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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY cm
DEPUTY

NO. 37466-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

HENRY HEINIG, Appellant.

APPELLANT'S BRIEF

Rebecca Wold Bouchey
WSBA #26081
Attorney for Appellant

P.O. Box 1401
Mercer Island, WA 98040
(206) 275-0551

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to bring Mr. Heinig to trial within the 90 day speedy trial time required by CrR 3.3.
2. The trial court erred by failing to dismiss Mr. Heinig's case when the State failed to bring him to trial within the speedy trial requirements of CrR 3.3.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the State comply with CrR 3.3 speedy trial requirement and bring Mr. Heinig to trial within 90 days?

III. STATEMENT OF THE CASE

On April 4, 2007, Henry Heinig was arraigned on charges of unlawful manufacturing of a controlled substance, unlawful possession of pseudoephedrine with intent to manufacture methamphetamine, and unlawful possession of a controlled substance. CP 1-2. Trial was continued on May 17. CP 3. On July 9, the trial was again continued, over Mr. Heinig's objection. CP 4.

On August 9, the prosecutor and defense attorney told the court that Mr. Heinig was unable to appear for trial because he had been sentenced on an unrelated Pierce County conviction and had been transferred to the custody of DOC. RP 8/9/07 5.

The next hearing was held on October 10, again continuing trial over Mr. Heinig's objection. CP 5. The final continuance was ordered, over objection, on November 29. CP 6. The bench trial commenced on December 3, 2007.

The defense moved to suppress statements made by Mr. Heinig and the evidence seized by police when they proceeded without warrant into the unfenced backyard of Mr. Heinig's condominium.¹ RP 12/3/07 86; RP 12/13/07 61, 152-55. The court denied the motions. RP 12/3/07 86, RP 12/13/07 152-55.

Mr. Heinig moved, pro se, for the dismissal of the charges against him for violation of his speedy trial rights. CP 11. This motion was never ruled on by the court.

¹ A written motion was apparently prepared by Mr. Heinig's attorney and given to the court, but was never filed. RP 12/3/07 6-7, 10, 86. Mr. Heinig also filed his own pro se motion for new trial, arguing that the evidence should be suppressed. CP 10, 16-31.

Mr. Heinig was convicted on all charges and sentenced to 120 months on the first two counts and 24 months on the final count. CP 38, 42. This appeal timely followed.

IV. ARGUMENT

ISSUE 1: THE STATE FAILED TO BRING MR. HEINIG TO TRIAL WITHIN THE TIME SPECIFIED BY CrR 3.3 AND THEREFORE THE CHARGES AGAINST HIM MUST BE DISMISSED WITH PREJUDICE.

A. *Speedy Trial Rule:*

CrR 3.3 governs the time for trial. A defendant must be brought to trial within 60 days of arraignment if he or she is detained on the pending charge and within 90 days if not. CrR 3.3(b). The time for trial commences upon arraignment and can reset to zero upon certain specified events. CrR 3.3(c). There are also certain events that will toll the time for trial. CrR 3.3(e). If the State does not bring the defendant to trial within the time limit determined under the rule, taking into account any applicable resets or exclusions, the charge must be dismissed with prejudice. CrR 3.3(h). Finally, “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.” CrR 3.3(a)(4).

B. Procedural History:

Mr. Heinig was arraigned on April 4, 2007. CP 1-2. 27 days elapsed on his time for speedy trial until the first continuance was entered, by agreement of the parties, on May 17. CP 3. By that order, trial was continued from May 23 to July 10, tolling the speedy trial limit. CP 3. A second continuance, over Mr. Heinig's objection, continued the trial from July 10 to August 9, again tolling the speedy trial period. CP 4.

Meanwhile, on July 12, Mr. Heinig was sentenced in Pierce County on an unrelated conviction and immediately sent into DOC custody. *See Cause #05-1-00249-4.*²

On August 9, the prosecutor and defense attorney appeared before the court and stated that Mr. Heinig had been sent to prison by Pierce County Superior Court on an unrelated Pierce County conviction and the prosecutor had not sought Mr. Heinig's transfer from DOC to appear for trial. RP 8/9/07 5. The prosecutor asked the court for a bench warrant, although everyone agreed that Mr. Heinig had no ability to appear for trial without the prosecutor executing the proper paperwork with DOC for his

² Although the judgment and sentence for Cause #05-1-00249-4 was not made a part of the record in this case, it is a part of public record. The parties refer to the conviction in the transcript of the August 9 hearing.

transfer.³ Mr. Heinig's attorney objected to the bench warrant because Mr. Heinig was not at fault. RP 8/9/07 6. The prosecutor tells the court that DOC will need two weeks to execute the transfer. RP 8/9/07 7. MR. Heinig's attorney asked that the case only be set over for a week to secure his presence, noting Mr. Heinig's continuing objection to continuances. RP 8/9/07 6-7. The court issues a bench warrant, but no order of continuance is entered.⁴ The order requires Mr. Heinig's presence at a hearing on August 23, 2007.⁵

The State filed an order for transfer of prisoner on August 9, ordering DOC to make Mr. Heinig available for trial on or before August 23.⁶

80 days later, the next order of continuance is entered, over Mr. Heinig's objection, on October 10, continuing trial to November 29. CP 5. Trial was continued again, over Mr. Heinig's objection, from November 29 to December 3. CP 6. Trial commenced on December 3, when the case was called for trial and the CrR 3.5 hearing was held. RP 12/3/07.

³ RP 8/9/07 5-6, Supp. CP, Motion and Declaration Authorizing Issuance of Bench Warrant, Attach. 1.

⁴ Supp. CP, Order Authorizing Issuance of Bench Warrant, Attach. 2, RP 8/9/07.

⁵ Supp. CP, Order Authorizing Issuance of Bench Warrant, Attach. 2.

⁶ Supp CP, Order for Transfer of Prisoner, Attach. 3.

Mr. Heinig repeatedly objected to continuances and refused to waive his speedy trial rights. See CP 4, 5, 6, RP 7/9/07 4-5, RP 10/10/07 4. Moreover, he moved, pro se, for the dismissal of the charges because the State had not complied with speedy trial rules. CP 11. Mr. Heinig's motion was never resolved by the court.

C. The time for trial in this case exceeded the speedy trial time limit of 90 days.

27 days elapsed before the first continuance was entered, and then 80 days elapsed between August 9 and the next continuance on October 10. Therefore, excluding the continuances, which toll speedy trial under CrR 3.3(e)(3), a total of 107 days elapsed. Mr. Heinig was in custody, both on these charges, as well as on an unrelated matter. Therefore, under CrR 3.3(b), the State was permitted 90 days to bring him to trial. The State exceeded that time and therefore dismissal is required under CrR 3.3(h) unless the time for trial recommenced or tolled for a sufficient period of time to excuse the delay.

D. The prosecutor's failure to secure Mr. Heinig's presence for trial while he was being held in DOC custody precludes the State from asserting that Mr. Heinig's failure to appear resets the time for trial.

CrR 3.3(2)(ii) provides that the time for trial will reset to zero upon: "The failure of the defendant to appear for any proceeding at which

the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance."

CrR 3.3(2)(ii) was enacted to address situations where the defendant is attempting to evade trial, not where the State has him in custody and prevents him from appearing for trial. In *State v. Williams*, 87 Wn.2d 916, 920, 557 P.2d 1311 (1976), the court interpreted the original version of our state rule and found that, like the federal rule it is patterned after, a defendant is only "absent" within the meaning of the rule when (a) his whereabouts were unknown and he is attempting to avoid prosecution or (b) his whereabouts could not be determined by due diligence. In *Williams*, the court concluded that the time for trial did not toll during the time a defendant was confined involuntarily at Western State Hospital because his whereabouts were known and, thus, he was not "absent" within the meaning of the rule. *Id.*, at 920.

In 1976, the rule was amended to apply when a defendant was "absent and thereby unavailable." Former CrR 3.3(f); *see State v. Peterson*, 90 Wn.2d 423, 585 P.2d 66 (1978). According to the *Williams* court, this change reflected the view that "[a] defendant should be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained or he resists being returned to the state for trial." 87 Wn.2d at 920 n.3.

Then, in 2003, the court rule was again amended to include a general limitation in CrR 3.3(a)(4), which states:

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.

This change was made as a response to the perceived uncertainty of the due diligence standard. *See State v. George*, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007). The court has subsequently held that although the current version of CrR 3.3 no longer requires the State to exercise good faith and due diligence in securing defendant's presence at trial, neither is CrR 3.3(c)(2)(ii) "a catchall provision that allows the time for trial to begin anew regardless of the cause for defendant's absence." *George*, 160 Wn.2d at 738.

Interpreting the identical language of CrRLJ 3.3(c)(2)(ii), the Supreme Court held that "the 'failure to appear' provision is intended to apply to a defendant who thwarts the government's attempt to provide a trial within the time limits specified under the rule by absenting himself from a proceeding." *George*, 160 Wn.2d at 739. The Court held that this provision does not apply when the defendant is incarcerated on unrelated charges. *Id.* at 739-40.

Under *George*, the time for trial did not pause or reset due to Mr. Heinig's "failure to appear" because at that time the State knew that he was in the custody of DOC and had failed to secure his presence. Nothing prevented the prosecutor from asking for an order of transfer prior to August 9 so that Mr. Heinig could be present to begin trial. The Pierce County prosecutor's office handled Mr. Heinig's sentencing on the unrelated matter and knew where he was. Yet, they wait until August 9 to ask for his transfer and then do not set another hearing until October 10. They do not even bother to get a continuance entered. Neither was this delay "unforeseen and unavoidable" given that the prosecutor, the defense attorney, and the Pierce County superior court was aware of Mr. Heinig's other conviction and his location. See CrR 3.3(e)(8). Therefore, the 80 days that elapsed between August 9 and the next continuance hearing on October 10 counts toward speedy trial according to the provisions of CrR 3.3.

Under CrR 3.3, 107 days elapsed between arraignment and trial. Thus, the State exceeded speedy trial by failing to bring Mr. Heinig to trial within 90 days of his arraignment. Therefore, the charges against him must be dismissed with prejudice. CrR 3.3(h).

V. CONCLUSION

Because the State did not bring Mr. Heinig to trial within the time limit specified by CrR 3.3, the charges against him must be dismissed with prejudice.

DATED: September 2, 2008

By: Rebecca W. Bouchey
Rebecca Wold Bouchey #26081
Attorney for Appellant

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STATE OF WASHINGTON
BY SWB
DEPUTY

CERTIFICATE OF SERVICE

I certify that on September 2, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

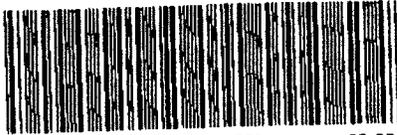
Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Appellant:
Henry R. Heinig
DOC #291731
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

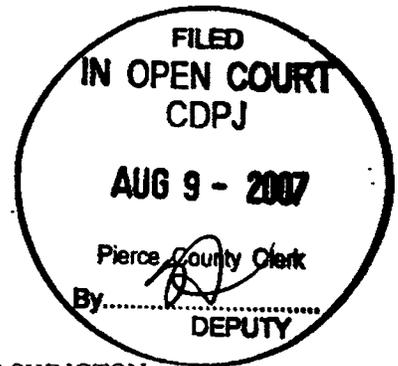
Rebecca W. Bouchey
Rebecca Wold Bouchey
WSB# 26081
Attorney for Appellant

ATTACHMENT 1:

Motion and Declaration Authorizing Issuance of Bench Warrant
Supp. CP



07-1-01823-1 28026303 MTFBW 08-09-07



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

Plaintiff,

NO. 07-1-01823-1

vs.

Henry R. Heinig,

MOTION AND DECLARATION
AUTHORIZING ISSUANCE OF BENCH
WARRANT

Defendant.

I. MOTION

The undersigned (deputy) prosecuting attorney, moves the court for the issuance of an order authorizing the clerk of this court to issue a bench warrant for the arrest of the defendant above named for the reason that the defendant has

failed to appear for trial date.

This motion is based upon the case record to date and upon the following declaration.

DATED: 8/9/07

Bione J. Ludlow #25104
DEPUTY PROSECUTING ATTORNEY

II. DECLARATION

The undersigned states:

2.1 I am a (deputy) prosecuting attorney and am acquainted with the court file of this case.

2.2 A bench warrant should issue for the following reasons:

On 7/9/07 the court ordered the defendant to appear on today's date and defendant has failed to appear as ordered; or

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: 8/9/07
PLACE: TACOMA, WASHINGTON

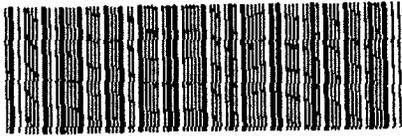
Bione J. Ludlow
DECLARANT

ATTACHMENT 2:

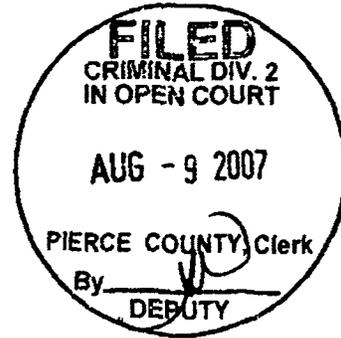
Order Authorizing Issuance of Bench Warrant
Supp. CP

ATTACHMENT 3:

Order for Transfer of Prisoner
Supp. CP



07-1-01823-1 28036887 ORTIJ 08-10-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-01823-1

vs.

HENRY RAYMOND HEINIG,

ORDER FOR TRANSFER OF PRISONER

DOB: 03/31/64

DOC: 291731

Defendant.

THIS MATTER coming on in open court, and it appearing that the defendant, HENRY RAYMOND HEINIG, is charged with the crime of UNLAWFUL MANUFACTURING OF A CONTROLLED SUBSTANCE; UNLAWFUL POSSESSION OF PSEUDOEPHEDRINE AND/OR EPHEDRINE WITH INTENT TO MANUFACTURE METHAMPHETAMINE; UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE in the above entitled cause and that HENRY RAYMOND HEINIG is presently incarcerated in the WASHINGTON CORRECTION CENTER or other state institution on other charges; and it further appearing that it is necessary that HENRY RAYMOND HEINIG appear for proceedings on 8/23/07 in the above entitled matter, and be present in Pierce County no less than one court day prior to that date, and the court being in all things duly advised, Now, Therefore, IT IS HEREBY

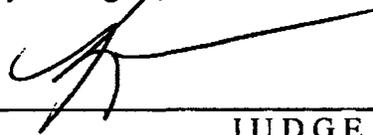
ORDERED that the Sheriff of Pierce County, or his designee, or the Department of Corrections, shall transport the defendant, HENRY RAYMOND HEINIG, from the

WASHINGTON CORRECTION CENTER or other state institution to the custody of the Sheriff
of Pierce County, to be held by him pending proceedings in the above entitled matter, and IT IS
FURTHER

ORDERED that immediately following the proceedings in Pierce County, the said
authorities of Pierce County shall forthwith return the said HENRY RAYMOND HEINIG to the
custody of the WASHINGTON CORRECTION CENTER or other state institution or such other
action that the court shall deem advisable, and IT IS FURTHER

ORDERED that sending institution provide to the Pierce County Jail a transfer summary
report containing the following information: a list of the charges on which HENRY
RAYMOND HEINIG is currently being held; a report as to his/her current institutional behavior;
and, a list of any medical conditions including any currently prescribed medications. Any health
information contained in this summary will be disseminated only to those employees of the
Pierce County Jail responsible for his/her care.

DONE IN OPEN COURT this 9 day of August, 2007.



JUDGE

KATHRYN J. NELSON



ATTACHMENT 4:

Bench Warrant
Supp. CP



07-1-01823-1 28049087 BW 08-14-07

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A.M. AUG 13 2007 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-01823-1

vs.

BENCH WARRANT

HENRY RAYMOND HEINIG,

Defendant.

CHRI NUMBER: 20040852022

1406 7TH ST SW, APT #A-102, PUYALLUP, WA 98373
BAIL BOND AGENCY: NONE

TO ALL PEACE OFFICERS IN THE STATE OF WASHINGTON, GREETINGS:

WHEREAS, an order of court has been entered directing the Clerk of the above entitled court to issue a warrant for the arrest of the above named defendant HENRY RAYMOND HEINIG

SEX MALE; RACE WHITE; EYES BROWN; WEIGHT 185; HEIGHT 5'6"; DOB 03/31/64; POLICE AGENCY: WA02701; DATE OF VIOLATION 04/02/07; POLICE AGENCY CASE NO. 07003186;

You are hereby commanded to forthwith arrest the said HENRY RAYMOND HEINIG, for the crime(s) of UNLAWFUL MANUFACTURING OF A CONTROLLED SUBSTANCE; UNLAWFUL POSSESSION OF PSEUDOEPHEDRINE AND/OR EPHEDRINE WITH INTENT TO MANUFACTURE METHAMPHETAMINE; UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, said defendant having failed to appear for JURY TRIAL as ordered by the court and bring said defendant into court to be dealt with according to law. BAIL IS TO BE SET IN OPEN COURT.

WITNESS THE HONORABLE KATHERINE M. STOLZ

Judge of the said court and seal thereof affixed

This 13 day of August, 2007.

KEVIN STOCK
Clerk of the Superior Court

By [Signature]
Deputy

This is to certify that I received the within bench warrant on the _____ day of _____, and by virtue thereof on the _____ day of _____, I arrested the within named defendant, _____, and now have defendant in full custody.

Extradition: Washington Only Shuttle States Only Nationwide
Warrant Service Fee \$15/Return Fee \$5/Mileage \$ _____ /TOTAL \$ _____

PEACE OFFICER

mrp