

COURT OF APPEALS  
DIVISION II

10 OCT 25 AM 10:25

STATE OF WASHINGTON

 DEPUTY

NO. 40327-7-II

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

---

STATE OF WASHINGTON, Respondent

v.

NATHAN OWEN PIERCE, Appellant

---

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01171-1

---

BRIEF OF RESPONDENT

---

Attorneys for Respondent:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869  
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

**TABLE OF CONTENTS**

I. STATEMENT OF FACTS .....1  
II. ARGUMENT .....3  
III. CONCLUSION .....5

## TABLE OF AUTHORITIES

### Cases

<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	4
<u>State v. Carlyle</u> , 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996).....	3
<u>State v. Downing</u> , 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).....	4
<u>State v. Flinn</u> , 154 Wn.2d 193, 199, 110 P.3d 748 (2005).....	4
<u>State v. Kingen</u> , 39 Wn. App. 124, 127, 692 P.2d 215 (1984).....	4
<u>State v. Torres</u> , 111 Wn. App. 323, 330, 44 P.3d 903 (2002) .....	4

### Rules

CrR 3.3.....	3, 4, 5
CrR 3.3(b)(1)(i), (c)(1) .....	4
CrR 3.3(d).....	5
CrR 3.3(d)(3) .....	3
CrR 3.3(f)(2).....	4

I. STATEMENT OF FACTS

On August 22, 2009 the defendant appeared in the Superior Court on charges that had previously been leveled against him for Possession of Controlled Substance – Methamphetamine. At that time the defendant waived his speedy trial rights for 90 days, commencing on August 27, 2009. Further, he was assigned a trial date of November 23, 2009 with a readiness hearing scheduled for November 19, 2009.

At the time of the readiness hearing (November 19, 2009) the defendant was present with his attorney and a co-defendant was also present with her attorney. The question was being raised concerning severance of the defendants and prosecutions for separate trials. On that date the Superior Court Judge indicated that he received from the co-defendant (Ms. Mode) a Waiver of Speedy Trial and he received from the defendant in our case a Motion to Sever and to Move the Trial. (RP 6). The attorney for Mr. Pierce explained it to the court how the matters became joined and indicated that his client wished to proceed to trial but did not wish to waive speedy trial rights, which he understood would take place when he went to trial on November 23, 2009. (RP 7). The issue was further confused by the fact that the Motion to Sever was filed by the

defense only that morning and no one had an opportunity to review it. (RP 8).

The record continues to become confusing when it is discussed that there are possibly two cases involving the defendant, both set for the same date for trial. The defense attorney makes it quite clear however that the main concern of the defense is that the severance is granted because they do not wish to go to trial jointly. (RP 18, L6-9).

Also on the readiness date, November 19, 2009, the court was advised that the attorneys possibly had conflicts in scheduling. The Superior Court Judge found that there was good cause for the continuance of the trial based upon the unavailability of counsel on the date scheduled and for a period of time extending through December 3<sup>rd</sup>. (RP 22). Further, the question of severance still needed to be resolved by the Judge who would actually be handling the matter. (RP 23-24). The Judge handling the readiness docket indicated to the defense attorneys that if they wished this matter to be heard, they would have to cite it in properly giving sufficient time and notice to the other side for response. (RP 24, L5-22). The trial judge had continued the matter and also excluded a time period until December 3 for purposes of the jury trial.

## II. ARGUMENT

The rules concerning speedy trial are set out in CrR 3.3. In our situation it's obvious that the defense attorney requests severance and considers it to be of extreme importance to his client. Even though that is his request, he doesn't file the necessary paperwork until the date of the readiness hearing. In fact, the motion and order to sever cases for trial filed by Mr. Pierce's attorney was not even made part of the clerk's record for purposes of this appeal.

The State submits that the trial court was well within its rights to reset the matters for purposes of clarification. The Deputy Prosecutor assigned to the case hadn't even had an opportunity to review the proposed Motion for Severance. Further, the State submits that the defendant did not comply with the rules set out in CrR 3.3. Specifically, the State maintains that under CrR 3.3(d)(3) the objection to the trial setting was not properly done by the defense and thus is not properly before this court.

The Appellate Court reviews an alleged violation of the speedy trial rule de novo. State v. Carlyle, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996). “[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court,” and the court will not disturb the trial court's decision unless there is a clear showing it is

“manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (*quoting* State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) and State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). CrR 3.3 provides that a defendant who is detained in jail shall be brought to trial within 60 days of his arraignment. CrR 3.3(b)(1)(i), (c)(1). The rule protects a defendant's constitutional right to a speedy trial and prevents undue and oppressive incarceration before trial. State v. Kingen, 39 Wn. App. 124, 127, 692 P.2d 215 (1984). Nevertheless, the constitutional right to a speedy trial does not mandate trial within 60 days. State v. Torres, 111 Wn. App. 323, 330, 44 P.3d 903 (2002). CrR 3.3(f)(2) permits the trial court to continue the trial past 60 days when necessary in the “administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” The rule adds that “[t]he bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.” CrR 3.3(f)(2). The Appellate Court reviews a trial court's grant of a continuance under CrR 3.3 for a manifest abuse of discretion, which prejudices the defendant. Torres, 111 Wn. App. at 330.

The State submits that the defendant did not comply with the rules set out in CrR 3.3:

CrR 3.3(d) Trial settings and notice -- Objections -- Loss of right to object.

(3) Objection to trial setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. **A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.**

### III. CONCLUSION

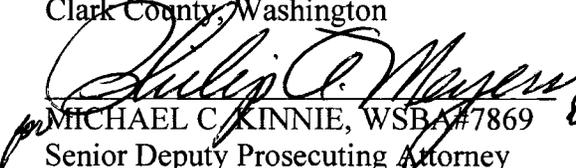
The trial court properly ruled that the continuance and ultimately the severance were appropriate. Further, that the additional time needed was also necessary under the rules. Finally, the State submits that the defense has not perfected this matter for purposes of this appeal.

DATED this 20 day of October, 2010.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
MICHAEL C. KINNIE, WSBA #7869  
Senior Deputy Prosecuting Attorney

8246

