

No. 35216-8-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH L. CLARK,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY _____
DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer, II Judge
Cause No. 95-1-00021-5

BRIEF OF RESPONDENT

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A. APPELLANT’S ASSIGNMENTS OF ERROR

1. Appellant assigns error the Court’s recalculation of time for commencement of trial after disqualification of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court properly recalculated Appellant’s time for trial pursuant to CrR 3.3(c)(2)(vii) after court-appointed counsel was disqualified? (Assignment of Error No. 1).

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Appellant Kenneth L. Clark (Appellant) was charged by second amended information filed in Mason County Superior Court on March 20, 2006, with one count of statutory rape of a child in the first degree and two counts of indecent liberties, contrary to former RCWs 9A.44.070 and 9A.44.100(1)(b) [CP 212-213]. Each count alleged the same time period between June 1, 1985, and June 1, 1988, and the same alleged victim, B.J.C.

Appellant was subsequently charged by fourth amended information on August 23, 2006, with one count of statutory rape of a child in the first degree and nine counts of indecent liberties (Counts II through X), contrary to former RCWs 9A.44.070 and 9A.44.100(1)(b). [CP 129-136]. Each count alleged the same time

period between June 1, 1985, and June 1, 1988, and the same alleged victim, B.J.C. (dob 05/30/1978). [CP 130-135].

A hearing regarding the Appellant's statement to Detective Sergeant Chuck Davis was heard by the Honorable James B. Sawyer II on August 18, 2006. [RP 212-226]. During that hearing, the parties agreed as to certain portions of Appellant's statement that would be heard at trial. Additionally, the trial court ruled as to the admissibility of those portions of the Appellant's statement that the parties could not reach agreement on.

No pre-trial motions were noted with respect to a CrR 3.6 hearing.

Trial to a jury commenced on August 22, 2006, with the Honorable Judge James B. Sawyer II presiding. Count I, statutory rape in the first degree, was dismissed for insufficient evidence at the conclusion 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 proved beyond a reasonable doubt that the crimes in counts V through 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].

Appellant was given an exceptional sentence of 178 months based on the jury's special verdicts with Counts II through IV to be served concurrently; Counts V through VII to be served concurrently to each other and concurrent with Counts II through IV; and Counts VIII through X to be served concurrent to each other, but consecutive to Counts V through VII. [CP 6-22; RP 677-78]. Timely notice of this appeal followed. [CP 5].

2. SUBSTANTIVE FACTS

On July 29, 1994, B.J.C. was interviewed by Detective Loreli Thompson of the Lacey Police Department. During that interview, B.J.C. disclosed that her father, Kenneth Leon Clark (dob 05/31/1945), had been sexually touching her. [RP 276]. She told Detective Thompson that the touching began when she was in the first or second grade. At that time, the family lived in Grapeview, which is located in Mason County, Washington. [RP 290].

On August 3, 1994, Appellant and his attorney, Ed Schaller, met with Detective Chuck Davis of the Tumwater Police Department [RP 282]. During the interview, Appellant disclosed that he had inappropriately touched his daughter, B.J.C., in a

sexual manner when they lived in Grapeview, Washington. [RP 284, 289-90].

Appellant left the family home some time shortly after B.J.C. disclosed to Detective Thompson. [RP 352] After Appellant left, he sent letters to his then-wife, Billie Clark. In a letter dated September 16, 1994, the Appellant wrote that

(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, Appellant 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 Appellant sexually abused her on a “(f)airly regular” basis, 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]

B.J.C. also testified regarding an incident in the pump house when she was probably seven when she touched his penis under his clothes. [RP 340-2, 351].

Prior to the Clark family moving from their house in Grapeview, Washington, in the summer of 1988, B.J.C. testified that Appellant 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] Appellant asked B.J.C. not to report the incidents, telling her that “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].

Appellant testified at trial 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

1. THE TRIAL COURT PROPERLY RESET THE COMMENCEMENT DATE FOR APPELLANT'S TIME FOR TRIAL DUE TO DISQUALIFICATION OF COUNSEL.

(a) Relevant Procedure

On February 6, 2006, the Appellant's case was reset for trial on March, 28, 2006, with a speedy trial period calculated to expire on April 7, 2006. [RP 22; CP 233] At the March 24, 2006, readiness hearing, Appellant advised the court that he wanted to discharge his court-appointed attorney. [RP 57]. Appellant's public defender also requested that the Court discharge him from the case. [RP 59-60]. The Court found that there was

[A] total breakdown of communication with regard to the attorney/client working relationship and will allow Mr. Clark to discharge Mr. Pimentel, and Mr. Pimentel to withdraw as attorney of record. The Court will appoint Mr. Gazori to represent Mr. Clark and will change his public defender.

[RP 64]

The Court then advised Appellant that it would reset the dates in his case based upon the court rule that provides for a new commencement

date if there is a discharge of counsel. [RP 64] At that juncture, Appellant interjected that if the Court were going to reset dates, he would represent himself so that the trial dates would not have to be reset. [RP 65]. The Court explained to Appellant that the court rules provide for a new commencement date when a defendant's attorney is discharged. The Court also told Appellant that if he wished to represent himself, it would go through the colloquy with him and see whether or not that was what Appellant wished to do. [RP 65]

The Court began its inquiry/colloquy by asking Appellant if he wished to represent himself. Appellant stated that no, he wanted a public defender, but that he didn't get one. [RP 65] The Court advised Appellant that he needed to make a choice as to whether he wanted a public defender or whether he unequivocally wanted to represent himself. [RP 65]

The Court continued to engage in a colloquy with Appellant as to whether he wanted to represent himself. The Court inquired as to Appellant's level of education [RP 65], whether he had ever represented himself in a court hearing before [RP 65], whether he understood the charges against him and the possible penalties [RP 67-69], and his familiarity with the Washington court rules, including the rules of evidence. [RP 69]. The Court additionally inquired of the Appellant as to

whether he understood that by representing himself, he would be required to understand and know how to use the rules. [RP 69-70].

Appellant then asked the court for co-counsel. [RP 69]. The Court explained to Appellant that it would appoint standby counsel if the Court deemed it appropriate, but also advised him that it was not required to do so. [RP 70]. Appellant then asked the Court if representing himself were the only way in which he could exercise his right to a speedy trial. [RP 71]. The Court explained to Appellant that

You have the right to have a trial in a speedy and timely manner. If you discharge your counsel today, the Court Rule provides that the Court sets the matter out again under a new commencement date today. So whether or not you choose to represent yourself, the Court is going to reset your trial date.

[RP 71].

The Court then resumed its colloquy with Appellant as to whether he wished to represent himself or whether he wanted a court appointed attorney. [RP 73].

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.

MR. CLARK: For the third time?

THE COURT: Correct.

MR. CLARK: Obviously the right to a speedy trial in this state does not exist.

THE COURT: Well we can register your –

MR. CLARK: Well I might as well – I might as well take a public defender, if you're going to abrogate my rights to a speedy trial.

[RP 73]

(b) Argument

The court is responsible for ensuring a trial in accordance with the provisions of CrR 3.3 to each person charged with a crime. CrR 3.3(a)(1). “A defendant who is detained in jail shall be brought to trial within the longer of (i) 60 days after the commencement date specified in this rule, or (ii) the time specified under subsection (b)(5).” CrR 3.3(b)(1). The initial commencement date is the date of arraignment pursuant to CrR 4.1. CrR 3.3(c)(1). A new commencement date is established and the elapsed time reset to zero when one of several events occurs, one of those being the disqualification of counsel. CrR 3.3(c)(2)(vii).

When a trial is delayed within the framework of the criminal rules, the defendant must show a violation of constitutional standards beyond

delay itself to constitute a denial of his or her Sixth Amendment right to a speedy trial. *State v. Poulos*, 31 Wash.App. 241, 242, 640 P.2d 735 (1982), citing *State v. Christensen*, 75 Wash.2d 678, 453 P.2d 644 (1969); *State v. Wieman*, 19 Wash.App. 641, 577 P.2d 154 (1978).

Our time for trial rule, CrR 3.3, is a tool to protect the integrity of the judicial process and is an additional safeguard against arbitrary, oppressive delay, but does not purport to mark the bounds of the Sixth Amendment's speedy trial clause.

Id., citing *Federated Publications, Inc. v. Swedberg*, 96 Wash.2d 13, 633 P.2d 74 (1981).

Appellant claims that the Court should have first made a determination as to whether or not Appellant wished to proceed pro-se before invoking the new commencement period provided for by CrR 3.3(c)(2)(vii). However, the record clearly shows that Appellant's first order of business at the March 24, 2006, hearing was to request that his court-appointed counsel be discharged [RP 65-73]. Appellant indicated that he wanted to represent himself only upon learning that the discharge of counsel would result in a recalculation of Appellant's time for trial.

Trial courts must properly be concerned about a defendant's knowing and intelligent waiver of the right to counsel. "To protect defendants from making capricious waivers of counsel, and to protect trial

courts from manipulative vacillations by defendants regarding representation, we require a defendant's request to proceed *in propria persona*, or pro se, to be unequivocal." *State v. DeWeese*, 117 Wash.2d 369, 376, 816 P.2d 1 (1991). Additionally, a trial court must establish that a defendant makes a knowing and intelligent waiver of the right to counsel in choosing to proceed pro se. *Id.*, at 377, citing *State v. Bebb*, 108 Wash.2d 515, 525, 740 P.2d 829 (1987).

Appellant argues that the Court should have taken last things first by addressing Appellant's second request (to proceed pro se) [RP 65] before addressing Appellant's first request (discharge of counsel) [RP 57, RP 59-60]. Appellant overlooks the fact that the Court properly handled the issues in the order presented to it.

Appellant's trial was properly delayed within the bounds of CrR 3.3 when Appellant's trial counsel was discharged at the March 24, 2006, hearing. CrR 3.3(c)(2)(vii) provides for a recalculation of time for trial in the event that counsel is discharged, regardless of whether new counsel is appointed or retained, or whether the defendant elects to represent him or her self.

Appellant has failed to show that the Court violated the provisions of CrR 3.3 in calculating his time for trial. Furthermore, Appellant has

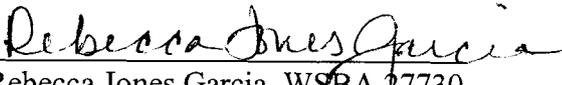
failed to show a violation of constitutional standards other than delay itself.

D. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny Appellant's appeal and affirm the convictions and sentence as imposed.

DATED May 31, 2007, at Shelton, Washington.

Respectfully submitted,


Rebecca Jones Garcia, WSBA 27730
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 35216-8-II
)
 vs.) DECLARATION OF
) FILING/MAILING
) PROOF OF SERVICE
 KENNETH L. CLARK,)
)
 Appellant,)
 _____)

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 JUN -1 PM 1:14
DEPUTY

I, TRICIA KEALY, declare and state as follows:

On May 31, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Thomas E. Doyle
P.O. Box 510
Hansville, WA 98340-0510

I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 31st day of May, 2007, at Shelton, Washington.


Tricia Kealy

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