NO. 35216-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

KENNETH L. CLARK,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 95-1-00021-5

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
PATRICIA A. PETHICK, WSBA 21324
Attorneys for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

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A. ASSIGNMENT OF ERROR

The trial court erred in continuing Clark's trial beyond the speedy trial requirement of CrR 3.3.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court erred in continuing Clark's trial without first determining Clark's constitutional right to self-representation in order to permit him to proceed in a timely manner that would obviate the need to reset his trial date beyond the speedy trial requirement of CrR 3.3?

C. STATEMENT OF THE CASE

01. Procedural Facts

Kenneth L. Clark (Clark) was charged by fourth amended information filed in Mason County Superior Court on August 23, 2006, with statutory rape of a child in the first degree, count I, and nine counts of indecent liberties, counts II-X, contrary to former RCWs 9A.44.070 and 9A.44.100(1)(b). [CP 129-136]. Each count alleged the same period between June 1, 1985 and June 1, 1988, and the same alleged victim, B.J.C. (DOB 05/30/1978). [CP 130-35].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on August 22, 2006, the Honorable James B. Sawyer II presiding. Count I, statutory rape of a child in the first degree, was dismissed for insufficient evidence at the

close of the State's case-in-chief. [RP 374]. The jury returned verdicts of guilty as charged on the remaining counts, in addition to returning a special verdict that the State had proven beyond a reasonable doubt that the crimes in counts V-X were part of an ongoing pattern of sexual abuse of the same victim under the age of 18 manifested by multiple incidents over a prolonged period. [CP 81, 84-92].

Clark was given an exceptional sentence of 178 months based on the jury's special verdict, with counts II-IV to be served consecutive to counts V-VII, and timely notice of this appeal followed. [CP 4, 6-22; RP 677-78].

02. Substantive Facts

On August 3, 1994, Clark (DOB 05/31/45) was interviewed by former Detective Sergeant Chuck Davis at the Tumwater Police Department. [RP 280, 284, 286]. During the interview, which was attended by Clark's attorney, Clark disclosed that he had inappropriately touched his daughter, B.J.C. (DOB 05/30/78). [284, 289-90]. According to Davis, the "abuse had apparently stopped, at least a couple of years before" the interview. [RP 291].

Billie Clark, Clark's ex-wife, received letters from Clark after he had left the family home. In a letter dated September 16, 1994, Clark wrote the following:

> (A)s for (B.J.C.), she truly enjoyed it many times before she said no. And that may be causing her some heartache. Please make sure that (B.J.C.) knows it was your rejection that forced me to leave and not her reporting the incest.

[RP 311-12].

In another letter dated December 7, 2005, Clark wrote:

> You said in your letter that I had not accepted responsibility for my actions. But the heart knows the truth, and reminds me daily that I need to pray for forgiveness each and every day from God and from those I have wronged. But the law prevents me from putting it all down on paper.

[RP 313].

B.J.C. testified that Clark, on a "(f)airly regular" basis, sexually abused her, mostly in her bedroom when he would tuck her in at night. The touching was on her bare skin. [RP 351].

> He would rub on my back and towards my back side, my buttocks; would feel down in my vagina area, and it - - it looks - - and rub on my chest.

[RP 343].

She also remembered an incident in the pump house when she was probably seven where she touched his penis underneath his clothes. [RP 340-42, 351].

Prior to her family moving from their house in Grapeview, Washington, in the summer of 1988, Clark had been sexually abusing her for "at least three years, if not more." [RP 344]. "(A)t least maybe once

or twice a week." [RP 345]. B.J.C. confirmed that Clark had sexually molested her at least nine times each year from 1985 through 1988. [RP 369-70]. Clark asked her not to report the incidents, saying "he would get counseling and wanted to keep our family together and that it would be better, but it wasn't going to be better that way." [RP 352].

Clark testified and admitted to sexually touching B.J.C.

> Yes, I did. But by the same token, there were - - thank you sir - - rubbing your kids back, or giving them a ride on your shoulders, or having them slide down your arm because they're falling and it's better to - - to shield them with your arm than it is to let them fall, is not the same as sexual contact. And I know that. And nine - - I don't think that nine separate incidents occurred.

[RP 482].

D. ARGUMENT

CLARK'S SPEEDY TRIAL RIGHT WAS VIOLATED AND HIS CONVICTIONS MUST BE REVERSED AND DISMISSED WITH PREJUDICE.

01. Relevant Procedure

On February 6, 2006, Clark's case was reset for trial on the following March 28, with the speedy trial period to expire on April 7. [RP 22; CP 233]. On March 24, Clark moved to discharge his court-appointed attorney [RP 57], further informing the court that he was "ready to go to trial, if necessary." [RP 64]. "And I do have a right to a speedy

trial." [RP 64]. The court granted the motion [RP 64] and informed Clark that it would reset his trial date "based upon the rule that provides for a new commencement date if there is a discharge of counsel." [RP 64]. In response, Clark asserted: "Then I will represent myself so that we don't have to reset the dates." [RP 65]. After an incomplete colloquy with Clark concerning his right to self-representation [RP 65-71], the court informed him that "whether or not you choose to represent yourself, the Court is going to reset your trial date [RP 71](,)" which the court eventually did, citing CrR 3.3(c)(2)(vii).[1] [RP 72, 74].

> MR. CLARK: So whether I have a new public defender or I represent myself, the trial dates would be the same?
>
> THE COURT: Correct.
>
> MR. CLARK: Postponed again?
>
> THE COURT: Correct.

[RP 73].

Given this choice, Clark responded:

> MR. CLARK: Well I might as well - - I might as well take a public defender, <u>if you're going to abrogate my rights to a speedy trial</u>. [Emphasis Added].

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[1] CrR 3.3(c)(2)(vii) provides, in part, that a new commencement date for trial shall be established upon the "disqualification of the defense attorney(.)" Clark's case was reset for trial "beginning May 9, or as soon thereafter as the matter can be heard, with a final start date of May 23rd." [RP 74].

02. Argument

A criminal charge must be dismissed with prejudice if it is not brought to trial within the time limit determined under CrR 3.3. CrR 3.3(h). The trial court bears the ultimate responsibility to ensure that the trial is held within the speedy trial period. CrR 3.3(a)(1); State v. Jenkins, 76 Wn. App. 378, 383, 884 P.2d 1356 (1994).

In reviewing an alleged violation of the speedy trial rule, the court applies the rule to the particular facts to determine whether there exists a violation that mandates dismissal. State v. Carlyle, 84 Wn. App. 33, 35, 925 P.2d 635 (1996). The application of a court rule to particular facts is a question of law reviewed de novo. Carlyle, 84 Wn. App. at 35.

The courts have "consistently interpreted CrR 3.3 so as to resolve ambiguities in a manner which supports the purpose of the rule in providing a prompt trial for the defendant once prosecution is initiated." State v. Edwards, 94 Wn.2d 208, 216, 616 P.2d 620 (1980).

> . . . [P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.

State v. Striker, 87 Wn.2d 870, 876-77, 557 P.2d 847 (1976) (citations omitted).

A defendant who has not been brought to trial within the time limits of CrR 3.3(b) is not required to show actual prejudice or

prosecutorial misconduct. Instead, failure to comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice. Ralph Vernon G., 90 Wn. App. 16, 20-21, 950 P.2d 971 (1998).

Despite the fact that as of February 6, 2006, Clark's speedy trial right required trial by April 7, and despite the fact that he was willing to exercise his constitutional right to represent himself without the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Art. 1, sec. 22 of the Washington Constitution (Amend. 10), Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975) and State v. Honton, 85 Wn. App. 415, 418, 419, 932 P.2d 1276, review denied, 133 Wn.2d 1011 (1997), the trial court denied him this right by invoking the new-commencement provision of CrR 3.3(c)(2)(vii), as previously set forth, without first determining Clark's constitutional right to self representation in order to permit him to proceed in a timely manner that would obviate the need to reset his trial date beyond the speedy trial requirement of CrR 3.3.

As the record demonstrates, Clark was more than willing to represent himself in order to preserve his right to a speedy trial, the exercise of which would have rendered moot the court's misplaced cart-before-the-horse reliance on CrR 3.3(c)(2)(vii), with the result that Clark's

convictions must be reversed and dismissed with prejudice. Ralph Vernon G., 90 Wn. App. 20-21.

E. CONCLUSION

Based on the above, Clark respectfully requests this court to reverse and dismiss his convictions.

DATED this 29th day of March 2007.

Respectfully submitted,

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Monty Cobb Deputy Pros Atty P.O. Box 639 Shelton, WA 98584-0639	Kenneth L. Clark #897942 Thurston County Jail 2000 Lakeridge Drive Olympia, WA 98502

DATED this 29th day of March 2007.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
WSBA No. 10634

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STATE OF WASHINGTON
BY DEPUTY