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NO. 40327-7-II
Clark County No. 09-1-01171-1

STATE OF WASHINGTON,

Respondent,

vs.

NATHAN OWEN PIERCE,

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
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PM 8-24-10

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A. ASSIGNMENT OF ERROR

I. MR. PIERCE'S RIGHT TO A TIMELY TRIAL WAS VIOLATED.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. MR. PIERCE'S RIGHT TO A TIMELY TRIAL WAS VIOLATED WHERE THE TRIAL COURT CONTINUED THE CASE, OVER HIS OBJECTION, BEYOND THE ALLOWABLE TIME FOR TRIAL, BECAUSE THE PROSECUTOR WAS SCHEDULED TO BE IN TRIAL ON A DIFFERENT CASE AND HAD FAILED TO PREPARE FOR MR. PIERCE'S TRIAL OR SUBPOENA WITNESSES.

C. STATEMENT OF THE CASE

Mr. Pierce was charged by Amended Information with unlawful possession of a controlled substance (methamphetamine) based on residue found on a spoon inside his girlfriend's bedroom. CP 7. He appeared for a readiness hearing on November 20, 2009 for a scheduled trial on November 23, 2009. RP 7. All parties agreed that his time for trial period was set to expire on November 25, 2009. RP 9. November 25, 2009 was the eighty-eighth day of a ninety day speedy trial clock, although Mr. Pierce was put in jail after the trial date was set based on a new charge. RP 2, 9. He was arraigned on the new charge on October 20 2009. RP 2.

In this case, the State originally charged Mr. Pierce singularly, but on July 24th, 2009 the State filed an Amended Information adding a co-defendant, Stephanie Mode. RP 14. However, none of the counts

involving Ms. Mode involved Mr. Pierce in any way, so it is not clear why they were placed as co-defendants on the same information. RP 14. Mr. Pierce's attorney, Jeff Riback, moved to sever Mr. Pierce's case from Ms. Mode's because Ms. Mode sought to have her case continued (and was willing to execute a speedy trial waiver) while Mr. Pierce wanted a speedy trial, and because the evidence in Ms. Mode's case would be unfairly prejudicial to Mr. Pierce. RP 11-12. The State complained that Mr. Pierce's motion to sever was untimely, but Mr. Riback pointed out that he had raised this issue on prior occasions. RP 18.

The deputy prosecutor, having assumed the Mode/Pierce case would be continued because that is what Ms. Mode wanted, and because he and Ms. Mode's attorney, Suzan Clark, were scheduled to try another case at the same time Mr. Pierce's case was set for trial, did not issue subpoenas in Mr. Pierce's case. RP 16-17. One witness in Mr. Pierce's case, Neil Martin, was unavailable on Mr. Pierce's trial date. RP 18. The trial court noted that the unavailability of an unsubpoenaed witness is *not* grounds for a continuance. RP 19. The deputy prosecutor moved to continue Mr. Pierce's case over his objection and beyond the speedy trial expiration because he was scheduled to be in another trial at the same time. RP 17, 19. Mr. Riback objected, arguing that Mr. Pierce's case, without Ms. Mode, was actually quite simple, involving no more than two

or three witnesses. RP 12. Mr. Riback argued that as the largest law firm in Southwest Washington the prosecutor's office ought to be able to find another deputy to try the case, particularly since the case was so simple. RP 12.

The only information volunteered about the other case set for trial was that Ms. Clark was also the defense attorney and it was a "fairly straightforward" UPF case. RP 15. The prosecutor said it was a three-strikes case, Ms. Clark said it wasn't. RP 15. The trial court granted the State's motion based on the unavailability of the prosecutor and instituted an excluded period ending December 3rd. RP 22. The trial court also set trial for December 7th. Id. The trial court declined to rule on the motion for severance, leaving that to the assigned judge. RP 23.

On December 3rd, 2009 the parties came before the assigned trial judge to argue the motion for severance and the motion was granted. RP 32. Trial commenced on December 7th. Mr. Pierce was convicted by the jury and given a standard range sentence. CP 23, 34. This timely appeal followed. CP 44.

D. ARGUMENT

I. MR. PIERCE'S RIGHT TO A TIMELY TRIAL WAS VIOLATED WHERE THE TRIAL COURT CONTINUED THE CASE, OVER HIS OBJECTION, BEYOND THE ALLOWABLE TIME FOR TRIAL, BECAUSE THE PROSECUTOR WAS SCHEDULED TO BE IN TRIAL ON A

**DIFFERENT CASE AND HAD FAILED TO PREPARE FOR
MR. PIERCE'S TRIAL OR SUBPOENA WITNESSES.**

A reviewing court reviews the application of the speedy trial rule de novo; it is a question of law. *State v. Lackey*, 53 Wn.App. 791, 798, 223 P.3d 1215 (2009); *State v. Nelson*, 131 Wn.App. 108, 113, 125 P.1008 (2006); *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003). Although the application of CrR 3.3 is reviewed de novo, a trial court's decision to grant a continuance is reviewed for abuse of discretion. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009) (speedy trial violation through de novo review of the court's *compliance with the rules* regarding the continuance decision, not the discretionary decision itself).

An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds. *In re Guardianship of Lamb*, 154 Wn.App. 536, 544, 228 P.3d 32 (2009); *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wash.2d 344, 347 P.2d 1062 (1959)). The court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis. *Lamb* at 544, *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). But if pure questions of law are presented, a de novo

standard of review should be applied to those questions. *Lamb* at 544; *Ang v. Martin*, 154 Wn.2d 477, 481, 114 P.3d 637 (2005).

Here, the trial court abused its discretion in granting the State's motion to continue Mr. Pierce's case beyond his speedy trial expiration. The prosecutor's primary reason for seeking a continuance was that he had failed to prepare for trial by issuing subpoenas because he simply assumed the case would be continued. He made this assumption not because Mr. Riback had expressed a desire for a continuance, but rather because Ms. Clark, Ms. Mode's attorney, wanted the continuance. Indeed, the prosecutor was rebuked by Judge Lewis for having assumed Mr. Pierce's case would be continued without having discussed it with Mr. Riback. The prosecutor made much of the supposed untimeliness of Mr. Riback's motion to sever, however, as Judge Lewis pointed out, the cases should never have been joined in the first place because they had no commonality.

Judge Lewis, however, granted the prosecutor's motion based on the fact that the prosecutor preferred to try a different case on Mr. Pierce's trial date. The trial court abused its discretion because it did not ascertain, or even inquire, which defendant's time for trial was set to expire first. Mr. Pierce's time for trial was set to expire two days after his trial was set to begin on November 23rd. The trial court did not even inquire about

whether the other defendant (named Mr. Park, according to the verbatim report of proceedings) was in custody, although we know Mr. Pierce was. If Mr. Park's time for trial was set to expire *after* Mr. Pierce's, the trial court's decision cannot be considered a proper exercise of discretion.

Under CrR 3.3 (a) (1), "it is the trial court which bears the ultimate responsibility to ensure a trial is held within the speedy trial period." *State v. Jenkins*, 76 Wn.App. 378, 382-83, 884 P.2d 1356 (1994). This responsibility "underscore[s]...the importance" of the speedy trial rule. *State v. Saunders*, 153 Wn.App. 209, 220, 220 P.3d 1238 (2009). When the court grants a continuance under CrR 3.3 (f) (2) it "must state on the record or in writing the reasons for the continuance." CrR 3.3. (f) (2). Although the speedy trial rule is "not a constitutional mandate," its purpose is to protect the constitutional right to a speedy trial." *Kenyon* at 136. "[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." *Id.*, quoting *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976). "Failure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice." *State v. Raschka*, 124 Wn.App. 103, 112, 100 P.3d 339 (2004), citing *State v. Adamski*, 111 Wn.2d 574, 582, 761 P.2d 621 (1988).
If the court finds

[T]hat the time for trial deadline has passed and the defendant's objection was properly raised, the court has no discretion in deciding whether to dismiss the charges. The charges "shall" be dismissed with prejudice.

State v. Swenson, 150 Wn.2d 181, 186, 75 P.3d 513 (2003).

Even assuming it was reasonable to allow the deputy prosecutor to dictate which defendant he would rather take to trial, without regard to Mr. Pierce's right to a timely trial under CrR 3.3, the court further abused its discretion by not simply instructing the prosecutor's office to produce another prosecutor to try the case. This case was remarkably simple. It was a straightforward, informant-free possession of a controlled substance case, in which the controlled substance was found in the actual possession of Mr. Pierce. This case was less complicated than the average assault fourth degree, and substantially less complicated than even the simplest DUI.

The trial court further erred in continuing Mr. Pierce's case where it failed to find the absence of prejudice to Mr. Pierce. CrR 3.3 (f) (2) requires the court to find "the defendant will not be prejudiced in the presentation of his or her defense." In *Saunders*, the trial court abused its discretion by granting continuances where the prosecutors who made the motions could not articulate "adequate basis or reason," but apparently expected their motions to be granted because they asked. *Saunders* at 220.

The court found the three continuances in question were “manifestly unreasonable, and exercised on untenable grounds and for untenable reasons.” *Saunders* at 221. See also *State v. Nguyen*, 131 Wn.App. 815, 822-24, 129 P.3d 21 (2006) (trial court abused its discretion by granting a continuance because the prosecutor wanted to “track” the defendant’s case with a string of similar robberies, without evidence of a connection.)

Although the State preferred to try another case on Mr. Pierce’s trial date, the trial court bore the responsibility to ensure that Mr. Pierce received a timely trial. By not determining whether the other defendant in question had the same or fewer days remaining in his speedy trial period or, alternatively, simply leaving the case set for trial and placing the responsibility of producing a prosecutor to try this unbelievably simple case with the prosecutor’s office, the trial court abused its discretion and Mr. Pierce’s conviction should be reversed and dismissed.

E. CONCLUSION

Mr. Pierce’s conviction should be reversed and dismissed with prejudice.

RESPECTFULLY SUBMITTED this 24th day of August, 2010.



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Attorney for Mr. Pierce

CERTIFICATE OF MAILING

I certify that on 8/24/10 I placed a properly stamped envelope in the mails of the United States addressed to: 1) Arthur Curtis, Clark County Prosecuting Attorney, P.O. Box 5000, Vancouver, WA 98666-5000; (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; (3) Mr. Nathan O. Pierce, DOC# 311693 Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.

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AUG 24 10 11 AM '10
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Vancouver, WA