

NO. 36266-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KENNETH L. CLARK,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

THE HONORABLE CHRISTINE A. POMEROY, JUDGE

CAUSE NO. 94-1-01051-8

BRIEF OF RESPONDENT

EDWARD G. HOLM
Thurston County
Prosecuting Attorney

JEREMY RANDOLPH
WSBA NO. 2248
Special Senior Deputy
Prosecuting Attorney
Attorneys for Respondent
P.O. Box 1206
Cannon Beach, OR 97110
360.219.6861

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A. STATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Clark's request to proceed "pro se with the assistance of counsel"?

2. Whether the trial court erred in continuing Clark's trial when the judge made findings that "good cause" for a resetting existed due to the unavailability of an essential State's witness?

B. STATEMENT OF THE CASE

On 16 September 1994, an Information was filed in Thurston County Superior Court Cause No. 94-1-01051-8, charging the defendant, Kenneth L. Clark, with one count of rape of a child in the first degree, one count of rape of a child in the second degree, one count of child molestation in the first degree, and one count of child molestation in the second degree. A warrant was authorized for Clark's arrest, based on an affidavit of the deputy prosecuting attorney setting forth the probable cause for the charges and stating that the defendant had fled the area after admitting to police he had sexually abused a number of children, and that his whereabouts were

unknown. [CP 6-7].

It was eventually determined that Clark had fled to Mexico. On 24 October 1998 he was charged in Ciudad Juarez, Chihuahua for the rape of two minors. Clark was convicted and sentenced to 7 years of imprisonment. He was released from the Ce.Re.So. in Juarez on 17 October 2005. CP 54. When Clark attempted to return to the United States he was arrested on the warrant in December of 2005. He was also arrested on a warrant issued by the Mason County Superior Court.

Clark was first transported to Mason County for trial. He was convicted of nine counts of indecent liberties, and was sentenced on 18 October 2006 to 178 months in prison. [The Mason County Judgment and Sentence was affirmed by this Court on 24 December 2007. *State v. Clark*, 2007 Wash. App. LEXIS 3313.]

Clark then appeared in Thurston County Superior Court for arraignment in the present cause on 8 November 2006, and counsel was appointed to represent him. A jury trial was

originally scheduled for 2 January 2007.

On 13 December 2006, a motion to continue the trial date was filed by the State of Washington. In a declaration filed in support of that motion, Deputy Prosecuting Attorney Jodilyn Erickson-Muldrew stated that the investigating officer in this case was presently retired, and living in the Philippines, and was a necessary witness in this case with regard to admissions made by Clark to him during the investigation of this matter back in 1994. The State requested the continuance to make the necessary arrangements to have this retired police officer travel from the Philippines to testify. It was noted that the earliest that Det. Davis could return to the United States would have been 12 March 2007 and further that the trial deputy would be on vacation and unavailable until 26 March 2007 leaving a week for both attorneys to interview Det. Davis in person. [CP 15-16].

At the hearing on this motion on 21 December 2006, Clark objected to the continuance. However,

at the same time, he moved the court to stay the trial until the completion of the appeal of his Mason County convictions. The court denied Clark's request for a stay, found there was good cause for the continuance requested by the State, and a new trial date was set for 2 April 2007. [RP 12.21.06 19-23].

At the hearing on December 21st, Clark requested to represent himself in this case "with the assistance of an attorney." Through clarification, the court determined that Clark was not simply asking to represent himself, but rather to represent himself with the assistance of counsel, including assistance beyond what the court found consistent with the role of standby counsel. Given the nature of Clark's request, the court denied it. [RP 12.21.06 4-19].

On 23 January 2007, Clark filed in the Court of Appeals a Motion for Interlocutory Appeal with regard to Thurston County Superior Court Cause No. 94-1-01051-8. In that motion, Clark requested that the Court of Appeals allow him to "proceed

pro se with the assistance of counsel", at the same time protect his right to effective assistance of counsel, stay the trial in this cause pending the outcome of the defendant's appeal of a separate Mason County conviction, or in the alternative provide him with a speedy trial. [COA# 35856-5-II]. The Respondent provided an Answer arguing that Clark's motion should be designated a motion for discretionary review, and further argued that Clark had failed to satisfy any of the criteria for discretionary review in RAP 2.3, and therefore his motion should be denied. [The "appeal" was dismissed on Clark's motion on 15 May 2007].

On 29 March 2007, in a hearing before the trial court, Clark renewed his request to waive counsel and framed it this time as a request to represent himself pro se at trial, but stated that he would need a continuance of the trial date in order to be able to represent himself. Noting that the trial was scheduled to begin on April 2nd and that a necessary witness for the State had

already been brought at great effort and expense from the Philippines, Judge Chris Wickham ruled that Clark's motion for a continuance to represent himself was not timely. Second, the court found that Clark was not able to represent himself at trial since he had acknowledged he would need a continuance of the trial date to be able to do so. Finally, the court found that Clark's request to represent himself at trial was equivocal, in that at least some of his remarks to the court indicated he still felt he would need the assistance of an attorney beyond that which a standby counsel could provide. [RP 03.29.07 3-31].

At the start of the jury trial on April 2nd, Clark again asked to represent himself, stating that he was now abandoning his request for a continuance to do so, and that he was willing to accept the limited assistance a standby counsel could provide. However, after a colloquy with Clark, Judge Christine Pomeroy noted that just 4 days earlier, Clark had argued he could not

adequately represent himself without a continuance, and that some of Clark's statements on April 2nd indicated he still felt that to be the case. The court ruled that Clark's request was again untimely and equivocal, and denied it. [RP 04.02.07 4-24].

The case proceeded to trial before a jury on April 2-4, 2007. The defendant was found guilty as charged in the first amended information of the following crimes: rape of a child in the first degree, Count I, child molestation in the first degree, Count II, rape of a child in the second degree, Count III and child molestation in the second degree, Count IV. On 4 May 2007, the Court imposed a total sentence of 198 months to run consecutively to the time imposed in Mason County. [RP 05.04.07 4-73].

C. GROUNDS FOR RELIEF AND ARGUMENT

1. Request to proceed "pro se with the assistance of counsel" was properly denied.

On numerous occasions Clark requested leave to proceed pro se with the assistance of counsel. It was not until the day of trial that Clark

indicated that he wanted to proceed pro se and that he was ready to proceed with trial that day after indicating 4 days earlier that he would need a continuance to adequately prepare his own defense. At the earlier hearings the trial judges made findings that Clark was requesting a hybrid form of representation. There is no constitutional right to hybrid representation, where a defendant serves as co-counsel with his attorney. *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991); *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). Nor does a defendant, in seeking to represent himself, have an absolute right to standby counsel. *DeWeese*, 117 Wn.2d at 379. The defendant's request to represent himself must be unequivocal. *DeWeese*, 117 Wn.2d at 377. If a defendant's request to represent himself is made dependent upon having the assistance of counsel beyond what the court is required, or willing, to provide, that request is not unequivocal.

The role of standby counsel is to provide

technical information and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. *Bebb*, 108 Wn.2d at 525. A standby counsel is not required to perform research and errands on behalf of a pro se defendant. *State v. Silva*, 107 Wn. App. 605, 629-630, 27 P.3d 663 (2001).

In Clark's original motion to the Court of Appeals seeking (discretionary) review, he asserted not simply his right to represent himself, but rather his right to represent himself "with the assistance of counsel". See pages 2 and 3 of 7, as designated in Clark's's motion in COA# 35856-5-II. He further asserted that he was demanding more in regard to the assistance of counsel than the trial court judge, Judge McPhee, had been willing to grant him in the form of standby counsel. See pages 6 and 7 of 7, as designated in defendant's motion. Thus, presuming this is the manner in which Clark presented his request for self-representation to Judge McPhee,

the request was equivocal, and it is certainly not surprising that the trial court denied this request.

It is equally clear that Clark's requests to proceed pro se 4 days before the scheduled trial and again on the day of trial were in no way "timely." [TRP 13-14, 23]. *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 596 (1995).

2. Clark was not denied his constitutional right to a "speedy trial" nor was the continuance granted due to witness unavailability in violation of the time for trial court rule.

At the State's request his case was continued for 90 days to allow the attendance of a retired police detective who was residing in the Philippines with his wife. Special arraignments had to be made to have the detective's wife accompany him to this country so that he could reenter the Philippines after the trial concluded. And while the detective could possibly have arrived near 12 March 2007, the trial deputy assigned the case was going to be on vacation and unavailable until the week before the requested trial date of 2 April 2007.

Both the federal and Washington Constitutions accord criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Was. Const. art. I, sec. 22. Neither constitution specifies the number of days or months within which a "speedy trial" should begin. *State v. Cornwall*, 21 Wn.App. 309, 312, 584 P.2d 988 (1978), review denied, 91 Wn.2d 1022 (1979). Nor do CrR 3.3's time for trial provisions set constitutional standards; rather they merely establish "a framework for the disposition of criminal proceedings." *State v. Wieman*, 19 Wn.App. 641, 644-45, 577 P.2d 154 (1978).

A defendant seeking dismissal for non-compliance with CrR 3.3 must prove more than a misapplication of the court rules; he must show violation of a constitutional right. CrR 3.3(a)(4). In that instance, instead of using a strict 60 day rule standard, the Court determines whether or not a trial court deprived a defendant of his right to a speedy trial by weighing the following: (1) the length of the delay, (2) the

prejudice to the defendant, (3) the reason for the delay, and (4) whether the defendant demanded a speedy trial below. *State v. Campbell*, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985).

Under CrR 3.3, a defendant must be brought to trial within 60 days of the commencement date specified in the rule if the defendant is in custody, or within 90 days of the commencement date if the defendant is out of custody, minus any period of time which is excluded in computing the time for trial and minus a period of 30 days beyond any such excluded period. CrR 3.3(b) and (e). Any delay in the form of a continuance granted by the court pursuant to CrR 3.3(f) constitutes such an excluded period. CrR 3.3(e)(3).

Under CrR 3.3(f), a continuance may be granted by a written agreement of the parties signed by the defendant. CrR 3.3(f)(1). The court can also continue the trial date without agreement of both parties if the court determines

that the continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his defense. CrR 3.3(f)(2). As has been recently noted by this court, "It is clear that the relaxation (in 2003) of the speedy trial rule was meant to transition from a hyper-technical application of the rules to one that allowed more time for the State, defense counsel, and the trial court to prepare for trial." *State v. Kenyon*, 2008 Wash. App. LEXIS 389, para. 29.

When an appellate court examines whether a defendant's trial occurred beyond the speedy trial period, such an examination requires an application of the court rule to particular facts. Therefore, the issue is a question of law, and so the appellate court determines de novo whether the speedy trial period was exceeded. *State v. Swenson*, 150 Wn.2d 181, 186, 75 P.3d 513 (2003). Additionally, an appellate court reviews the trial court's decision to grant a motion for a continuance for manifest abuse of discretion.

State v. Johnson, 132 Wn.App. 400, 411, 132 P.3d 737 (2006), *review denied*, 153 P.3d 196 (2007).

The arraignment in this cause took place on 8 November 2006. Thus, that became the commencement date pursuant to CrR 3.3(c)(1). Since the defendant was in custody, the trial was initially set for 2 January 2007, within a 60 day period from the commencement date and 5 days before the time for trial expiration date - 7 January 2007. At the hearing on 21 December 2006 the trial judge specifically found that the request for a 90 day continuance due to witness unavailability coupled with the scheduled absence of the assigned trial deputy was for good cause. At the same hearing, Clark, while objecting to a continuance asked for a "stay of the trial" until his appeal in the Mason County case was completed. [As noted, this would have been a delay of over one year]. On several other occasions Clark asked for a "stay of the trial." Whatever Clark wanted to label his motions, the simple fact he was seeking a continuance well in excess of that granted the

State. To paraphrase Gertrude Stein, a continuance by any other name is still a continuance.

Under earlier "hyper-technical" versions of CrR 3.3, appellate courts have found that cases continued beyond the time for trial expiration date because of a deputy prosecutor's scheduling conflicts or a deputy prosecutor's pre-planned vacation were unavoidable or unforeseen circumstances justifying an extension of the time for trial period. *State v. Krause*, 82 Wn.App. 688, 698, 919 P.2d 123 (1996), *review denied*, 131 Wn.2d 1007 (1997) [conflict in deputy prosecutor's trial schedule]; *State v. Kelly*, 64 Wn.App. 755, 767, 828 P.2d 1106 (1992). [deputy prosecutor had planned vacation]. It is the State's position that under the current reading of the rule the continuance of 90 days did not violate the letter or the spirit of the time for trial rule. "good cause."

Abuse of discretion occurs when the trial court's decision is "manifestly unreasonable, or

exercised on untenable grounds, or for untenable reasons." *State ex rel Carrol v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial judge did not manifestly abuse his discretion by granting the 90 day continuance under the facts of this case and Clark submits no evidence of prejudice by the delay. Neither his constitutional "speedy trial" rights nor his court created "time for trial" rights were violated.

Clark's claim is especially disingenuous in light of the fact that by fleeing the jurisdiction and hiding in Mexico and then becoming imprisoned in Mexico for rape of 2 minors he effectively delayed adjudication of his guilt for more than 11 years. Coupled with his numerous requests to "stay" the Thurston County case pending the outcome of the Mason County appeal places this argument in the proper context.

D. CONCLUSION

Clark's conviction and sentence should be affirmed.

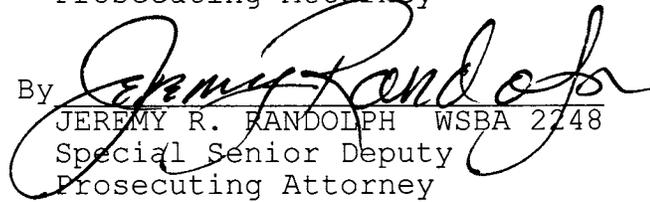
Pursuant to RAP 14.2 and 14.3 and RCW

10.73.160, the State respectfully requests that appellant be required to pay all taxable costs of this appeal, including the cost of the reproduction of briefs, verbatim transcripts, clerk's papers, filing fee, and the fee to be paid to appellant's court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 910 P.2d 545 (1996).

Dated this 30th day of March, 2008.

Respectfully submitted,
ED HOLM, Thurston County
Prosecuting Attorney

By



JEREMY R. RANDOLPH WSBA 2248
Special Senior Deputy
Prosecuting Attorney
for Thurston County
Attorney for Respondent
P.O. Box 1206
Cannon Beach, OR 97110
360.219.6861

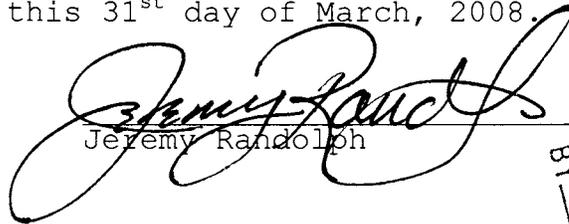
CERTIFICATE

I certify that on this date I mailed a copy of the foregoing Response Brief by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

David L. Donnan
1511 Third Ave., Suite 701
Seattle, WA 98101`

Kenneth L. Clark
c/o David L. Donnan
same address

DATED this 31st day of March, 2008.



Jeremy Randolph

BY  DEPUTY

STATE OF WASHINGTON

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FIFTH
COURT OF APPEALS
DIVISION II