

NO. 38226-1-II

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

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY *[Signature]*
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

KEVIN SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00288-6

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Eric Fong
Ste. A, 569 Division St.
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 15, 2009, Port Orchard, WA *[Signature]*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Smith's "right to a speedy trial" was violated when his trial on the bail jump charge was timely under any calculation since the trial commenced 15 days after the bail jump charge was filed in the 08 cause and less than 60 days from the date the bail jump charge had first been filed in the 07 cause?

2. Whether the trial court erred in allowing the State to amend the information by dismissing the bail jump count (without a written motion requesting the dismissal of that count) when the State is not required to file a written motion to amend an information?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kevin Smith was charged by information filed in Kitsap County Superior Court cause number 08-1-00288-6 with one count of bail jumping. CP 1. A jury found Smith guilty, and the trial court imposed a standard range sentence. CP 418-427. This appeal followed.

B. FACTS

The facts underlying the conviction in the present case are not in dispute; namely, on November 13, 2007 Smith failed to appear for his trial in cause number 07-1-01010-4 (hereinafter the "07" cause) in which the charge was possession of methamphetamine. See App.'s Br. at 1-2. Smith also has

not assigned error to any aspect of his trial. Rather, Smith's argument on appeal is that his right to a speedy trial was violated and the trial court improperly allowed the State to dismiss the bail jump charge in the 07 cause and re-file it as separate charge in cause number 08-1-00288-6 (hereinafter the "08" cause). A brief factual summary of the proceedings in the 07 cause is therefore necessary.

In the 07 cause Smith was originally charged only with possession of methamphetamine, but when Smith failed to appear for his November 13, 2007 trial date, the State filed an amended information adding one count of bail jumping. CP 453. This amended information was filed on January 28, 2008, which was Smith's first appearance in court following his failure to appear. CP 452, 456. At the January 28th hearing, the trial court read the two charges to Smith, confirmed that Smith understood that charges, and set a trial date and a status date. RP (1/28/08) 2-3. The trial court also explained that Smith had a right to a trial within 60 days and noted that the 60th day was March 28. RP (1/28/08) 2-3. The court, however did not ask Smith to enter a plea to the bail jumping charge.

As the 07 cause proceeded to trial, Smith continued to represent himself on the possession charge (with standby counsel), but requested that counsel be appointed on the bail jump charge. See, App.'s Br. at 3, RP

(3/7/08) 16-17.¹ Mr. Weaver was eventually appointed to represent Smith on the bail jump charge and to act as standby counsel on the possession charge. RP (3/7/08) 17-19.

At a pretrial hearing on March 10, 2008, the trial court began by stating that the purpose of hearing was to enter a plea on the bail jumping charge since the court had failed to take a plea on January 28th. RP (3/10/08-Judge Hartman) 2.² Before a plea could be entered, however, the court addressed the issue of the “hybrid representation” in which Smith was representing himself on one count and had appointed counsel on the second count. RP (3/10/08-Judge Hartman) 2. The State argued that Smith did not have a right to this type of “hybrid” representation and noted that a number of problems could arise from this type of representation. RP (3/10/08-Judge Hartman) 2-5. Mr. Weaver argued that the situation was created when the State filed the second charge, and asked that the representation remain as it

¹ At a March 3, 2008 hearing Smith appeared pro se but was assisted by “standby counsel.” RP 3/3/08 31-32. This “standby counsel,” requested to withdraw due a conflict. RP (3/3/08) 31-32. The court attempted to appoint several defense counsel, but Smith stated that he had previously filed bar complaints against these attorneys. RP (3/3/08) 32-34. The court eventually appointed John Cross as standby counsel RP (3/3/08) 34-35. At the March 7th hearing, however, the court allowed Mr. Cross to withdraw since Smith had previously filed a bar complaint against Mr. Cross’s law partner. RP (3/7/08) 4-8. The court then appointed Mr. Weaver to represent Smith on the bail jumping count and to be standby counsel on the possession charge. RP (3/7/08) 17-19. Pursuant to CrR 3.3(c)(vii) the commencement date is reset and whenever there is a disqualification of defense counsel.

² There are two transcripts from two separate hearings that took place on March 10, 2008. The first transcript is from the morning hearing that took place in front of Judge Hartman. The second transcript is from the 3 o’clock hearing in front of Judge Roof. In order to distinguish the two, these transcripts will be cited as RP (3/10/08 – Judge Hartman) and RP

was. RP (3/10/08-Judge Hartman) 7-8. The trial court then asked if Mr. Weaver was asking that the two counts be severed, and Mr. Weaver responded, "That may make sense. But at this point I think that's the State's motion, not mine." RP (3/10/08-Judge Hartman) 8.

The State then suggested the following,

The State would seek that if the Court denies our request to have Mr. Smith either represent himself pro se on both counts or have Mr. Weaver be appointed on both counts. If the Court denies that, the state would then move that we would like – we would bring Mr. Smith up at 3 o'clock to have him arraigned. We'd separate the counts. Count I would be one case, Count II another case, and have him formally arraigned and a whole separate filing.

RP (3/10/08-Judge Hartman) 9-10. The trial court then stated,

I think that [the prosecutor's] observations about whether it would be practical from the standpoint of the administration of the case to have Mr. Smith act as his own counsel on one count while he's actively defended by an attorney on the second count is well taken. I think it would be extraordinarily difficult to properly administer such a trial.

If it is the wish of Mr. Smith to proceed on – to proceed with Mr. Weaver as standby counsel on Count I and have Mr. Weaver act as his counsel on Count II, it would make some sense from my perspective that the matters be processed separately.

RP (3/10/08-Judge Hartman) 13.

(3/10/08 Judge Roof).

Later, the following colloquy took place:

The Court: All right. And what you're telling me is that the state between now and 3 o'clock would propose to dismiss Count II and then re-file it as a separate filing.

Ms. Wallace: That's correct, Your Honor.

The Court: And arraign him on the 3 o'clock calendar.

Ms. Wallace: That's correct, Your Honor.

The Court: Okay. I think that's the State's prerogative. I'll hear from Mr. Weaver since you have been appointed as counsel on Count II on that issue.

Mr. Weaver: I mean, if the state wants to move to dismiss I'm not going to stand in their way.

RP (3/10/08-Judge Hartman) 14-15.

The parties then appeared on the 3 o'clock arraignment calendar that same day at which time the State filed the bail jump charge under a new cause number and asked the court to sign an order dismissing the bail jump charge from the 07 cause after explaining the circumstances to Judge Roof.

RP (3/10/08-Judge Roof) 2-4.³ Judge Roof then signed an order dismissing

³ The prosecutor explained the circumstances behind the motion to dismiss to Judge Roof as follows:

We actually have a motion to dismiss. This was originally charged as Count 2 in cause number 07-1-01010-4. We're moving to dismiss it without prejudice as Count 2 in that case, and we've refilled it as its own count in this case.

We've appeared before Judge Hartman this morning about this issue. Mr. Smith was originally pro se on both counts in the case. Mr. Weaver was appointed as counsel for Count 2 in the '07 cause with Mr. Smith as pro se on Count 1 of the '07 case.

After appearing before Judge Hartman this morning, it was determined that it would be – it was determined by our office and proposed to Judge Hartman that we would

Count 2 in the '07 cause. RP (3/10/08 – Judge Roof) 4, CP 490. Mr. Weaver indicated that he had no objection to the order of dismissal.⁴ RP (3/10/08 – Judge Roof) 5.

Judge Roof then appointed Mr. Weaver to represent Smith on the new bail jump cause. RP (3/10/08 – Judge Roof) 7. Mr. Weaver then explained that the bail jump charge had originally been filed on January 28, but that “due to an oversight, Mr. Smith was never arraigned for that.” RP (3/10/08 – Judge Roof) 5. Mr. Weaver then went on to state,

But the clear intent of, I think, the prosecutor’s office, as well as the Court, was that they were going to arraign him on January 28. I would ask the Court to set a constructive arraignment date of January 28, schedule this for trial within 60 days of that date.

RP (3/10/08 – Judge Roof) 5-6. Judge Roof indicated that he was not making any ruling regarding when the time for trial commenced or expired, but set a trial date for March 24th as that date was with a “safe time period” since it was “within 60 days of what is best case scenario for the defense,

be dismissing this as Count 2 in the '07 case and refiling it today as its own separate cause number. And that’s why we’re here to arraign Mr. Smith on the '08 case.

And I’m handing forward an order of dismissal on the '07 case.

RP (3/10/08-Judge Roof) 3-4.

⁴ Mr. Weaver did note that Smith himself had an objection, but no reason or basis for the objection was given and Mr. Weaver still remained the counsel of record on the bail jump charge at that time. RP (3/10/08 – Judge Roof) 5.

constructive arraignment on that date.” RP (3/10/08 – Judge Roof) 7. Smith then signed the acknowledgment of advice of rights and entered a plea of not guilty to the bail jump charge. RP (3/10/08 – Judge Roof) 8.

Trial on the bail jump charge in the 08 cause began on March 25, 2008, and the trial court began hearing the motions in limine that day. RP (3/25/08) 2; App.’s Br. at 4. During those motions Mr. Weaver acknowledged that that day, March 25, was “within speedy trial under any calculation.” RP (3/25/08) 11. When an issue arose that required further briefing from the parties, the court recessed the trial noting that the trial had officially commenced. RP (3/25/08) 12-13, 21.

Later during the trial, Mr. Weaver indicated that Mr. Smith wanted to bring a motion for new counsel. RP (4/7/08) 2-3. Mr. Smith then indicated that he felt he had a conflict of interest with Mr. Weaver and that he wanted a new attorney. RP (4/7/08) 3-4. The state objected, noting that there had been multiple attorneys on the case previously that had been disqualified and that it had been difficult to find a defense counsel to appoint since Smith had filed bar complaints against numerous Kitsap attorneys. RP (4/7/08) 4. The State also indicated that it was concerned that Smith’s actions were being used as a tactic to get a continuance. RP (4/7/08) 4. Smith stated that his sister was in the process of filing a bar complaint against Mr. Weaver. RP (4/7/08) 7.

The trial court then initially denied Smith's request for a new attorney, noting that there was no evidence that there had been a breakdown in communications that prevented Smith from effectively communicating with his counsel. RP (4/7/08) 8. After some further discussion, the court asked Smith whether he had filed a bar complaint against Mr. Weaver or whether only his sister had filed a complaint. RP (4/7/08) 12. Smith responded that he had also filed a complaint against Mr. Weaver and against the prosecutor. RP (4/7/08) 12.

The court then stated that it would take a ten-minute recess, but before doing so the court made the following statement to Smith,

Sir, the Court's concern is that if you are doing this for stalling tactics the Court will not take it lightly. If you are filing a complaint – let me finish. You have had your turn. If you are filing a complaint against every attorney that we appoint for you, this court is not playing that game.

RP (4/7/08) 12. After the recess that court reiterated that it did not find good cause under the court rules to appoint new counsel and that Smith's motion for new counsel was denied. RP (4/7/08) 13.

The following day Smith stated the following, "I don't want to be here anymore. I want to be absent form this trial." RP (4/8/08) 4. The trial court then called for a short recess in order to allow Mr. Weaver to discuss this with Smith. RP (4/8/08) 5. After the recess Mr. Weaver informed the court

that he was moving to withdraw based on a breakdown in the attorney client relationship and that it had become clear that his relationship with Smith was “totally broken down at this point and I don’t think it’s repairable at this point.” RP (4/8/08) 5-6. The court then inquired if the relationship was broken down to the point that it prohibited Mr. Weaver from effectively representing Smith, and Mr. Weaver indicated, “I believe so, yes.” RP (4/8/08) 6.

The State objected noting that a jury and witnesses were present and referenced its argument from the previous day. RP (4/8/08) 6. The trial court stated that it appreciated the State’s concerns, but that given Mr. Weaver’s statements it would allow him to withdraw. RP (4/8/08) 6-7. At the defense request the trial court declared a mistrial and appointed new counsel. RP (4/8/08) 10-11. The court also noted that a new 60 day speedy trial period began that day and a new trial date was set. RP (4/8/08) 10-12.

On April 8 the court entered an order appointing Tom Olmstead as defense counsel with a new trial date of May 27 and a time for trial expiration date of June 6. CP TBD.⁵ On May 23, Mr. Olmstead filed a written motion for a continuance asking that the trial be continued for approximately six

⁵ See State’s Supplemental Designation of Clerk’s Papers - April 8, 2008 Order Appointing Attorney.

weeks. CP TBD.⁶ A hearing on this motion was held on May 27, at which time the court granted the defense request for a continuance and set a new trial date for June 23 with a speedy trial expiration of July 22. CP TBD.⁷

On June 9, Smith filed a motion for change of venue and a supporting memorandum arguing that a change of venue was appropriate because “the defendant has filed bar complaints and judicial conduct complaints against virtually every Judge, prosecutor and public defender in Kitsap County.” CP 62-63. The court denied this motion. CP 72.

On July 3, Smith filed a motion asking for the appointment of an out-of-county judge, noting that he had “filed judicial conduct complaints against virtually every Judge in Kitsap County, including Judge Sally Olsen, who is currently the pre-assigned trial judge in this case.” CP TBD.⁸ The trial court granted this motion and set the matter for trial on July 21 noting that the trial would be heard in front of Judge Sheldon of the Mason County Superior Court. CP 83-84.

⁶ See State’s Supplemental Designation of Clerk’s Papers – May 23 Motion to Continue Trial Date & Declaration.

⁷ See State’s Supplemental Designation of Clerk’s Papers – May 27, 2008 Clerk’s Minutes (Motion Hearing); Order Setting. The trial date was later moved to July 7. See State’s Supplemental Designation of Clerk’s Papers – June 9, 2008 Order Setting.

⁸ See State’s Supplemental Designation of Clerk’s Papers – July 3, 2008 Motion & Declaration for Out-of-County Judge.

Trial then began on July 21. CP TBD.⁹ At trial Smith argued that the time for trial rules had been violated. RP (7/21/08) 33-37. Judge Sheldon, denied this motion after explaining the protracted history of the case as follows:

The Court, in looking at the motion and looking at this court file, which is 08-1-00288-6, also needed to have access to the prior court file, which the clerk's office did provide to the court, which is 07-1-01010-4, so I have reviewed that file as well.

I see from that earlier file, the 07 file, that a first amended information was filed on January 28th, 2008, and that first amended information charged the count I as previously charged, possession of a controlled substance, methamphetamine, and anew count, count II, bail jumping. The defendant was present in custody that day, having been arrested on an outstanding warrant. He was represented by counsel, and counsel for the state was also present. At that time, the clerk's minutes indicate that the defendant was served with a copy of the first amended information. The minutes also indicate that the matter was set on for further arraignment for February 21st, 2008. There was no arraignment that took place, at least as documented by the clerk's minutes on that date, January 28th, 2008.

When the matter did come on for the next hearing, set by way of the court order entered that same day, January 28th, 2008, for a hearing on February 21st, 2008, no arraignment took place on that date, either.

The Matter was heard by the court on March 10th, 2008, at which time the state dismissed count II and that same day refilled count II as a stand-alone count under the current cause number, 08-1-00288-6, so as of that point, no arraignment had taken place on count II under the 07 cause number.

⁹ See State's Supplemental Designation of Clerk's Papers – July 21, 2008 Clerk's Minutes – Jury Trial.

The clerk's minutes do indicate under the 08 cause number that the matter did come on for arraignment on March 10, 2008, at which time a not guilty plea was entered and the matter was set for trial on March 24th, 2008.

The case did not come before the court for a timely arraignment. It is required that there be an arraignment within 14 days of the filing of the information, and at least as to count II, that information was first filed on January 28th, 2008. The rules do provide for a constructive arraignment date to be established from which the court then uses that date as a commencement date for calculating the final start date.

The information having been first filed on January, 28th, 2008, adding 14 days for the time period that there should have been for an arraignment, the court would be establishing a constructive arraignment date of February 11th, 2008, and then noting that the defendant was in custody, adding 60 days to that, a final start date of April 11, 2008 would have been calculated. And it may have been calculated, I don't have the transcript from that particular hearing, but I can see that the court was well aware of the need to have this matter heard within a very short period of time because on January – or strike that, on March 10, when the matter did come on for arraignment, the trial date was set for March 24th, 2008, which is well within the final start date which I just calculated using a constructive arraignment date of April 11, 2008. And frankly, there would have been no other reason to have set a trial date so shortly after an arraignment other than to take into account the fact that there was time that had already elapsed as to this particular count under the other cause number, and the arraignment had not taken place as required under the court rules.

So, to that point, the case was proceeding under the time for trial rules in that the arraignment having been outside of the time for arraignment, a very short-set trial date was made to comply with the final start date of April 11, 2008.

The matter did come on for trial on March 25th, 2008, which again was well within the final start date of April 11, 2008. The court, after hearing some motions, granted a continuance of the trial and indicated specifically through the mutation in the minutes that the speedy trial was tolled

through the time of the continuance, and the continuance was to end on April 7th, 2008. The matter then came on for trial on April 7th, 2008, and by April 8th, 2008, while in the midst of trial, there was a mistrial granted, and the new trial date was set at that point. The mistrial under the rule required a new commencement date, so the new commencement date was the date of the mistrial, April 8th, 2008. Adding 60 days because the defendant was still in custody, a new final start date becomes June 7th, 2008.

In a motion by defense filed on May 23rd, 2008, there was a request for a continuance. That motion was heard on May 27th, 2008 and was granted. The court set the trial date for June 23rd, 2008, with a new final start date of July 22nd, 2008. The court correctly calculated that new final start date, seeing that from the date the continuance was granted, May 27th, 2008, that there were only 13 days left on the time for trial. Resetting the matter within that last time frame, that short time frame under the rule, the time for trial jumps to 30 days rather than what's left on the clock if it's under 30.¹⁰ So the new final start date having been set for July 22nd, 2008, with trial starting today, there is no violation of Mr. Smith's time for trial. Motion is denied.

RP (7/21/08) 43-47.

Following Judge Sheldon's denial of Smith's motion, the trial proceeded and Smith was found guilty of bail jumping and the court imposed a standard range sentence of 60 months. CP 418.

¹⁰ Judge Sheldon's reference here is clearly to CrR 3.3(b)(5) which provides that if any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of the excluded period. Further, CrR 3.3(e)(3) provides that delay granted by the court due to continuances is an excluded period. Thus the period of time between May 27th and June 23 was an excluded period (since this delay was granted by the court on the defense motion for a continuance), and pursuant to CrR 3.3(b)(5), the allowable time for trial following this excluded period shall not expire earlier than 30 days after the end of the excluded period. 30 days from June 23rd was, of course, July 22nd, as the court correctly determined.

III. ARGUMENT

- A. **SMITH'S "RIGHT TO A SPEEDY TRIAL" WAS NOT VIOLATED BECAUSE HIS TRIAL ON THE BAIL JUMP CHARGE WAS TIMELY UNDER ANY CALCULATION SINCE THE TRIAL COMMENCED 15 DAYS AFTER THE BAIL JUMP CHARGE WAS FILED IN THE 08 CAUSE AND LESS THAN 60 DAYS FROM THE DATE THE BAIL JUMP CHARGE HAD FIRST BEEN FILED IN THE 07 CAUSE.**

Smith first argues that his right to a "speedy trial" was violated. App.'s Br. at 13. This argument is without merit. While Smith was not arraigned within 14 days of the filing of the amended information, Smith nevertheless received a speedy trial because he was brought to trial less than 60 days after the information was filed. Thus, although the arraignment was untimely, the trial itself was timely.

The time for trial rules state that an in-custody defendant shall be brought to trial within 60 days of the commencement date. CrR 3.3(b). A failure to appear, however, operates to reset the commencement date. CrR 3.3(c). In the present case, therefore, it is clear that the commencement date was reset when Smith failed to appear for his November 13, 2007 trial date. It is also clear that the time for trial clock next began running on January 28, 2008 when Smith next appeared in court. It was on this date the State filed an amended information adding the bail jump charge. CP 453.

The State concedes that Smith should have been arraigned on the bail jump charge within 14 days of the filing of the information pursuant to CrR 4.1(a). Smith, however, argues that the rules are silent as to the remedy for an untimely arraignment and that the appropriate remedy is dismissal with prejudice. App.'s Br. at 19. This argument is without merit as the plain language of the rule states that the remedy for an untimely arraignment is the setting of a constructive arraignment date.

CrR 4.1(b) states that a defendant can object to an untimely arraignment and that "if the court rules that the objection is correct, it shall establish and announce the proper date of arraignment." CrR 4.1(b). This, of course, is the procedure commonly referred to as the setting of a "constructive arraignment date." The existence of the remedy in the plain language of the arraignment rule clearly refutes Smith's claim that CrR 4.1 is "silent as to the proper remedy where a defendant is not arraigned in a timely manner." App.'s Br. at 19.

As Judge Sheldon ruled below, when Smith was not arraigned in a timely fashion, the proper remedy was for the court to set a constructive arraignment date:

The case did not come before the court for a timely arraignment. It is required that there be an arraignment within 14 days of the filing of the information, and at least as to count II, that information was first filed on January 28th, 2008.

The rules do provide for a constructive arraignment date to be established from which the court then uses that date as a commencement date for calculating the final start date.

RP (7/21/08) 45.

Smith also claims that his right to a “speedy trial” was violated, but his only argument in this regard appears to be that he was not arraigned in a timely fashion. *See*, App.’s Br. at 13, 19, 22. While it is true that the arraignment date or the constructive arraignment date is the trigger that starts the time for trial clock, there is no time for trial violation if a defendant is brought to trial within 60 days of the commencement date. Smith fails to ever address the fact that even if the time for trial clock began to run on the date the bail jump charge was first filed (January 28, 2008) the trial was timely since it started on March 25 (which was less than 60 days from January 28).

Smith’s claim that dismissal with prejudice is the remedy for an untimely arraignment is further refuted by CrR 3.3 (h) which states that “no case shall be dismissed for time-for-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.” Smith has failed to demonstrate any rule, statute, or constitutional provision that expressly states that dismissal with prejudice is the remedy for an untimely arraignment.¹¹

¹¹ Furthermore, Washington courts have held that the purpose of the arraignment rule is to provide notice to a defendant and to give him or her an opportunity to prepare for trial. *See, e.g. State v. Toliver*, 5 Wn. App. 321, 331, 487 P.2d 264 (1971)(holding that there was no

In short, although the arraignment on the bail jump charge was untimely, Smith's trial itself was timely because the trial commenced within 60 days of the filing of the amended information adding the bail jump charge. Furthermore, the court rules specifically state that the remedy for an untimely arraignment is the setting of a constructive arraignment date.

As Judge Sheldon explained at great length below, the trial in this matter was timely under the rules because even if the trial court established a constructive arraignment date, the trial in this matter commenced less than 60 days from that constructive arraignment date. RP (7/21/08) 43-47.¹² Smith's argument that his trial rights were violated (and that the case should be dismissed with prejudice), therefore, is without merit.

prejudice resulting from an untimely arraignment since defendant was aware of the charge, and that the remedy if that had been prejudice was for a continuance, not a dismissal). Similarly, courts have held that the complete absence of arraignment alone does not rise to a due process violation. *State v. Anderson*, 12 Wn. App. 171, 528 P.2d 1003 (1974). Similarly, the failure to arraign amounts to a due process violation only if it results in a failure to give the accused sufficient notice and adequate opportunity to defend. *State v. Royster*, 43 Wn. App. 613, 619, 719 P.2d 149 (1986) (citing *State v. Alferez*, 37 Wn. App. 508, 516, 681 P.2d 859, review denied, 102 Wn.2d 1003 (1984)). The harm occurs when absence of arraignment results in failure to give the accused and his counsel sufficient notice and adequate opportunity to defend. *Garland v. Washington*, 232 U.S. 642, 34 S. Ct. 456, 457, 58 L. Ed. 772 (1914) (cited with approval in *Anderson*, 12 Wn. App. at 173, 528 P.2d 1003). In the present case the amended information was filed and Smith was clearly informed of the bail jump charge as the judge read the charge to him on the record. RP (1/28/08) 2-3. In addition, Smith had counsel appointed specifically for that charge and counsel was obviously aware of the charge. See, e.g., RP (3/7/08) 17-19; RP (3/10/08-Judge Hartman) 2-15. Smith has failed to allege any prejudice at all from the untimely arraignment other than the mere fact that the arraignment was untimely.

¹² Furthermore, Smith has not assigned error to Judge Sheldon's findings on this issue not has Smith argued or explained how the time for trial rules were violated other than his argument that the arraignment itself was untimely. The remedy for an untimely arraignment, however, as explained above, is for the court to set a constructive arraignment date as Judge Sheldon

B. THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO AMEND THE INFORMATION BY DISMISSING THE BAIL JUMP COUNT (WITHOUT A WRITTEN MOTION REQUESTING THE DISMISSAL OF THAT COUNT) BECAUSE THE STATE IS NOT REQUIRED TO FILE A WRITTEN MOTION TO AMEND AN INFORMATION.

Smith next claim is that the trial court erred in dismissing the bail jump count without a written motion from the State. App.'s Br. at 15. This claim is without merit because the State is not required to file a written motion requesting to amend an information.

CrR 2.1(d) provides that the court may permit any information to be amended at any time before verdict if substantial rights of the defendant are not prejudiced. The rule does not require the State to file a written motion seeking permission to amend an information.

In the present case the State suggested that the information in the 07 cause number be amended by dismissing the bail jumping count due to the myriad of problems that would arise if the case proceeded to a "hybrid" trial with Smith representing himself on the possession charge and Mr. Weaver representing Smith on the bail jump charge. See RP (3/10/08-Judge Hartman) 2-5. The trial court agreed that such a procedure would be impractical and that "it would be extraordinarily difficult to properly

correctly explained.

administer such a trial.” RP (3/10/08-Judge Hartman) 13. Even defense counsel suggested that separating the counts “may make sense.” RP (3/10/08-Judge Hartman) 8. The State thus suggested that the bail jumping count could simply be dismissed and refilled as a stand-alone charge. RP (3/10/08-Judge Hartman) 9-10. At no time did Smith or his attorney raise an objection that the dismissal of the bail jump count could only occur if the State filed a written motion. Rather, Mr. Weaver stated, “If the state wants to move to dismiss I’m not going to stand in the way.” RP (3/10/08-Judge Hartman) 14-15. The lack of an objection on this ground, however, is understandable since CrR 2.1 does not require a written motion in order to amend an information.

At a hearing later that same day, the court entered an order dismissing the bail jump count from the 07 cause and arraigned Smith on the bail jump charge that had been refilled as a stand alone charge in the 08 cause. RP (3/10/08-Judge Roof) 2-5. Again, at no time did Smith or his attorney raise an objection that the dismissal of the bail jump count could only occur if the State filed a written motion. Rather, Mr. Weaver indicated that he had no objection to the order of dismissal.¹³ RP (3/10/08 – Judge Roof) 5.

¹³ Mr. Weaver did note that Smith himself had an objection, but no reason or basis for the objection was given and Mr. Weaver was the counsel of record on the bail jump charge at

On appeal, however, Smith argues for the first time that CrR 8.3 applies and that a court can only dismiss a “charge upon written motion of the prosecuting attorney.” App.’s Br. at 16. Smith, however, misstates the rule. The rule does not state that the court can only dismiss a **charge** upon filing of a written motion; rather, the rule says the “court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefore, dismiss an **indictment, information, or complaint.**” CrR 8.3(emphasis added).

In the present case the court did not dismiss the entire 07 information; rather, it only amended the 07 information by dismissing one of the counts. CrR 8.3, therefore, is inapplicable to the present case, and the trial court did not err because CrR 2.1(d) authorizes a court to permit any information to be amended at any time before verdict if substantial rights of the defendant are not prejudiced.

Furthermore, even if this court were to assume for the sake of argument that a written motion was required, Smith waived this issue by failing to object to the absence of a written motion below. *See* RAP 2.5(a) (nonconstitutional error waived if not raised at trial); *State v. Roberts*, 73 Wn. App. 141, 145, 867 P.2d 697 (appellate court does not consider specific

that time. RP (3/10/08 – Judge Roof) 5.

objections raised for the first time on appeal), *review denied*, 124 Wn.2d 1022 (1994).

In addition, at the time of the dismissal Mr. Weaver represented Smith on the bail jump charge. Mr. Weaver not only failed to object to absence of a written motion requesting dismissal, but Mr. Weaver also specifically consented to the dismissal by stating that he was not going to “stand in the way” of the dismissal and that he had no objection to the dismissal. See RP (3/10/08-Judge Hartman) 15, RP (3/10/08-Judge Roof) 5. Thus, even if the court had erred in dismissing the bail jumping count without the filing of a written motion, any error in this regard was invited error.¹⁴

Furthermore, Smith cannot show any prejudice from the absence of a written motion since the only purpose of a written motion would be to outline the State’s reasons for the dismissal. This purpose, of course, was adequately accomplished by the lengthy discussion that took place on the record regarding the State’s reasons for seeking the order dismissing the count: namely, the avoidance of a “hybrid “ trial. RP (3/10/08-Judge Hartman) 2-5.

¹⁴ The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). The invited error doctrine is an important aspect of our appellate process that was crafted to prevent the injustice of a party benefiting from an error that he caused or should have prevented. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). In the present case Smith received a benefit when the bail jump charge was essentially severed from the 07 cause. It is not surprising, therefore, that counsel stated he had no objection to the dismissal. Given these facts, Smith cannot now complain on appeal that the dismissal was error since counsel explained that there was no objection to the dismissal.

Thus, even if a written motion had been required, any error was harmless since the reasons for the dismissal were clearly stated on the record.

Finally, Smith's argument that "true benefit sought by the State in the dismissal and re-filing of the bail jump charge was the resetting of the time for arraignment" is not supported by the record. Rather, the record demonstrates that the commencement date was not reset upon the filing of the 08 cause and Smith ultimately was tried 15 days after the 08 cause was filed and less than 60 days from the date the bail jumping charge was first added to the 07 cause. Smith's claim that "true reason" that the State sought to dismiss the bail jump charge was to "avoid the violation of Mr. Smith's right to a speedy trial"¹⁵ is, therefore, without merit.

IV. CONCLUSION

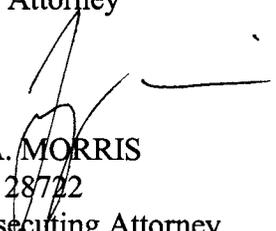
For the foregoing reasons, Smith's conviction and sentence should be affirmed.

¹⁵ App.'s Br. at 18-19.

DATED September 15, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28772
Deputy Prosecuting Attorney

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