

FILED  
COURT OF APPEALS  
DIVISION II

09 MAY -4 AM 9:40

STATE OF WASHINGTON  
BY  \_\_\_\_\_  
DEPUTY

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

---

NO. 37798-5 -II

STATE OF WASHINGTON,

Respondent.

vs.

DONALD JAMES LYNCH,

Appellant.

---

On Appeal from the Superior Court of Lewis County

**STATE'S RESPONSE BRIEF**

MICHAEL GOLDEN  
PROSECUTING ATTORNEY  
Law and Justice Center  
345 W. Main St. 2nd Floor  
Chehalis WA 98532  
360-740-1240

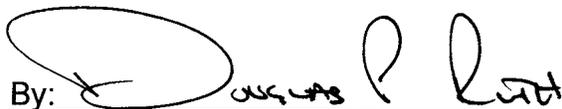
By:   
Douglas P. Ruth, WSBA 25498

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 1

**A. THE TRIAL COURT PROPERLY RECONSIDERED  
AND REVERSED ITS DISMISSAL OF THE TRIAL.....1**

**B. THE DATE OF MR. LYNCH'S TRIAL DID NOT  
VIOLATE EITHER CrR 3.3 OR THE SIXTH  
AMENDMENT OF THE U.S. CONSTITUTION.....3**

**1. The Time Between Municipal Court and Superior  
Court Arraignments.....3**

**2. Time Between the Trial Court's Dismissal Of  
Charges and Reinstatement by the Trial Court.....6**

**3. The Time Between The Trial Court Reversing Its  
Dismissal Order And The Date Of Trial.....9**

**4. The Defendant's Sixth Amendment Guarantee  
Of A Speedy Trial Were Not Violated By The State  
And Trial Court.....10**

**A. Length of the Delay.....11**

**B. B. The Defendant's Assertion of his Speedy  
Trial Rights.....11**

**C. The Reason for the Delay.....12**

**D. Prejudice to the Defendant.....15**

**C. MR. LYNCH RECEIVED CONSTITUTIONALLY  
ADEQUATE REPRESENTATION AT TRIAL.....20**

CONCLUSION..... 22

## TABLE OF AUTHORITIES

### **Washington Cases**

<i>Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000) .....	4
<i>Mark v. King Broadcasting Co.</i> 27 Wn.App. 344, 618 P.2d. 512 (1980).....	1
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999) .....	20
<i>State v. Barragan</i> , 102 Wn.App. 754, 9 P.3d 942 (2000).....	21
<i>State v. Brewer</i> 73 Wn.2d 58, 436 P.2d 473, 475 (1968).....	10
<i>State v. Christensen</i> , 75 Wn.2d 678, 453 P.2d 644, 649 (1969)...	11
<i>State v. Clark</i> , 129 Wn.2d 805, 920 P.2d 187 (1996).....	1
<i>State v. Collins</i> , 112 Wn.2d 303, 308-09, 771 P.2d 350 (1989)....	22
<i>State v. Corrado</i> 94 Wn.App. 228, 972 P.2d 515, 517 (1999).....	13
<i>State v. Dennis</i> , 67 Wn.App. 863, 840 P.2d 909 (1992) .....	2
<i>State v. Dowling</i> , 98 Wn.2d 542 (1983) .....	22
<i>State v. Greenwood</i> , 120 Wn.2d 585, 845 P.2d 971 (1993) .....	4, 10
<i>State v. Hoffman</i> , 150 Wn.2d 536, 78 P.3d 1289 (2003) ....	9, 17, 21
<i>State v. Horton</i> , 116 Wn.App. 909, 68 P.3d 1145 (2003).....	20
<i>State v. Madison</i> , 53 Wn.App. 754, 770 P.2d 662 (1989).....	21
<i>State v. O'Connell</i> , 137 Wn.App. 81, 95, 152 P.3d 349 (2007).....	21
<i>State v. Rice</i> 110 Wn.2d 577, 757 P.2d 889, 910 (1988).....	3
<i>State v. Scott</i> , 20 Wn.App. 382, 580 P.2d 1099 (1978) .....	1
<i>State v. Turner</i> , 143 Wn.2d 715, 23 P.3d 499 (2001) .....	20
<i>State v. Whelchel</i> , 97 Wn.App 813, 988 P.2d 20 (1999).....	8
<i>State v. Wieman</i> , 19 Wn.App. 641, 577 P.2d 154 (1978) .....	10

**Federal Cases**

*Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 2187 (1972) ..... 11

*Loud Hawk*, 474 U.S. 302, 314, 106 S.Ct. 648, 656 (9<sup>th</sup> 1986).....

.....11, 14, 16, 17, 18

*U.S. v. Colombo*, 852 F.2d 19, 23 (9th 1988) ..... 18

*U.S. v. Gilliss*, 645 F.2d 1269, 1273 n.7 (8<sup>th</sup> Cir. 1981)..... 17

## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

### ARGUMENT

Mr. Lynch makes several arguments regarding the procedural course of his case. None warrant reversal and dismissal of his conviction.

#### **A. THE TRIAL COURT PROPERLY RECONSIDERED AND REVERSED ITS DISMISSAL OF THE TRIAL.**

Mr. Lynch offers two arguments regarding the trial court's December 17, 2008 decision to reinstate his trial for assault. I will address these in turn.

First, Mr. Lynch argues that there is no superior court criminal rule allowing for a motion to reconsider. He is correct. However, the absence of a criminal rule does not prevent parties to a criminal action to seek reconsideration. Nothing precludes the a party from timely moving for reconsideration of a trial court's oral ruling. *See State v. Clark*, 129 Wn.2d 805, 814, 920 P.2d 187 (1996) (“Where the criminal rules are silent, the civil rules can be instructive as to matters of procedure...”). Since the criminal rules do not provide for reconsideration of orders, only relief from judgment, a criminal party may assert the civil rule reconsideration authority under CR 59. *State v. Scott*, 20 Wn.App. 382, 580 P.2d 1099 (1978) (applying CR 60(b) to criminal cases); *See also Mark v. King Broadcasting Co.* 27 Wn.App. 344,349, 618 P.2d. 512

(1980), *affirmed*, 96 Wn.2d 473, 635 P.2d 1081, *cert denied* 457 U.S. 1124 ("Where in a procedural area a civil rule speaks and a criminal rule is silent, the civil rule applies.")

Here, the state filed a motion for reconsideration. CP 102. The trial court disagreed with this characterization and treated the pleading as a CrR 7.8(b) motion. 12/17/07 RP 5. It did so, although the state did not claim that the court's prior ruling was subject to any of the five factors in CrR 7.8(b). The court, *sua sponte*, found that the state was making a motion under CrR 7.8(1), regarding mistakes. The court erred.

Granting the state's motion on the basis of CrR 7.8 was a mistake by the court. This is Mr. Lynch's second argument and he is correct to assert it. A court may not grant a motion to vacate a judgment pursuant to CrR 7.8 for legal mistake. *State v. Dennis*, 67 Wn.App. 863, 865, 840 P.2d 909 (1992). However, the trial court did have authority to grant the state's motion. As the state suggested, CR 59 gave the trial court the authority to reconsider its earlier ruling. Unlike under CrR 7.8, a party may base a CR 59 motion for reconsideration on either an error of law or that the contested decision is contrary to law. CR 59(a)(7) & (8).

The motion was also timely. The state filed the motion on August 1, 2007 and noted the motion for a hearing on August 16. CP169. Thus, CR 59 provided an independent basis for the trial court's ultimate reversal of its ruling. As such, the court's mistaken reliance on CrR 7.8(b) to reverse its ruling was harmless. The standard for determining the prejudicial affect of a violation of court rules that does not implicate constitutional guarantees is whether "within reasonable probabilities, had the error not occurred, the

outcome of the trial would have been materially affected. *State v. Rice* 110 Wn.2d 577, 616, 757 P.2d 889, 910 (1988) *reversed on other grounds*, 44 F.3d 1396 (9th Cir. 1995), *opinion vacated in part on rehearing en banc*, 77 F.3d 1138 (9<sup>th</sup> Cir. 1996) (*quoting State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Clearly here, this case would not have been affected if the trial court had ruled under CR 59 rather than pursuant to CrR 7.8(b). As the report of proceedings for the December 17, 2007 hearing shows, the trial court's use of CrR 7.8(b) did not have a substantive affect on the court's ruling. 12/17/07 RP. It cannot be said that the trial court's reliance on the criminal rules rather than on the civil rules "materially affected" his decision to overrule the court's prior decision to dismiss.

**B. THE DATE OF MR. LYNCH'S TRIAL DID NOT VIOLATE EITHER CrR 3.3 OR THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION.**

Mr. Lynch makes several arguments based upon the time for trial rule, CrR 3.3 and the U.S. Constitution's speedy trial guarantees. The state will group these arguments and address them according to the chronology of Mr. Lynch's case.

**1. The Time Between Municipal Court and Superior Court Arraignments.**

Mr. Lynch argues in his Statement of Additional Grounds for Review that the period of time he was subject to prosecution in municipal court counts toward the time for trial period under CrR 3.3. Additional Grounds at 20. He misreads the criminal rule. CrR

3.3(c) is clear that the commencement date of a time for trial period is arraignment *under CrR 4.1*. CrR 3.3(c). This limitation is also found in the definition of "arraignment." The rule defines the term as "the date determined under CrR 4.1(b)"<sup>1</sup> Thus, not any arraignment launches a time for trial period, but only one conducted by superior court. For CrR 4.1 states,

"The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in *the adult division of the superior court...*" CrR 4.1(a)(1) (emphasis added)

Mr. Lynch's reading of the rule makes the italicized phrase meaningless. Court rules, like statutes, are read to give meaning to each word. See *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993) (court rules should be interpreted like statutes); *Bellevue v. Lorang*, 140 Wn.2d 19, 25, 992 P.2d 496 (2000) (statutes should be read to give each word meaning and effect, so that no term is rendered superfluous). Mr. Lynch violates this principle of construction when he reads the commencement date rule as applying to non-superior court arraignments. It does not. Clearly, the rule limits initiation of the 90-day time for trial period in CrR 3.3(b) to the date of arraignment in a superior court. In this case, that date is April 19, 2007. A correct reading of the rule excludes municipal or district court arraignments from the scope of the rule.

---

<sup>1</sup> The reference to subsection (b) to CrR 4.1 seems to be an error as subsection (b) regards objections to an arraignment date. For purposes of this response, the state assumes the correct reference should be to CrR 4.1(a).

Mr. Lynch challenges this conclusion through comparing the text of the former CrR 3.3(g)(4) with the current CrR 3.3(e)(4). He claims that this comparison indicates an opposite reading of the rule than the state's reading. Br. of Appellant at 21. This argument fails when we recognize that the comparison is made in a vacuum. The argument does not consider all the changes made to CrR 3.3 in 2003. Indeed, the Supreme Court rewrote the rule. Thus, comparisons of the former and current rules must be placed in the context of all the changes made in 2003.

Mr. Lynch is correct that former CrR 3.3(g)(4) referred to arraignments in superior court while the current rule does not. This difference is immaterial once when we consider that the former rule also did not reference CrR 4.1 when defining "arraignment." Former 3.3(c)(6). Formerly, the rule merely defined the term as the date when "a plea is entered." This broader definition necessitated restricting the excluded period for dismissals in former 3.3(g)(4) to "arraignment or rearrangement in superior court." This is not true in the new rules. Once Supreme Court limited the definition of arraignment to arraignments occurring in superior court and specified the commencement date as that of superior court arraignments, there was no need to define the excluded period for dismissals in terms of a superior court arraignment. To do so would have been redundant.

In fact, the 2003 changes in the rule support the state's position that the time for trial period in municipal court does not apply once a case is moved to superior court. Beyond the clear language of the new rule, the comments of the Time for Trial Task Force, which was created by the Supreme Court to review CrR 3.3,

support this interpretation. Regarding the commencement date for time for trial periods, the Task Force's comments state,

"Under proposed subsection 3.3(c)(1)... the time for trial period commences on the date of defendant's arraignment as determined under CrR 4.1. By using this date, the proposal departs from the existing rule with regard to cases that are initially filed in juvenile court or district court. Under the existing rule, when cases move from juvenile court or district court to superior court, time for that case spent in juvenile court or district court is counted toward the superior court time for trial deadline, shortening the time in superior court for getting the case ready to be heard. See existing CrR 3.3(c)(2) through (c)(6). Under the Task Force proposal, these complicated provisions from the existing rule are deleted. Doing so ensures that cases will have adequate time to be prepared for trial in superior court and reduces the possibility of coordination problems between different court levels." 12/17/07 RP 9-10.

Clearly, the new rules eliminated any connection between the superior court time for trial and the time for trial in other courts. After 2003, the rule simply commenced the superior court's time for trial period at arraignment in superior court. Mr. Lynch was arraigned in the Lewis County Superior Court on April 17, 2007; this commenced his 90 day time for trial period on that day. CrR 3.3(b)(2).

## **2. Time Between the Trial Court's Dismissal Of Charges and Reinstatement by the Trial Court.**

Mr. Lynch next contends that the time between the trial court's dismissal of his trial on July 30, 2007 and the reinstatement of the trial on December 17, 2007 should count as a time for trial

period. Additional Grounds at 22; Br. of Appellant at 15. This contention is based upon the absence of any final order filed by the trial court to dismiss the charges. Mr. Lynch argues that each day the trial court did not file a dismissal order was a day that counted towards the speedy trial limit. His argument is not based on any rule and he fails to establish a Sixth Amendment violation.

Initially, it is clear that Mr. Lynch's application of the time for trial rules places prosecutions in an untenable position. By his argument, whenever a court does not actually enter its order to dismiss within the CrR speedy trial period, a prosecution is forced to bring the case to trial in direct contravention of the dismissal. If the prosecution does not do so, a court will be forced to automatically dismiss on speedy trial grounds if the court ultimately reverses its order upon a motion for reconsideration, a CrR 7.8(b) motion to vacate, or on any other basis. In circumstances where a trial court, similar to the facts of this case, orally dismisses a case on the day before the speedy trial period is to expire the prosecution is forced to make a Hobbesian choice. The state must either ignore the trial court's order or surrender its right to move for reconsideration. Reading the rule in this manner is absurd. It makes the option to file a motion for reconsideration meaningless in these and similar circumstances.

At the same time, it appears that no provision of CrR 3.3 directly applies to oral rulings to dismiss. CrR 3.3 does not provide satisfactory guidance on how to tally the time between an oral order to dismiss and either entry of the order or a successful reconsideration motion. Mr. Lynch recognizes this inadequacy of the rule as well. He notes that "there is no criminal rule governing

motions to reconsider... there is nothing in CrR 3.3(e) that covers a situation like this." See Appellant's Brief at 16 & 17. Where no provision of CrR 3.3 applies to define the appropriate deadline for trial, this court may apply a provision of CrR 3.3 by analogy and analyze the result for consistency with constitutional speedy trial principles. CrR3.3(a)(4); *State v. Welchel*, 97 Wn.App 813, 818, 988 P.2d 20 (1999).

The implicit ruling of the trial court excluding the time period between dismissal and its subsequent reinstatement of charges is supported by analogy to CrR 3.3. The rule that is most applicable to the circumstances presented by Mr. Lynch's case is CrR3.3(e)(4). This subsection directs courts to exclude the periods between a dismissal and refiling of a charge in computing the time for trial. While this provision does not directly apply to these facts, this court should apply it by analogy to affirm the trial court's ruling. First, the rule is ambiguous. The language of the provision does not specify that the excluded period is triggered only by a written order or entry of a "dismissal of a charge" Presumably, an oral ruling dismissing a trial is satisfactory to initiate exclusion of a segment of time.

Second, applying the rule to an oral dismissal avoids hampering prosecutions while they wait for a court to either enter its order or hear a motion for reconsideration. By tolling the speedy trial deadline upon an oral order, the prosecution isn't prejudiced against having an option to seek reconsideration.

Third, the intent of the provision is clear and supports applying this rule by analogy to our facts. The rule excludes the period after dismissal because dismissal releases a defendant from

the burdens and strains that accompany a criminal charge. Once charges are dismissed, the protections provided by a speedy trial are unnecessary. See *State v. Hoffman*, 150 Wn.2d 536, 539, 78 P.3d 1289 (2003). This was true after the trial court dismissed Mr. Lynch's charges. He was unburdened by the threat of a trial and his liberty unencumbered by any release restrictions. After the trial court dismissed the trial, Mr. Lynch was not under restraint and for all intents and purposes he could state that he was no longer subject to prosecution. There was no purpose to holding the state to a deadline for resolving the case when, at that point, it had been resolved against the state.

### **3. The Time Between The Trial Court Reversing Its Dismissal Order And The Date Of Trial.**

The last period of time that Mr. Lynch is concerned with is the time period from December 17, 2007 to his trial on March 10, 2008. Regarding this period, Mr. Lynch claims the trial court provided the prosecution excessive time under the rules to bring him to trial. He argues that the trial court incorrectly recommenced the 90-day time for trial period when on December 17, 2007 it overturned its ruling dismissing the case. He asserts that the trial court improperly applied Rule 3.3 (c)(2)(iii) following its ruling. Mr. Lynch's takes adopts and overly narrow a view of the rule.

The state again invites this court to analogize from a provision of CrR 3.3 to address Mr. Lynch's argument. Mr. Lynch claims that CrR 3.3(c)(2)(iii) cannot apply because there was no motion for a new trial under CrR 7.5 in this case. But the rule does not limit itself to a new trial based on a post verdict motion. This

was true of the former rule regarding the time for trial after a mistrial or new trial. Former CrR 3.3(d)(3) specified the new time period after mistrials ordered "before verdict" and new trials ordered "after verdict." The 2003 amendments removed these references. This change indicates an intention to broaden the application of the rule beyond simply to CrR 7.5 new trial orders.

#### **4. The Defendant's Sixth Amendment Guarantee Of A Speedy Trial Were Not Violated By The State And Trial Court.**

The proceeding arguments establish that CrR 3.3 fails to apply, except by analogy, to either the trial court's oral dismissal of the case or its subsequent reversal of that order. Thus, if this court is unwilling to extend CrR 3.3(e)(4) and CrR 3.3(c)(2)(iii) to address the time of trial of this case, we must look to the Sixth Amendment of the U.S. Constitutional to determine if the trial court erred. This constitutional analysis is independent of any application of the CrR 3.3 rules to the case. The provisions of CrR 3.3 do not set constitutional standards, but "merely establish a framework for the disposition of criminal proceedings." *State v. Wieman*, 19 Wn.App. 641, 644-45, 577 P.2d 154 (1978). The speedy trial guarantees of the U.S. Constitution may support a time period different from those measured inflexibly by the state rule and, thus, demand a separate analysis. Where no criminal rule applies directly, the constitutional standards control the computation of what is acceptable. See *State v. Brewer* 73 Wn.2d 58, 62, 436 P.2d 473, 475 (1968); *State v. Greenwood*, 57 Wn.App. 854, 860, 790 P.2d 1243 (1990), *aff'd. in part, rev'd in part*, 120 Wn.2d 585, 845 P.2d 971 (1993).

The U.S. Supreme Court has identified four factors to apply when determining whether a defendant's right to a speedy trial is violated. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 2187 (1972). The four factors are the length of the delay, the reason for the delay, whether or not the defendant asserted the right, and the prejudice to the defendant. *Barker*, 407 U.S. at 522. These factors attempt to measure the degree a defendant was deprived of the guarantees provided by the speedy trial protections of the US Constitution. Application of the factors to Mr. Lynch's prosecution reveals that he was adequately guaranteed his speedy trial rights.

#### **A. Length of the Delay**

The first Barker factor, the length of the delay, is a triggering mechanism invoking the other factors if the delay is "presumptively prejudicial." *Loud Hawk*, 474 U.S. 302, 314, 106 S.Ct. 648, 656 (9<sup>th</sup> 1986). Here, the time between arraignment on April 19, 2007 and trial on March 10, 2008 was approximately eleven months. The state concedes that this amount of time triggers further application of the Barker factors. However, the state does not concede that this period of time is prejudicial. *See State v. Christensen*, 75 Wn.2d 678, 686, 453 P.2d 644, 649 (1969) (delay itself is not prejudicial unless the defendant demonstrates that, because of it, his ability to establish a defense was prejudiced)

#### **B. The Defendant's Assertion of his Speedy Trial Rights**

Skipping over the second factor momentarily, the third factor - the extent to which a defendant asserted his speedy trial rights -

weighs in Mr. Lynch's favor. He consistently sought protection from CrR 3.3 against a delayed prosecution.

### **C. The Reason for the Delay**

Mr. Lynch concentrates his argument on the concern embodied in the second factor, the reason for the delay. Mr. Lynch claims that the state bears the full responsibility for the delay. This is incorrect. The record is replete with statements by the Lewis County Superior Court judges that they are unable to hear motions in the trial due the recusal of all three Lewis County Superior Court Judges due to personal connections to the defendant. Consequently, all scheduling was handled by another jurisdiction and all rulings made by a visiting judge. The delay this reasonably caused was not due to dilatory prosecution by the state, but at its root the protection of Mr. Lynch's right to have impartial adjudication by the presiding judge. This extenuating circumstance of the case weighs in the state's favor. At least to some degree, trial delay was due to scheduling and not the result of purposeful, negligent, vexatious or arbitrary action by the state.

This is also true of the period of time between the July 30, 2007 trial dismissal and the December 17, 2007 rehearing on the matter. While the lapse of this period of time was not due to Mr. Lynch's actions, neither was it due to undue delay by the state. The state entered its motion to reconsider the trial court's ruling two days after the court announced its decision to dismiss the case. CP 169. As quickly, the state requested an August 16, 2007 hearing on the motion. At that hearing, a Lewis County Superior Court judge reset the matter to August 30, 2007 due to the need to

have the motion heard by a visiting judge. CP 138. 8/16/07 RP 1. It is unclear from the record whether this hearing ever occurred. The record does show a hearing in Grays Harbor on November 13 at which both parties attended. The hearing was again postponed, until December 5, 2007, and again to December 17, 2007. CP 101, 96. The last continuance was due to flooding that closed the courthouse. The state's reconsideration motion was heard on December 17, 2007. 12/17/07 RP 1.

This record reveals simply that the delay during this period was caused by the natural difficulties of scheduling a hearing with another jurisdiction's court. Before trial and on appeal, Mr. Lynch does not claim that the state was not diligent in its prosecution of the case during this period. He only highlights the fact that the trial court failed to enter its ruling. In fact, the state diligently filed and then sought a hearing on its reconsideration motion. There is no evidence that it failed to pursue the case during this period with the "customary promptness" of a criminal prosecution. *State v. Corrado* 94 Wn.App. 228, 233, 972 P.2d 515, 517 (1999) (At the threshold, a defendant who makes a speedy trial argument must show that the State failed to prosecute his case with customary promptness.). The delay certainly was not purposeful or oppressive.

Moreover, delay during this period was at its base the result of the state's efforts to correct a mistake of law, the court's reliance on outdated law. This was not a frivolous effort; the trial court ultimately found that it had misanalyzed the CrR 3.3 issue that Mr. Lynch raised. 12/17/07 RP 25. The value of this type of state action must be weighed against the speedy trial rights of the

accused. Referring to interlocutory appeals, the U.S. Supreme Court noted,

"Given the important public interests in appellate review, *supra*, at 655, it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay. In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and-in some cases-the seriousness of the crime. *Loud Hawk* 474 U.S. 302, 315, 106 S.Ct. 648, 656 (9<sup>th</sup> 1986)

The same may be stated of a motion for reconsideration. Here, the state ultimately prevailed on its motion, the motion concerned a fundamental issue of the case, and it prevented the mistaken dismissal of a prosecution of a violent assault. As in *Loud Hawk*, the significance of bringing to the courts attention the relevant law on the criminal time for trial rules justified the delay during this period in Mr. Lynch's prosecution.

The final period that is the basis for Mr. Lynch's speedy trial claims is between December 17, 2007 when the trial court reinstated the trial and the trial date, on March 10, 2007. The cause for this time period is shared between the trial court's application of CrR 3.3(2)(iii), which provides a 90-day timeline for a new trial, and the three week continuance arranged between the state and Mr. Lynch. 2/21/08 RP 2. The trial court granted this request and moved the trial from February 25, 2008 to March 10, 2008.

During this period, there is again no showing of bad faith or dilatory prosecution by the state. The delay here was simply the

result of the state seeking application of the CrR 3.3 provision most relevant to the unusual circumstances of a trial judge reversing its dismissal prior to entry of a dismissal order.

#### **D. Prejudice to the Defendant.**

The fourth and final factor is the prejudice to the defendant caused by the delay. This factor should be filtered through the principles the speedy trial right was designed to protect. In *Barker*, the Supreme Court identified the relevant principles:

" (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. *Barker*, 407 U.S. at 532, 92 S.Ct. 2182 (citations omitted).

As already noted, Mr. Lynch was not prejudiced by the delay by any loss of liberty. To refute this conclusion, Mr. Lynch asserts that he continued to be under conditions of release after the dismissal, but this is untrue. Initially, the trial court placed him on his own recognizance. 5/4/07 RP 5. Only two conditions applied to his release – that he not commit any criminal acts and that he appear for hearings. 6/14/07 RP 7. But after the trial court dismissed the trial and the charges based upon the time for trial rules, the court clearly removed all conditions of release. On August 16, 2007, Mr. Lynch inquired as to his status:

MR. LYNCH: Am I subject to conditions of release?

COURT: No.

MR. LYNCH: So I don't have to come to the hearing?

COURT: Yes, you do.

8/16/07 RP 2. Thus, Mr. Lynch faced no further restrictions on his freedom after the trial court's July 30, 2007 ruling. Nor did the mere requirement that he attend hearings invoke the constitutional speedy trial protections. *Loud Hawk*, 474 U.S. at 312. In this respect, the trial court's dismissal acted as a formal ruling releasing him from restraint.

This absence of any limitation on Mr. Lynch's liberty continued after the trial was reset. Either through design or negligence, the state did not request the trial court impose any conditions of release. The record is devoid of any new restrictions placed on Mr. Lynch. His liberty continued to be unconstrained throughout the post-December 17, 2007 period.

Turning to the second interest identified by the *Barker* Court, Mr. Lynch's anxiety and concern between the July 30, 2007 and December 17, 2007 hearings should have been minimal. In fact, the Supreme Court in *U.S. v. MacDonald* found that an order of dismissal relieves the court of any speedy trial restrictions:

"Once charges are dismissed, the speedy trial guarantee is no longer applicable. At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation. Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life... After the charges against [a defendant] are dismissed, 'a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a

defendant who has been arrested and held to answer." Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation." *United States v. MacDonald*, 456 U.S. 1, 9, 102 S.Ct. 1497, 71 L.Ed.2d 696 (quoting *U.S. v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459 (1971)).

While the charges against the *MacDonald* appellant were dismissed by the charging authority, and not by oral decision of a trial court, the principles and considerations are largely the same. Mr. Lynch may have faced some uncertainty regarding the future of his case because the court did not enter an order. Consequently, the court could reverse its decision at any later date. But as already established above, whether an order is made orally or is entered, a trial court may reconsider a ruling under CR 59, CrR 7.8, or the ruling may be overturned on appeal. The anxiety for an accused connected to this uncertainty does not, by itself, justify dismissal. In *Loud Hawk*, the Supreme Court held that the delay caused by an interlocutory appeal did not justify dismissal due to speedy trial protections. *Loud Hawk*, 474 U.S. at 317. See also, *U.S. v. Gilliss*, 645 F.2d 1269, 1273 n.7 (8<sup>th</sup> Cir. 1981). The same should apply to the time between when a court issues an order and the court's reconsideration hearing regarding the order. See *Hoffman*, 150 Wn.2d at 539, 78 P.3d at 1290-91.

Moreover, where a court dismisses charges on a defendant's motion, there is no concern that the state is using the time between dismissal and recharging as a way to circumvent the speedy trial rules. Here, the state opposed dismissal. It was the mistaken application of superseded law by Mr. Lynch and the trial court that

resulted in the four and a half month delay between July 30 and December 17. Mr. Lynch was undoubtedly prejudiced by the state's efforts to correct his and the court's mistake, but this prejudice does not support reversal. "[C]ourts have implicitly assumed that if an indictment is dismissed on motion of a defendant, and the defendant is subsequently reindicted for the same offense, only the delay in prosecution of the second indictment is relevant for Sixth Amendment speedy trial purposes." *U.S. v. Colombo*, 852 F.2d 19, 23 (9th 1988)

Finally, Mr. Lynch also fails to establish that any period of delay impaired his ability to raise a defense. Mr. Lynch's ability to assert a defense was not compromised. The trial was originally scheduled for July 30, 2007, the day the court dismissed the charges. There is nothing in the record indicating that Mr. Mr. Lynch was not prepared for trial at that point. And he gives no reason on appeal why the delay compromised his ability to build a defense. In addition, as the *Loud Hawk* court observed,

"...delay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry this burden." *Loud Hawk*, 474 U.S. at 315, 106 S.Ct. at 656.

There is nothing in the record to establish that the state's edge of the sword became any sharper or the defendant's edge any duller during the 6 month delay between the first and second trial. After the trial court reinstated the trial, Mr. Mr. Lynch did state he was having difficulty finding a witness. 12/20/07 RP 10. However,

neither at trial nor on appeal has Mr. Lynch established the materiality of this witness. A showing of prejudice must be specific. *Christensen*, 75 Wn.2d at 686, 453 P.2d at 649.

The lack of any prejudice due to the delay caused by the trial court commencing a 90 day time for trial period is underscored by Mr. Lynch's request for a continuance on February 13, 2008 because he would not be ready for trial. 2/13/08 RP 38. Later, he withdrew that request. But on February 21, 2008 he consented to a three week continuance. 2/21/08 RP at 2. Clearly, the additional time resulting from the trial court's rulings did not limit his ability to prepare his defense.

In conclusion, Mr. Lynch does not convincingly assert that he suffered any discernible prejudice through the loss of any evidence or the testimony of any identifiable witness as a result of the delay. Nor does establish that the dismissal and reinstatement with a new 90 day time period was a deliberate, tactical, and oppressive scheme by the state to undermine Mr. Lynch's right to a timely disposition of the charges against him. The U.S. Supreme Court observed in *U.S. Ewell*:

".... in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public

justice.' *Beavers v. Haubert*, 198 U.S. 77, 87, 25 S.Ct. 573, 576, 49 L.Ed. 950. 'Whether delay in completing a prosecution... amounts to an unconstitutional deprivation of rights depends upon the circumstances... The delay must not be purposeful or oppressive,' *Pollard v. United States*, 352 U.S. 354, 361, 77 S.Ct. 481, 486, 1 L.Ed.2d 393. '(T)he essential ingredient is orderly expedition and not mere speed.' *Smith v. United States*, 360 U.S. 1, 10, 79 S.Ct. 991, 997, 3 L.Ed.2d 1041. *U.S. v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773, 776 (1966).

When the record and the actions of the state in prosecuting Mr. Lynch are looked at as a whole, the trial delay was the result of the natural procedural safeguards of the accused and of public justice, not purposeful action by the state to gain an advantage or limit Mr. Lynch's rights.

### **C. MR. LYNCH RECEIVED CONSTITUTIONALLY ADEQUATE REPRESENTATION AT TRIAL**

Mr. Lynch's final argument through appellate counsel, is that his trial counsel was ineffective for failing to object to the instruction that gave the jury the option to convict him of the lesser included crime of assault in the fourth degree. His argument does not justify reversal of his conviction.

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn.App. 909, 912, 68 P.3d 1145 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide

a basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Counsel's failure to object to the lesser included instruction may be described as a tactical decision to avoid a more serious conviction. Although Mr. Lynch believes that offering the lesser included offense as an option for the jury made it more likely that he would be convicted, it is just as likely that the instructions permitted the jury to find Mr. Lynch guilty of a less serious crime than the one with which he was charged. Counsel's conduct can be characterized as a legitimate trial strategy and defeats the claim of ineffective assistance of counsel. See *State v. Hoffman*, 116 Wn.2d 51, 112-13, 804 P.2d 577 (1991) (holding that murder defendants did not receive ineffective assistance for failure to request lesser included offense instructions); *State v. O'Connell*, 137 Wn.App. 81, 95, 152 P.3d 349 (2007).

Mr. Lynch, pro se, also challenges his counsel's effectiveness in not objecting to various testimony and a statement by the prosecutor in closing argument. His arguments also do not justify reversal. This court strongly presumes that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (citing *U.S. v. Strickland*, 466 U.S. 668), review denied, 113 Wn.2d 1002 (1989). The incidents that Mr. Lynch cites do not rise to this level. Mr. Lynch has failed to establish that

counsel's performance fell below an objective standard of reasonableness, or that he was prejudiced by it.

**D. THE TRIAL COURTS REVERSAL OF ITS ORDER TO DISMISS DID NOT CONSTITUTE DOUBLE JEOPARDY**

Mr. Lynch, pro se, also makes a double jeopardy claims. He bases the claim on *State v. Dowling*, 98 Wn.2d 542 (1983). Dowling was overruled in *State v. Collins*, which confronted facts very similar to the facts in this case. The court held that where a trial judge does not issue a formal order or make a journal entry of its order to dismiss, double jeopardy does not attach to a later reversal of the order to dismiss. *State v. Collins*, 112 Wn.2d 303, 308-09, 771 P.2d 350 (1989).

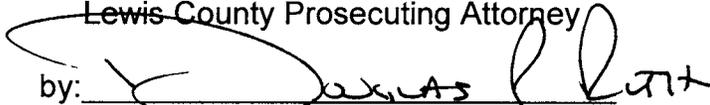
**CONCLUSION**

Mr. Lynch's conviction for assault in the fourth degree should be affirmed.

RESPECTFULLY submitted this 1<sup>st</sup> day of May, 2009.

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

by:

  
DOUGLAS P. RUTH, WSBA 25498  
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
DONALD JAMES LYNCH, )  
Appellant. )  
\_\_\_\_\_ )

NO. 37798-5 -II

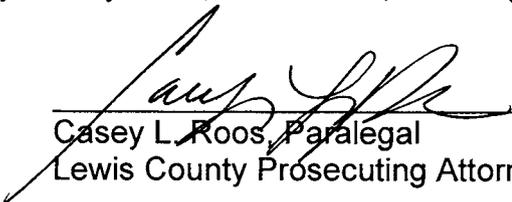
DECLARATION OF  
MAILING

09 MAY -4 11 59 AM '09  
STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY  
COURT OF APPEALS  
DIVISION II

Ms. Casey Roos, paralegal for Douglas P. Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 1, 2009 the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Ann Cruser, Esq.  
PO Box 1670  
Kalama WA 98625

DATED this 1st day of May 2009, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
Lewis County Prosecuting Attorney Office