

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

NO. 37682-2-II

STATE OF WASHINGTON

Respondent,

vs.

DANIEL WAYNE LACKEY

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
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ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 07-1-00078-5

BRIEF OF RESPONDENT

JUELANNE DALZELL
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Date: December 18, 2008

 ORIGINAL

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BRIEF OF RESPONDENT

State of Washington v. Lackey

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STATEMENT OF THE CASE

I Restatement of Issues Presented

- A. The 323 day period between arraignment and trial resulted from prosecution witness illness and defense delays from switching attorneys and did not constitute a violation of Mr. Lackey's rights.
- B. Mr. Lackey appeared in court on Monday, July 23, 2007, for a 3.6 hearing without an attorney, because:
- his attorney withdrew the previous Friday ;
 - his trial was scheduled for Monday, July 30, 2007;
 - his speedy trial period was almost expired; and
 - a new attorney had not yet been appointed.
- Based on these factors, the trial court's rescheduling and requiring Mr. Lackey to extend his speedy trial period fully observed his right to be represented by an attorney.
- C. The admission of the body wire recording and transcript did not violate Mr. Lackey's right to confrontation since body wire data is not testimonial.
- D. The prosecutor did not fail to disclose exculpatory material about Ms. Halverson and did not impair Mr. Lackey's right to compel witnesses.

II Statement of Facts

Procedural Facts

Mr. Lackey was arraigned on May 7, 2007.¹ RP, 4. Trial commenced on March 25, 2008, 323 days later. Because Mr.

¹ Each reference to the report of proceedings refers to the appropriate date, when possible, with the exception of the jury trial, which is referred to as

Lackey filed an affidavit of prejudice against Judge Verser, all proceedings were heard by court commissioners or visiting judges. RP, 5 (June 22, 2007). The sequence of events was as follows:

May 7, 2007: Arraignment. Mr. Hynson retained by Mr. Lackey as counsel. Dates are set: Omnibus Hearing May 18, 2007; pretrial hearing June 22, 2007; and Trial July 2 and 3, 2007. RP, 10.

June 22, 2007: Defense counsel moves to withdraw. RP, 3. Court denies the motion without prejudice. RP, 6. Mr. Hynson declares he will not be ready for trial on July 2nd. RP, 7. Trial date is reset to July 30, 2007.

July 20, 2007: Defense counsel renews motion to withdraw due to conflict of interest. RP, 3. Court grants the motion. RP, 6.

July 23, 2007: Mr. Lackey appears without counsel. After a short discussion of Mr. Lackey's finances, the court appoints attorney James Gilmore to represent Mr. Lackey. RP, 5. The prosecutor references CrR 3.3(c)(2)(viii) represents her

TRP. Where the appropriate date is not apparent, the date is referenced in parenthesis.

understanding that the speedy trial clock starts anew due to the withdrawal of the first defense attorney. RP,6. Mr. Lackey asked for an "earlier" trial date, although he recognized the need to give his new attorney time to prepare. RP, 6. Pretrial set for August 10, 2007, and trial set for August 20 and 21, 2007. RP 11

August 10, 2007: The State moves to continue the trial due to the illness of a material witness, Detective Miller. RP, 3. The State asks for a trial date of October 1 because of "some prior commitments." RP,4. Defense counsel states that the defense is unwilling to waive speedy trial. RP,4. Mr. Lackey objects to any continuance that is beyond the speedy trial expiration date. RP, 5. The court grants a continuance of the trial date to October 1, 2007. RP, 6.

August 31, 2007: The State again moves to continue due to "one of [its] officers is unavailable." RP, 3. The next trial date available for a visiting judge is October 29, 2007. RP, 6. Mr. Lackey did not object to that date. RP, 6. Mr. Lackey signs a speedy trial waiver. RP,9. The speedy trial waiver does

not reflect an expiration date, but Mr. Lackey consents to a trial date of October 29, 2007. CP, 19.

September 21, 2007: Discussion of a violation of Mr. Lackey's conditions of release. RP, 1 et. seq.

October 10, 2007: Court increases bail by \$20,000 due to repeated violations of conditions of release. RP, 20.

October 12, 2007: More discussion of conditions of release. RP, 1 et. seq.

October 19, 2007: Mr. Lackey appears in court. RP, 4. Defense counsel Gilmore, appearing by telephone, announces his intention to file several pre-trial motions and needs a short continuance to properly prepare the motions. RP, 4. He asks to move the trial date to November 5. RP, 3-4. The court treats the request as waiving the right to speedy trial for the period covered by the motion. RP, 9. The Court set a pre-trial review date for October 26 to decide when the trial date should be. RP, 11.

October 26, 2007: Mr. Lackey appears in person. Mr. Gilmore, appearing again by telephone, reiterates his request for a November 5 trial. RP, 4. The clerk announces that the

November 5 date has been taken by another case. RP, 4. The next available date with a visiting judge was December 10. RP,4. Mr. Gilnore is unavailable on December 10 due to another trial in Alaska. RP, 4. The clerk stated that the next available date after December 10 is in March. RP, 5. Mr. Gilmore expresses no opposition to continuance. RP, 8. After speaking privately with Mr. Lackey, Mr. Gilmore asks for a hearing in front of the visiting judge on November 5. RP,11. The court sets a status hearing for that date. RP,11.

November 5, 2007: Status hearing: Mr. Gilmore states that he and Mr. Lackey "have some conflicting issues on the status of the speedy trial clock ticking." RP, 7. Mr. Gilmore states Mr. Lackey is available for trial on December 10, but he is not. RP, 7. The trial is set for January 7 and 8, 2008. RP, 12.

December 28, 2007: Mr. Gilmore advises he has "previously preserved our speedy trial right" and is ready to go to trial on January 7. RP, 4. The State advises the court that another case with priority is also scheduled to go to trial on January 7. RP, 3. The court schedules a trial date for February 4. RP, 6.

January 17, 2008: Mr. Lackey files a motion to dismiss for violation of his right to speedy trial. CP, 50.

January 25, 2008: The State brings a motion to continue the trial because Detective Miller is in the hospital with a heart condition. CP, 51; RP, 3. The motion states that Detective Miller will be on "medical leave for approximately four weeks." CP, 52. Mr. Lackey continues to object to any trial continuances. RP, 4-5. The court grants the motion to continue. RP, 7. Trial is set for March 24.

February 4, 2008: The court hears Mr. Lackey's motion to dismiss for violation of his speedy trial rights. CP, 90. After reviewing the procedural history of the case, the trial court rules that the last commencement date under CrR 3.3 was December 19 and that the State had 90 days from that date to bring Mr. Lackey to trial. The court sets the last day for trial under CrR 3.3 as March 18, 2008. RP, 28. The court then deals with the issue that the trial is scheduled for March 24. RP, 29. Mr. Lackey objects to the trial date of March 24 on the ground that it exceeds the speedy trial expiration of March 18, as determined by the court. RP, 35. The court reviews a letter from Medrona Family Medicine that

Detective Miller "is recovering from hospitalization and illness [and it] is appropriate to defer trial and works assignments until March 2008." RP, 37-38. The court finds there is good cause to continue the trial in the administration of justice. RP, 39. The March 24 trial date remains unchanged.

March 24, 2008: Trial commences with pre-trial motions. RP, 1. Mr. Lackey is found guilty of two counts of Possession of Methamphetamine with intent to deliver within 1000 feet of a school bus stop, for the April 2nd and April 9th sales.

Substantive Facts

Joey Morris had an arrest warrant. TRP, 44. Deputy Brett Anglin located Mr. Morris on Second Street in Port Townsend on March 23, 2007. TRP 45-46,75. When Deputy Anglin arrested Mr. Morris, he had methamphetamine on his person. TRP, 45. Rather than charge him with drug possession, however, Deputy Anglin offered him the chance to work as an informant for the Sheriff's Office. RP, 45. As an informant, he was required in part to report daily to Detective Miller and obey all laws. TRP,81.

The State's theory was that Mr. Morris performed two controlled buys of methamphetamine on April 2 and April 9, 2007.

Under the State's theory, Mr. Lackey was acting as an accomplice on April 2 and as a principal on April 9. The first buy was done at 190 Second Street in Port Townsend. TRP, 50. Mr. Morris lived at that address with his girlfriend, Bonita Halverson.²Z TRP, 70-71. Mr. Morris was not wearing a body wire on April 2, but he was on April 9. TRP, 54, 68.

On April 2, 2007, Mr. Morris was strip searched and provided with photocopied buy money. TRP, 67-68. The buy money was two twenty-dollar bills. TRP, 68, Exhibit 11. Deputy Anglin watched as Mr. Morris approached 190 Second Street. TRP, 69. Reserve Deputy Bruce Turner was able to see Mr. Morris enter the house. TRP, 70-71. Ten minutes later, Mr. Morris came out of the house and returned to Deputy Anglin. TRP, 71. He was in possession of methamphetamine that he said he had purchased. TRP, 72.

Mr. Morris was asked to testify at trial about the purchase on April 2, 2007. The prosecutor did not question Mr. Morris about the controlled buy on April 9, Defense counsel offered for admission a transcript of Mr. Morris' debriefing from April 2. TRP, 33, Exhibit 12. The transcript was admitted without objection from the State.

² Ms. Halverson also uses the name of Newton in the record.

TRP, 133.³ Between April 2 and April 4, Mr. Morris moved out of Ms. Halverson's house. TRP, 89. A controlled buy was completed on April 4 at the house during that week utilizing a body wire. TRP, 90. On the wire, Ms. Halverson can be heard selling drugs to Mr. Morris. TRP, 90; CP, 56. Mr. Lackey was not present. TRP, 90. Ms. Halverson later pled guilty to delivery of a controlled substance stemming from this investigation. TRP, 71.

On April 9, 2007, Deputy Anglin picked Mr. Morris up at his home. TRP, 48. Mr. Morris was searched, as was his van, and he was provided with \$40 in photocopied buy money in the form of a twenty dollar bill and four five dollar bills. TRP, 48, 119, Exhibit 9. Mr. Morris tried to call Mr. Lackey, but received no answer. TRP, 50. Mr. Morris was equipped with a body wire on this transaction. RP, 51. Mr. Morris was unable to make a methamphetamine purchase. RP, 51. Mr. Morris tried later that day to call Mr. Lackey. TRP, 52. After two attempts, Mr. Lackey answered the phone and agreed to meet Mr. Morris on Foster Street. TRP, 52.

³ In Exhibit 12, Mr. Morris describes contacting Mr. Lackey and conversing with him. He asked Mr. Lackey, "Got anything happening?" Mr. Lackey said, "Yeah." Ms. Halverson then said, "Well, I'll go ahead and take care of it. You know, how much you want?" Mr. Morris asked for "40." Ms. Halverson then said, "I'll be right back." Ms. Halverson left, returned with methamphetamine, and exchanged the drugs for money. Mr. Lackey was close enough to observe the exchange.

The contact between Mr. Morris and Mr. Lackey was recorded by the body wire. Both the tape and the transcript of the tape were admitted into evidence without objection. TRF, 54, 61. Deputy Anglin watched Mr. Morris approach Foster Street. TRP, 64. Deputy Anglin was monitoring the body wire from his vehicle. TRP, 64. Mr. Morris said, "Here he comes." TRF, 64. As Mr. Morris said that, Deputy Anglin was driving by in his vehicle and he momentarily could see Mr. Morris and Mr. Lackey approaching each other. TRP, 64.

On the tape, Mr. Morris can be heard counting out \$ 40. Mr. Morris had some trouble with his count, but Mr. Morris confirmed he passed \$40. TRP, 121 4. Detective Miller confirmed he heard the \$40 being counted out. TRP, 171.

After the contact, Mr. Morris rejoined Deputy Anglin. TRP, 65. Mr. Morris was in possession of methamphetamine. TRP, 65.

⁴ The transcript is two pages long, most of which involves Mr. Lackey and Mr. Morris discussing the recent break up with Ms. Halverson. The relevant portion of the transcript is as follows (Exhibit 10):

Morris: Here he comes, here he comes. Yeah.
Dan: Perfect timing.
Morris: Uh-
Dan: It's in the timing.
Morris: It's in the timing. How you been.
Dan: Pretty Good.
Morris: Here's 20, and 10 four 5's.
Dan: Okay, what, oh okay good.
Morris: Forty. So what's up with you and Bonnie?
Dan: Yeah I've been fighting with her.

When Mr. Morris testified at trial, he was asked no questions by the prosecutor about what happened on April 9, 2007. TRP, 201-04.

Mr. Lackey did not testify and called no witnesses. TRP, 278. Mr. Lackey tried to call Ms. Halverson to testify about the events of April 2, but the trial court sustained her invocation of her right to remain silent. TRP, 21.8, 272.

ARGUMENT

III. Mr. Lackey's constitutional right to a speedy trial was not violated since the delays on both sides were reasonable and necessary for a fair trial

Mr. Lackey asserts that the trial court erred in denying his motion for dismissal for what he alleges was a violation of CrR 3.3. He contends, in that regard, that the continuances granted beyond March 18, 2008 were due to court congestion and that this was not sufficient reason to delay his trial.

Standard of Review

Generally, the State must bring a defendant who is in custody to trial within 60 days after his or her arraignment. CrR

3.3(b)(1), 3.3(c)(1). The parties may agree to continue the trial past 60 days or “the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(2). “[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

A trial court's grant or denial of a motion for a CrR 3.3 continuance or extension will not be disturbed absent a showing of a manifest abuse of discretion." *State v. Silva*, 72 Wn.App. 80, 83, 863 P.2d 597 (1993).

“We will not disturb the trial court's decision unless the appellant or petitioner makes ‘a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’ ” *Downing*, 151 Wn.2d at 272, 87 P.3d 1169 (alteration in original) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A decision is manifestly unreasonable if the court takes a position and decides the issues in a way that no other reasonable person would do, despite applying the correct law to facts it found supported by

the evidence. If the trial court's decision relies on unsupported facts or applies the incorrect legal standard, its discretion is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The continuance to March 24

“The unavailability of a material state witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant.” *State v. Nguyen*, 68 Wn.App. 906, 914, 847 P.2d 936 (1993). The court scheduled trial dates so that Mr. Lackey had the very next available visiting judge date. Mr. Lackey likens this situation to routine court congestion, which we generally have found not to be a valid reason for a continuance. See *State v. Mack*, 89 Wn.2d 788, 793-94, 576 P.2d 44 (1978); *State v. Kenyon*, 143 Wn.App. 304, 313-14, 177 P.3d 196 (2008); *State v. Smith*, 104 Wn.App. 244, 251-52, 15 P.3d 711 (2001).

Here, Mr. Lackey rejected the sole Jefferson County Superior Court judge, thus requiring that all of his proceedings be with a visiting judge. This necessarily made scheduling more

difficult. Most of the delays were a result of defense attorney replacements and their scheduling difficulties. The state requested continuances only due to the illness of Detective Miller and the unavailability of an officer, both material witnesses.

These problems were not routine and were unavoidable. See *Smith*, 104 Wn.App. at 252, 15 P.3d 711. The state's witness unavailability was of short duration and the delay caused no prejudice to Mr. Lackey

The court's decisions to grant extensions and deny dismissal were reasonable and should not be overturned.

Constitutional right to a speedy trial

Mr. Lackey argues that the period of 323 days from his arrest to his trial violated his constitutional right to a speedy trial.

The U.S. Supreme Court held that a balancing test was appropriate to determine when a defendant's speedy trial right had been violated. Their test identified four factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972).

“[T]he constitutional right to speedy trial is not violated at the expiration of a fixed time, but at the expiration of a reasonable time.” *State v. Monson*, 84 Wn.App. 703, 711, 929 P.2d 1186 (1997) (citing *State v. Higley*, 78 Wn.App. 172, 184-85, 902 P.2d 659 (1995)).

When determining whether delay is unconstitutional, the court considers the length of the delay, the reason for the delay, whether the defendant asserted the right, the prejudice to the defendant, and such other circumstances as may be relevant. *State v. Whelchel*, 97 Wn.App. 813, 823-24, 988 P.2d 20 (1999) (quoting *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972))). Notably, the presumption that delay has prejudiced the defendant “ ‘intensifies over time.’ ” *State v. Corrado*, 94 Wn.App. 228, 233, 972 P.2d 515 (1999) (quoting *Doggett v. United States*, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992))

The unavailability of a key witness is a valid reason for delaying a trial. *Barker*, 407 U.S. at 531, 92 S.Ct. 2182.

In this case, the only delays caused by the state were because of unavailability of two police officers, both material

witnesses. These were valid reasons for delaying the trial and Mr. Lackey's constitutional rights were not abridged. Mr. Lackey's motion should be denied.

IV Mr. Lackey's right to an attorney was not denied on July 23, 2007

Mr. Lackey argues that on July 23, 2007, he appeared without an attorney at a CrR 3.6 hearing and the court violated his constitutional right to be represented by an attorney by rescheduling his trial and insisting he sign a speedy trial waiver. Mr. Lackey admits the speedy trial waiver is immaterial. Appellant's Brief , 17.

The court has upheld the Sixth Amendment right to counsel at any stage of proceedings where there is a possibility of prejudice to the defendant. *Garrison v. Rhay*, 75 Wn.2d 98, 102, 449 P.2d 92 (1968) ("The constitutional right to have the assistance of counsel arises at any critical stage of the proceedings, and a critical stage is one in which there is a possibility that a defendant is or would be prejudiced in the defense of his case."); see also *Hamilton v. Alabama*, 368 U.S. 52, 53, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (right to counsel attaches at any "critical stage in a criminal proceeding"). This means critical aspects of the proceeding must

be conducted in the presence of defense counsel, with notice and opportunity for full participation on behalf of his client. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (holding Sixth Amendment right to counsel was violated when defense counsel was not notified in advance about the nature of a psychiatric examination).

In this case, merely rescheduling the trial, including signing a speedy trial waiver did not prejudice Mr. Lackey, thus it was not a critical stage of the proceedings and his motion should be denied.

V Admission of the body wire recording and transcript did not violate Mr. Lackey's right to confrontation

The record shows that Mr. Morris, the police informant, made controlled buys of methamphetamine from Mr. Lackey on two occasions. On the second occasion Mr. Morris wore a body wire and the police recorded the transaction. At trial the prosecution called Mr. Morris to testify about the first buy. The prosecution then called the police officers to testify about both buys, including the body wire recording. Mr. Lackey argues that because the prosecution did not ask Mr. Morris about the recording, that he was denied his right of confrontation.

The police recording of a drug transaction is not testimonial. *State v. Castellanos*, 132 Wn.2d 94, 101, 935 P.2d 1353 (1997); *Pino v. State*, 849 P.2d 716 (Wyo.1993) (admitting both audiotape of drug transaction and transcript thereof because the evidence was not testimonial). Since the recording was not testimonial, the right of confrontation does not apply to the recording.

In addition, the prosecution may call their witnesses in the order that best serves their theory of the case. Mr. Morris was on the stand and could have been cross-examined if the defense so chose. The right of confrontation was not violated.

This motion should be denied.

VI Mr. Lackey's right to compel witnesses was not unconstitutionally impeded by the prosecutor or court

Mr. Lackey contends Ms. Halverson could not have been prosecuted based on the plea agreement she had with the state and that therefore the prosecutor was at fault for letting the court and defense erroneously assume she was at personal risk if she testified. The defendant argues that he was entitled to have had the court grant immunity to Ms. Halverson so that she could be

compelled to testify when called by the defendant. Mr. Lackey implies the prosecutor has a duty to grant immunity to witnesses.

However, CrR 6.14, provides for the granting of immunity at the discretion of the trial court Only upon the motion of the prosecution. The absence of a right in a defendant to compel a grant of immunity to a witness is consistent with the fact that the prosecutor, as an agent of the state, performs an important role in deciding whether or not to grant immunity.

The making of a motion to grant immunity must be left to the discretion of the State's representative. *State v. Matson*, 22 Wn.App. 114, 120, 587 P.2d 540 (1978).

A defendant does not have a right to a grant of immunity to a witness, or to compel such a grant. *Matson* at 121 quoting *United States v. Allstate Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974), Cert. denied, 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975); *Sanders v. State*, 69 Wis.2d 242, 230 N.W.2d 845 (1975).

Mr. Lackey's motion is without merit and should be denied.

CONCLUSION

The State respectfully requests that this Court deny Appellant's motion and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 18th day of December, 2008

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney



By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,
vs.
DANIEL WAYNE LACKEY,
Appellant.

Case No.: 37682-2-II
Superior Court No.: 07-1-00078-5

DECLARATION OF MAILING

08 DEC 23 AM 10:10
STATE OF WASHINGTON
BY [Signature]

COURT OF APPEALS
DIVISION II

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 18th day of December, 2008, I mailed, postage prepaid, a copy of the State's

BRIEF OF RESPONDENT to the following:

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Daniel W. Lackey
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 18th day of December, 2008, at Port Townsend, Washington.

[Signature]
Janice N. Chadbourne
Legal Assistant

DECLARATION OF MAILING
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