evaluation of the defendant to indefinitely postpone trial for that defendant by willfully or negligently failing to forward the order for evaluation to Western State Hospital. Simply obtaining an order for a competency evaluation does not initiate “proceedings related to the competency of a defendant.” Further action is required.

b. *The State's interpretation of CrR 3.3(e)(1) is contrary to the language of CrR 3.3*

When interpreting a court rule, a court must give effect to the plain meaning of the rule's language. *Dep't of Licensing v. Lax*, 125 Wn.2d 818, 822, 888 P.2d 1190 (1995). When construing a rule, a court must read it in its entirety, giving effect to all language so that no portion is rendered meaningless or superfluous. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001), *cert. denied*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). In addition, each provision must be viewed in relation to other provisions in order to harmonize them. *Keller*, 143 Wn.2d at 277, 19 P.3d 1030.

The State's argument fails to consider the first half of CrR 3.3(e)(1), which indicates that the period of time to be excluded from calculation of the time for speedy trial is the time during "[a]ll proceedings relating to the competency of a defendant to stand trial on pending charge." Because CrR 3.3(e)(1) excludes the period of time relating to "proceedings relating to the competency of a defendant," the implicit requirement of CrR 3.3(e)(1) is that in order for the time for trial to be tolled, evaluation proceedings must occur. Where, as here, no proceedings occur following the entry of the order for evaluation, the time for speedy trial is not tolled.

In *State v. Harris*, 122 Wn.App. 498, 94 P.3d 379 (2004), the court explained why the period for “proceedings” relating to the competency determination of a defendant were excluded from the calculation of the time for speedy trial:

Once Mr. Harris’s competency proceedings were set in motion, the court rules tolled the trial period until the court was satisfied that he was competent. An order for evaluation under RCW 10.77.060(1)(a) automatically stays the criminal proceedings until the court determines that the defendant is competent to stand trial. Tolling is necessary because neither side can go forward with preparation until the defendant is found competent to proceed.

Harris, 122 Wn.App at 505, 94 P.3d 379. (internal citations omitted) (emphasis added). Implicit in the court’s logic is the presumption that once the order is entered, proceedings to determine the competency of the defendant will be “set in motion.”

Read as a whole and in conjunction with CrR 1.2, *Cornwall*, and *Harris*, CrR 3.3(e)(1) tolls a defendant’s time for speedy trial only after **“proceedings” are “set in motion,”** beginning when the trial court enters the order for evaluation and ending when the trial court enters and order finding the defendant competent.

Implicit in this rule is the assumption that once the trial court orders a competency evaluation, the party who sought the evaluation will ensure that the defendant is, in fact, evaluated. Where a party obtains an

order for evaluation but then does nothing to set the evaluation proceedings in motion, CrR 3.3(e)(1) does not toll the time for speedy trial.

c. *The rule of lenity bars the State's interpretation of CrR 3.3(e)(1)*

A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993).

If a criminal statute or rule is ambiguous, the rule of lenity requires it to be construed in favor of the accused. *In re Post Sentencing Rev. of Charles*, 135 Wn.2d 239, 249-250, 955 P.2d 798 (1998).

CrR 3.3(e)(1) is ambiguous with regards to whether or not the time for trial will be tolled automatically upon the entry of the order of evaluation without any action by the party moving for the evaluation to ensure that the evaluation occurs.

As discussed above, the State's interpretation of CrR 3.3(e)(1) is contrary to the plain language of CrR 3.3 and the intent of the criminal rules. As such, it is not a reasonable interpretation. However, should this court find that the State's interpretation of CrR 3.3(e)(1) is reasonable, the rule of lenity requires this court to adopt Mr. Walsh's interpretation that CrR 3.3(e)(1) must be interpreted as requiring the party who moves for the

order for evaluation to ensure that evaluation proceedings are “set in motion” in order for CrR 3.3(e)(1)’s exclusionary period to apply to calculation of the speedy trial deadline.

d. The State’s interpretation of CrR 3.3 is contrary to a prosecutor’s duty to see that a defendant is tried in a timely manner

A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). “[I]t is the duty of a prosecutor, as a quasi judicial officer, to see that one accused of a crime is given a fair trial.” *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), *cert. denied*, 396 u.s. 1019, 90 s.cT. 587, 254 L.Ed.2d 511 (1970). “A defendant has no duty to bring himself to trial.” *Barker v. Wingo*, 407 U.S. 514, 527, 92 S.Ct. 2182 (1972), *citing*, *Dickey v. Florida*, 398 U.S. 30, 37-38, 90 S.Ct. 1564, 1569, 26 L.Ed.2d 26 (1970) (“Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.”) “As between the defendant and the State, it is the State who has the primary duty to see that the defendant is tried in a timely fashion.” *State v. Jenkins*, 76 Wn.App. 378, 383, 884 P.2d 1356 (1994), *review denied*, 126 Wn.2d 1025, 896 P.2d 64 (1995).

In bringing a defendant to trial, the right to a speedy trial under Criminal Rules imposes upon the prosecution a duty of good faith and due diligence. *State v. Ross*, 98 Wn.App. 1, 4, 981 P.2d 888, *amended*, 990 P.2d 962, *review denied*, 140 Wn.2d 1022, 10 P.3d 405 (1999). “The Superior Court speedy trial rules were not designed to be a trap for the unwary” (*State v. Fladebo*, 113 Wn.2d 388, 394, 779 P.2d 707 (1989)), nor were they intended to be a source of authority for the State to delay bringing a defendant to trial.

Although the court is ultimately responsible for ensuring compliance with the speedy trial rule, the State is primarily responsible for bringing the defendant to trial within the speedy trial period. *Ross*, 98 Wn.App. at 4, 990 P.2d 962.

The prosecutor’s duty of good faith and due diligence as an officer of the court to bring a defendant to trial in timely fashion cannot be harmonized with the State’s position that CrR 3.3(e)(1) allows a prosecutor to obtain an order for evaluation of a defendant, fail to set the evaluation proceedings in motion, yet have CrR 3.3(e)(1)’s tolling apply. The purpose of CrR 3.3(e)(1) is to exclude a period of time for the defendant’s evaluation, not to provide justification or excuse for the State’s negligence in failing to set in motion evaluation proceedings.

e. The order of evaluation placed a duty on the prosecutor to have Mr. Walsh evaluated and returned to the Kitsap County Jail within 15 days

The language of the order signed by the trial court also makes clear that it was the understanding of the court that the prosecutor would seek to have Mr. Walsh evaluated as soon as possible, since the court ordered that Mr. Walsh was to be sent to Western State Hospital for an evaluation for a period not to exceed 15 days. CP 14-20.

The plain language of CrR 1.2, CrR 3.3, the language of the court order, and case law interpreting the tolling of the time for trial, require the conclusion that in order for the time for trial to be tolled for the evaluation of a defendant, there must actually be “proceedings relating to the competency of a defendant” set in motion, and that it is implicit that the party seeking the evaluation have it performed as soon as possible. The time for trial will not be tolled if no proceedings for evaluation are set in motion.

f. The State’s interpretation of CrR 3.3 is contrary to public policy

Public policy also requires that the State’s interpretation of CrR 3.3(e)(1) be rejected. Under the State’s interpretation, a prosecutor could obtain an order seeking to have a defendant evaluated, then, as here, fail to take any action towards getting the defendant evaluated, yet have this time

tolled despite the fact that the defendant was imprisoned. This would create a loophole which would allow the State to charge a defendant, then indefinitely delay bringing him to trial without implicating a violation of the defendant's rule-based right to speedy trial.

Further, it would contradict the stated purpose of the Criminal Rules in CrR 1.2 that the rules were enacted to "secure the elimination of unjustifiable expense and delay."

The Washington State Constitution guarantees defendant's the right to a speedy trial, and the Court Rules should not be interpreted in a manner which would allow the State to nullify this right by inaction.

g. The proper interpretation of CrR 3.3(e)(1) is that the exclusionary period only applies where the party who moves for the order of evaluation puts evaluation proceedings in motion.

As discussed above, the intent of the criminal rules, the language of CrR 3.3, and the case law interpreting CrR 3.3's exclusion of the time for competency proceedings from the time for trial all carry the implicit presumption that a party who moves the court for an order for evaluation will, upon grant of the motion, ensure that evaluation proceedings are set in motion promptly. In this case, all that would have been required was for the prosecutor to fax the court's order to Western State.

In *State v. Setala*, 13 Wn.App. 604, 536 P.2d 176 (1975), the Court of Appeals examined the then current provision of CrR 3.3(d) which excluded “[a]ll proceedings relating to the competency of the defendant to stand trial” from the calculation of the speedy trial period:

Prior to trial Mr. Setala moved to dismiss the charges against him, pursuant to CrR 3.3(f), because he had not been brought to trial, pursuant to CrR 3.3(c), ‘within 60 days following the preliminary appearance.’ The trial court denied the motion. We agree.

CrR 3.3(d) provides in part: The following periods shall be excluded in computing the time for trial: (1) All proceedings relating to the competency of the defendant to stand trial. The record reflects that a total of 74 days elapsed between the date of preliminary appearance and the date of trial. However, the record also reveals that a period of 19 days elapsed from the date the trial court ordered a psychiatric examination until the date on which the physician’s report was filed in the clerk’s office. Those 19 days, at least, must be excluded under CrR 3.3(d) when computing the elapsed time to date of trial. Hence, the defendant was brought to trial within the time limits prescribed by CrR 3.3.

We are compelled to observe, however, that in other instances the exclusionary period need not terminate when the examination results are filed. **CrR 3.3(d) (1) excludes All proceedings relating to competency. The rule is broad in scope because competency proceedings can involve a protracted period of time.** It may be necessary for the court to review the report prior to making its determination as to whether or not the defendant is competent to stand trial. We believe that CrR 3.3(d)(1) is sufficiently broad to encompass this period of court review as well as the period of examination. In many instances, therefore, CrR 3.3(b) or (c) will be reactivated the day the court makes its determination of competency.

Setala, 13 Wn.App. at 605-605, 536 P.2d 176 (emphasis added).

The *Setala* court made it clear that the purpose of the CrR 3.3 exception to the time for trial period for competency proceedings of the defendant is interpreted broadly because the trial court has no control over how long the competency proceedings may take at Western State. Further, the court clearly indicated that the period to be excluded was the time necessary for competency proceedings at Western State to be completed and the time necessary for the trial court to review the report from Western State. The excluded period does **not** include any time lost due to a party's mismanagement in failing to forward the court's order to Western State. The exclusion of the time necessary for competency proceedings does not vitiate the prosecutor's duty of good faith and due diligence in bringing a defendant to trial. Simply because the court grants a motion by the State to have a defendant evaluated does not relieve the State of its burden to bring the defendant to trial in a timely manner. Otherwise, CrR 3.3(e)(1) would create an exclusionary period for prosecutorial mismanagement and misconduct.

Here, because the prosecutor failed to send Western State Hospital a copy of the trial court's order, no proceedings to determine Mr. Walsh's competency were initiated. Because no proceedings were initiated, Mr.

Walsh's time for speedy trial was not tolled under CrR 3.3(e)(1) on August 10 when the trial court entered the initial order to have Mr. Walsh evaluated. Because the speedy trial time was not tolled on August 10, to comply with CrR 3.3 the State would have had to bring Mr. Walsh to trial by October 19, 2005.

Because the time for speedy trial was not tolled, Mr. Walsh's trial date was not timely under CrR 3.3 (a)(4). Therefore, the trial court did have authority to dismiss Mr. Walsh's case under CrR 8.3, and no analysis under the Federal Constitutional guarantee of speedy trial was necessary. CrR 3.3 (a)(4).

The State's assertion that CrR 3.3(e)(1) tolled the time for speedy trial simply because the trial court granted the State's motion to have Mr. Walsh evaluated is contrary to the intent of the court rules, the prosecutor's duties as an officer of the court, public policy, and the Washington State Constitution's guarantee of speedy trial for all defendants. Because the State failed to set in motion the evaluation proceedings, CrR 3.3(e)(1) did not toll the time for Mr. Walsh's speedy trial, and the State was required to bring Mr. Walsh to trial by October 9.

2. The trial court properly dismissed the case under CrR 8.3

CrR 8.3 provides, in pertinent part,

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to the arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

For dismissal of criminal charge under rule allowing dismissal in furtherance of justice, a defendant must show (1) arbitrary action or governmental misconduct, and (2) prejudice materially affecting defendant's right to a fair trial. *State v. Moore*, 121 Wn.App. 889, 894, 91 P.3d 136, *review denied*, 154 Wn.2d 1012, 114 P.3d 657 (2004).

The rule authorizing dismissal of criminal charges in furtherance of justice exists to see that one charged with a crime is fairly treated. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), *see also State v. Stephans*, 47 Wn.App. 600, 603, 736 P.2d 302 (1987) ("The purpose of [CrR 8.3] is to ensure that once an individual has been charged with a crime, he or she is treated fairly."), *citing State v. Whitney*, 96 Wn.2d 578, 580, 637 P.2d 956 (1981)).

Dismissal of a criminal charge under CrR 8.3 does not require evil or dishonest acts; simple mismanagement is enough. *State v. Moore*, 121 Wn.App. 889, 91 P.3d 136, *review denied*, 154 Wn.2d 1012, 114 P.3d 657 (2004).

A trial court's decision to dismiss under CrR 8.3(b) can be reversed only when a trial court has abused its discretion by making a

decision that is manifestly unreasonable or based on untenable grounds. *Michielli*, 132 Wn.2d at 240, 937 P.2d 587. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Sleasman v. City of Lacey*, 128 Wn.App. 617, ¶ 13, 116 P.3d 446 (2005). "Where there is no evidence of arbitrary prosecutorial action or governmental misconduct including mismanagement of the case, the court's dismissal will be reversed." *State v. Blackwell*, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993).

The State argues that the prosecutor here "was, at worst guilty of a single instance of simple negligence which did not support the extraordinary remedy of dismissal." Brief of Appellant, p. 26. Further, the State argues that it was error for the court to resort to dismissal of the case without considering intermediate alternatives. Brief of Appellant, p. 30.

a. *The trial court did not abuse its discretion in concluding that the State committed egregious misconduct warranting dismissal of the case*

In support of its position, the State cites *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) for the proposition that, "Washington

courts have clearly maintained that dismissal is an extraordinary remedy to which the court should resort only in ‘truly egregious cases of mismanagement or misconduct.’”

Simple mismanagement may be sufficient grounds for dismissal of a case under CrR 8.3. *Michielli*, 132 Wn.2d at 239, 937 P.2d 587. The State has conceded that its conduct in failing to forward the court’s order to Western State Hospital and thus forcing Mr. Walsh to remain in jail for more than 70 days while nothing happened in his case was misconduct. State’s Memorandum, p. 3, CP 33-39, RP 8-9, 12-14-05.

In this case, the State’s claimed “single instance of simple negligence” deprived Mr. Walsh of his right to a speedy trial under CrR 3.3. RP 7, 12-30-05. Mr. Walsh was in custody for 70 days before the State, at the prompting of defense counsel, took any action to have Mr. Walsh evaluated at Western State. RP 7, 12-30-05. Under *Michielli*, violation of a defendant’s speedy trial right is sufficient prejudice to warrant dismissal of the case. *Michielli*, 132 Wn.2d at 240, 937 P.2d 587. Because the State’s mismanagement in failing to forward the order of evaluation to Western State Hospital was sufficiently egregious mismanagement to warrant dismissal of the case, the trial court did not abuse its discretion in dismissing the case.

b. *The trial court properly concluded that the State's misconduct prejudiced Mr. Walsh*

As stated above, the State's failure to bring Mr. Walsh to trial within the speedy trial time violated Mr. Walsh's right to speedy trial under CrR 3.3.

"The second necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. Such prejudice includes the right to a speedy trial." *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

The State argues that,

[t]he trial court's reliance on *Michielli* [sic], however, was misplaced, [sic] as there was no violation of the speedy trial rule in this case, [sic] as outlined above. Furthermore, because the plain language of the speedy trial rules specifically preclude the trial court from looking beyond the speedy trial rules, statutes, or constitutional provisions, *Michielli* [sic] no longer applies to rule-based violations."

Brief of Appellant, p. 14.

In support of its assertion that *Michielli* has been impliedly overruled by the revised CrR 3.3, the State cites CrR 3.3(a)(4) ("If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a

speedy trial was violated”) and CrR 3.3(h) (“A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice...No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution”). The State’s argument is flawed.

First, as stated above, Mr. Walsh’s right to speedy trial under CrR 3.3 was violated in this case.

Second, *Michielli* is not affected by the 2003 amendments to CrR 3.3. The portion of the *Michielli* holding at issue here is the *Michielli* court’s statement that the violation of a defendant’s right to speedy trial is sufficiently prejudicial for a case to be dismissed under CrR 8.3. The *Michielli* decision is relevant to CrR 8.3 and CrR 3.3 only insofar as the court held that the violation of a defendant’s speedy trial right is sufficiently prejudicial to warrant dismissal under CrR 8.3.

Michielli is not implicated by any of the amendments to CrR 3.3 which occurred in 2003. The 2003 amendments to CrR 3.3 affected mainly how a defendant’s right to speedy trial will be calculated, not how the violation of that right prejudices the defendant. While the 2003 amendments to CrR 3.3 make it much more difficult, if not impossible, for a defendant to successfully assert that his CrR 3.3-based right to speedy trial has been violated, should a defendant manage to prove that it has

been violated, the prejudice to the defendant will be no less after 2003 than it was prior to 2003.

c. The trial court did not err in applying CrR 8.3 to the facts of this case

The State argues that, “the trial court erred in applying a CrR 8.3(b) analysis to an alleged speedy trial violation, [sic] when CrR 3.3(a)(4) and CrR 3.3(h) specifically prohibit dismissal based upon a delay unless there has been a constitutional violation or a statute expressly requiring the dismissal.” The State misinterprets the provisions of CrR 3.3 as well as the relationship between CrR 3.3 and CrR 8.3.

Under CrR 8.3(b), in order for a defendant to have a case dismissed, he must prove governmental misconduct and some resulting prejudice. If a defendant seeks to use a violation of his right to speedy trial as the basis for the prejudice, that defendant would still be required to prove that a speedy trial violation occurred. If a defendant were able to prove governmental misconduct as well as a violation of CrR 3.3 occurred, then the case would be dismissable under either CrR 8.3 or CrR 3.3(h).

In order for CrR 3.3(a)(4) to apply to a motion to dismiss under CrR 8.3, the trial would have to have been timely under CrR 3.3 but in violation of the moving defendant’s constitutional right to a speedy trial.

This is not a bar to the applicability of CrR 8.3 to a speedy trial violation. It simply means that in order for a defendant to claim prejudice under CrR 8.3 by a violation of his right to speedy trial, he must prove either that his right to speedy trial under CrR 3.3 was violated or his federal constitutional right to speedy trial was violated.

The 2003 amendments to CrR 3.3 certainly “raised the bar” for defendants asserting a violation of their rule based speedy trial rights, but the amendment had no effect on a defendant’s constitutional speedy trial rights and did not affect CrR 8.3 other than to raise a defendant’s burden when that defendant attempts to use a rule based speedy trial violation as the basis for the prejudice claimed under CrR 8.3. CrR 3.3(a)(4) and CrR 3.3(h) still permit dismissal of a trial on grounds that a defendant’s right to speedy trial under CrR 3.3 has been violated, provided a defendant can prove it.

d. The trial court did not abuse its discretion by not imposing a remedy lesser than dismissal

Dismissal under CrR 8.3 is an extraordinary remedy, one to which a trial court should turn only as a last resort after considering intermediate remedial steps. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

Here, both the State and trial counsel for Mr. Walsh suggested that rather than dismiss the case the court instead release Mr. Walsh from custody. RP 6, 11, 12-14-05.

The trial court took these suggestions under advisement, but reserved ruling on the issue. RP 17-18, 12-14-05. Ultimately, the trial court dismissed the case with prejudice. RP After discussing *Wilson*, the trial court explained its ruling as follows:

Applying this law to the facts, the State's failure to submit the referral is misconduct and I think the State forthrightly concedes that in its memorandum. The Court knows that the defendant has a right to trial within 60 days after a finding of competency, and the effect of the State's error here has been to delay a finding of competency at a minimum of 70 days, that would be between August the 10th when he was arraigned and October 19th when the State found out about the problem and it started to act on it; that's 70 days.

There is no remedy that the Court can craft to give Mr. Walsh back these 70 days. They are, in effect, dead time. I think that the State has deprived Mr. Walsh of his right to speedy trial under the court rules, that this is prejudice, and that the case should be dismissed with prejudice.

I think that if the State had simply forgotten Mr. Walsh for 70 days it would certainly dismiss; that is, if the issue of the competency evaluation wasn't before us, and that **there is really no lesser remedy that can fit here to resolve what the problem is. Because before the State discovered the error Mr. Walsh had been in custody for a full 60 plus days. I mean, his speedy trial time had been exhausted and he can't get it back.**

RP 7-8, 12-30-05 (emphasis added).

It is clear from the court's ruling that it considered alternatives to dismissal, but because of the nature of the prejudice, specifically violation of Mr. Walsh's right to be brought to trial in 60 days, no remedy was available short of dismissal. Further, under the language of CrR 3.3(h), dismissal was the proper remedy.

3. Even this court finds that the trial court dismissed the case for improper reasons, this court should affirm the trial court's ruling because the time for speedy trial had run

Where a judgment or order is correct it will not be reversed merely because the trial court gave wrong or insufficient reason for its rendition. *Pannell v. Thompson*, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979). Even if the Court of Appeals finds abuse of discretion, it will affirm the trial court's dismissal of the charges due to arbitrary action or governmental misconduct, if it finds that the defendant proved sufficient grounds. *State v. Martinez*, 121 Wn.App. 21, 30, 86 P.3d 1210, *amended on reconsideration* (2004).

As discussed above, because he was in custody Mr. Walsh's time for speedy trial under CrR 3.3 expired on October 9. Thus, Mr. Walsh's case could have been dismissed under CrR 8.3 or CrR 3.3(h).

4. This court should dismiss this appeal as moot

It is a general rule that, where only moot questions or abstract propositions are involved, or where the substantial

questions involved in the trial court no longer exist, the appeal, or writ of error, should be dismissed. There is an exception to the above stated proposition. The [reviewing court] may, in its discretion, retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved.

Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

In addition to failing to bring Mr. Wash to trial within the required 60 days, the trial court also set forth other grounds on which Mr. Walsh's case could have been dismissed, but which the trial court stated were not the basis for its decision. The trial court noted that at the time of dismissal, Mr. Walsh had already been in custody nearly the entire length of the sentence he would receive if convicted. Presuming this case were remanded back to the trial court for new proceedings, and assuming Mr. Walsh was not imprisoned prior to trial and was found competent to stand trial², when given credit for time served Mr. Walsh's sentence would be 15 days. RP 9, 12-30-05.

Because Mr. Walsh has already been detained pre-trial for virtually the entire sentence he would receive, assuming he was found competent, this court should dismiss this appeal as moot.

² This in and of itself is unlikely, considering that Mr. Walsh had previously been found incompetent to stand trial several times in the past with the charges against him being dismissed. CP 38.

D. CONCLUSION

For the reasons stated above, this court should affirm the trial court's dismissal of the case.

DATED this 28th day of July, 2006.

Respectfully submitted,



Eric Fong, WSBA No. 26030
Attorney for Appellant

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STATE OF WASHINGTON

BY [Signature] DEPUTY CLERK OF THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	Appeal No. 34362-2-II
Respondent,)	Superior Court No. 5-1-01211-9
)	
v.)	
)	AFFIDAVIT OF MAILING
CLYDE WALSH,)	
)	
Appellant.)	
_____)	

The undersigned, being first duly sworn, under oath, states: That on the 28th day of September, 2006, affiant deposited in the United States mails, a properly stamped and addressed envelope, containing the original and one (1) copy of the Response Brief, directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

and a true copy of the Response Brief to:

Mr. Randall Sutton, Esq.
614 Division Street, MS-35
Port Orchard, WA 98366

Mr. Clyde Walsh
1805 Winfield Avenue, Apt. A
Bremerton, WA 98312

[Signature]
Julie A. duChene

SUBSCRIBED AND SWORN to before me this 28th day of September, 2006.

[Signature]
NOTARY PUBLIC in and for the State of
Washington, residing at Port Orchard.
My commission expires 9-9-2010.

AFFIDAVIT OF MAILING - 1

ORIGINAL

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