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A. ARGUMENT IN REPLY

1. REVERSAL AND DISMISSAL WITH PREJUDICE IS REQUIRED BECAUSE HUGHES WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The State argues that “defendant’s time for trial rights were not violated when all continuances were found to be with good cause under the criminal rules.” Brief of Respondent at 9-12. The State is apparently unaware that defendants have a constitutional right to a speedy trial. Asserting that “[a]ll the delays and continuances fell under the criminal rules,” the States disregards the holding in State v. Iniguez, 143 Wn. App. 845, 180 P.3d 855 (2008), review granted, 164 Wn.2d 1025, 195 P.3d 958 (2008), where Division Three of this Court dismissed with prejudice convictions for armed robbery in the first degree despite the fact that the case maneuvered its way through the court rules. The Court concluded that “although the trial court complied with the speedy trial rights afforded the defendants under court rule, Mr. Iniguez’s constitutional right to a speedy trial was violated.” Iniguez, 143 Wn. App. at 849-50. The record substantiates that under the factors articulated in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and applied in Iniguez, Hughes was denied his constitutional right to a speedy trial. See Brief of Appellant at 10-15.

To support its assertion, the State cites State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984), but the facts in Campbell undermine the State's argument. Campbell was charged with three counts of aggravated first degree murder. Over Campbell's objection, defense counsel moved for a continuance based upon the vast amount of discovery to be completed and to afford Campbell a fair trial with effective assistance of counsel. The trial court granted a two-month continuance, believing the "administration of justice and the interests of the defendant will best be served." Campbell, 103 Wn.2d at 6-7. On appeal, Campbell argued that the trial court erred in granting defense counsel's motion for a continuance, waiving his right to trial in 60 days over his objection. The Washington State Supreme Court concluded that the trial court properly exercised its discretion and made a proper record of its reasons. Id. at 13-14. The trial court found that Campbell's counsel "could neither effectively represent him nor ensure that he received his constitutional right to a fair trial within 60 days of arraignment through no fault of their own but because of the complexity and length of the case." Id. at 15. Campbell's trial began within six months of arraignment. Id. at 15.

While a six-month delay is appropriate in a multiple murder case, an equal amount of time for a straightforward robbery case is clearly unreasonable, particularly when Hughes remained in custody, did not

personally cause any of the delay, persistently asserted his right to a speedy trial by objecting to the continuances, and his ability to testify in his defense was prejudiced by the delay.

Reversal and dismissal with prejudice is required because Hughes was denied his constitutional right to a speedy trial to prove his innocence.

2. REVERSAL IS REQUIRED BECAUSE HUGHES WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The State argues that defense counsel was not ineffective because his decision to discuss Hughes' prior theft convictions "went to the heart of his trial strategy." The State asserts that "the strategy in discussing his prior theft convictions was to question the current robbery charge with the use of a gun when defendant had no history of using a gun in the past." Brief of Respondent at 16-17. The record belies the State's argument.

The record reflects that after defense counsel revealed Hughes' past convictions during direct examination, the prosecutor requested a side bar before conducting cross-examination. 6RP 158. The prosecutor argued that although the court had previously ruled that any other convictions besides Hughes' 2007 theft conviction were inadmissible unless the State provided proof of the convictions, he should now be allowed to cross-examine Hughes about the other convictions:

Mr. Shaw asked the defendant if he had been convicted in 2006 and 2005 in Tacoma Municipal Court for shoplifting. And I believe he used the word “several occasions” or “several shopliftings” or something to that effect. The defendant said that, yes, he had. The truth is the defendant was convicted October 5th, 2005; October 21st, 2005; and February 14th, 2006. I believe that Mr. Shaw has opened the door to my cross-examination of the defendant about the fact that he has those three specific shoplifting convictions.

6RP 159-60.

Defense counsel responded that if he had not brought out Hughes’ other convictions, the State would have during cross-examination pursuant to ER 609. Defense counsel argued that “[t]he fact that I have elicited at least three convictions for crimes of dishonesty and now Mr. Neeb wants to extend that to four I think is cumulative and I think it’s unnecessary.” 6RP 161. The prosecutor replied, “I disagree with Mr. Shaw that I would have gotten into it had he not because of the prior Court’s ruling about documentation, which I had not provided.” 6RP 161. The court ruled that the State could clarify what Hughes had already testified to on direct examination. 6RP 163-64. Thereafter, the prosecutor elicited from Hughes that he had been convicted four times. 6RP 164-65.

The State’s argument has no merit given the fact that according to defense counsel, he questioned Hughes about his other convictions because he believed the State would do so during cross-examination, the

trial court's prior ruling notwithstanding. Moreover, if defense counsel planned to show a pattern of theft and shoplifting, he would not have objected to evidence of another shoplifting conviction. Furthermore, during closing argument, defense counsel never argued that Hughes' convictions for theft and shoplifting reflect that he is a thief but not a person who would commit armed robbery. 6RP 279-87. The record substantiates that defense counsel had no legitimate strategic or tactical reasons for asking Hughes during direct examination about prior convictions which the State would not have otherwise raised because it had not proven the convictions. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Reversal is required because defense counsel's performance fell below an objective standard of reasonableness and but for counsel's deficient performance, there is a reasonable probability that the result would have been different. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). See Brief of Appellant at 15-21.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss with prejudice, or in the alternative, reverse and remand for a new trial with newly appointed counsel.

DATED this 28th of August, 2009.

Respectfully submitted,

A handwritten signature in cursive script that reads "Valerie Marushige". The signature is written in black ink and is positioned above a horizontal line.

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, James Roshon Hughes

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Melody Crick, Pierce County Prosecutor's Office, Pierce County Superior Court, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 28th day of August, 2009 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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