

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON LAINE,

Appellant.

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STATE OF WASHINGTON
BY _____
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George Wood, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

LAINE'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL
WAS VIOLATED.

a. The Six Month Delay Was Presumptively Prejudicial.

The State argues the delay in this case does not even trigger the full analysis under State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009), and Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), because the six-month delay is not presumptively prejudicial. For this proposition, the State cites Iniguez, and argues that, in Iniguez, the court determined the eight-month delay was just beyond the bare minimum needed to be presumptively prejudicial. Brief of Respondent at 16. But this Court should reject any determination based solely on comparing the number of months of delay.

As the State concedes, the inquiry as to whether a delay is presumptively prejudicial depends on the specific circumstances of each case. Brief of Respondent at 15 (citing Iniguez, 167 Wn.2d at 283). Iniguez explained, “[T]he United States Supreme Court has consistently emphasized an individualized, fact-specific inquiry into whether a delay is presumptively prejudicial.” 167 Wn.2d at 291. The court noted that, more recently, lower courts have since seized on a footnote from Doggett v. United States, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992), to improperly apply an eight to eleven month cutoff for presumptive prejudice. Iniguez, 167 Wn.2d

at 291-92. But the court then expressly rejected a “formulaic presumption of prejudice upon the passing of a certain period of time.” Iniguez, 167 Wn.2d at 292.

This court should therefore reject the State’s formulaic argument that the delay is not presumptively prejudicial merely because it is less time than was found prejudicial in Iniguez. In this very simple case, where Laine was held in custody the entire time, the more than six-month delay was sufficient to trigger a full analysis of whether Laine’s speedy trial rights were violated. See Iniguez, 167 Wn.2d at 292.

b. Laine Objected As Much As Was Reasonable to the Violation of His Speedy Trial Rights.

The constitutional speedy trial right is not waived by mere silent acquiescence or failure to demand a timely trial. Barker, 407 U.S. at 528. The Barker court considered and expressly rejected such a “demand/waiver” rule. Barker, 407 U.S. at 528. The strength and frequency of the defendant’s objection is a factor to be considered in determining whether the right has been violated. Barker, 407 U.S. at 428.

The State argues Laine either acquiesced to or requested some of the continuances. Brief of Respondent at 16-17. This is correct, as far as it goes, but it must also be noted that Laine strenuously, if ineffectively, objected to three months of the delay. CP 175, 207-08; 1RP 2. He requested

one short continuance early in the case, then objected to lengthy delays due to court congestion and the unavailability of a State's witness. CP 175, 179; 1RP 2. When his motion to dismiss was denied and the State revealed substantial new discovery, he requested additional time to prepare. CP 200.

This case is utterly unlike Barker, where the failure to object clearly weighed against finding a speedy trial violation. Barker, 407 U.S. at 517-18, 534-35. That case involved 16 continuances over five years. Barker, 407 U.S. at 517-18, 533-34. However, the court found extremely significant that Barker did not object to the first 11 continuances. 407 U.S. at 517. At the 12th, 15th, and 16th continuances, he made pro forma motions to dismiss. 407 U.S. at 517-18, 534-36. The state had delayed Barker's trial in hopes of first convicting his accomplice, so the accomplice could testify against Barker without incriminating himself. 407 U.S. at 516. The evidence against the accomplice was weak, and without his testimony, Barker hoped, the State would not be able to proceed against him. 407 U.S. at 535-36. Under these circumstances, the court concluded, and defense counsel conceded, Barker, "did not want a speedy trial." 407 U.S. at 534-35.

Here, by contrast, Laine objected strenuously to three months, roughly half, of the total delay. CP 156, 175, 205-06, 207-08; 1RP 2. These were not pro forma objections while simultaneously hoping to take advantage of the delay. When he subsequently agreed to additional delay,

this was because the State had suddenly presented substantial additional discovery, requiring additional preparation. CP 200.

Laine's personal and vehement objection should weigh more heavily than counsel's agreement to continue the March 22, 2010 trial date. See Barker, 407 U.S. at 529. The Barker court held it may be appropriate to assign different weight to counsel's acquiescence to continuances and the defendant's personal expression. 407 U.S. at 529. The court specifically contrasted cases where a defendant knowingly fails to object from cases where an attorney "acquiesces in long delay without adequately informing his client." 407 U.S. at 529.

What occurred on March 22, 2010 in this case, was precisely the type of situation the Barker court contemplated. Although counsel agreed to a two-month delay, Laine almost immediately objected, explaining that he had not understood what he was signing. CP 169, 207-08. The trial court did not find, contrary to the State's assertion at page 19 of its brief, that Laine waived the March 22 trial date. The findings of fact state that at time, Laine "appeared" to agree to the continuance. CP 156. This apparent agreement was a misunderstanding or miscommunication between client and counsel. CP 169. Laine's strenuous written objections to half of the total delay in this case is a factor indicating a violation of his speedy trial rights.

c. The Reasons for Much of the Delay Weigh in Favor of Dismissal Because It Is the Government's Responsibility to Ensure a Speedy Trial.

Although less serious than intentional interference, the Barker court explained that delays due to court congestion should still be considered in the speedy trial analysis because “the responsibility for such circumstances must rest with the government rather than with the defendant.” 407 U.S. at 531. The same is true for the availability of witnesses, especially in this case, where the State has not argued it diligently tried to obtain the witness’s testimony in a timely manner, such as using its subpoena power. Cf. State v. Wake, 56 Wn. App 472, 475, 783 P.2d 1131 (1989) (issuance of subpoena is critical factor in granting continuance based on witness unavailability). Moreover, even the requested continuances after Laine’s motion to dismiss was denied were due to the State’s conduct in providing late discovery requiring additional preparation. CP 200. Under these circumstances, the reasons for the delay also weigh in favor of finding Laine’s right to a speedy trial was violated.

d. The Violation of his Speedy Trial Right Prejudiced Laine Because It Resulted in Denial of Needed Prison-Based Substance Abuse Treatment.

The potential prejudice resulting from violation of the constitutional right to a speedy trial is not limited to effects on preparation of the defense. See Barker, 407 U.S. at 532-33. It includes “oppressive pre-trial incarceration.” Barker, 407 U.S. at 532. Additionally, prejudice may result because even if released on bond, an accused person awaiting trial may experience public scorn, be deprived of employment, or be chilled in exercising his or her First Amendment rights to free speech. Barker, 407 U.S. at 532 n.3.

In addition to these various types of prejudice, the Barker court specifically identified the lack of treatment and other rehabilitative programs. 407 U.S. at 532-33. The personal detriment of pre-trial incarceration includes “enforced idleness” because “Most jails offer little or no recreational or rehabilitative programs.” 407 U.S. at 532. As a result of his substantial pre-trial incarceration, Laine was not only subjected to the “dead time” of jail, but the length of his pre-trial dead time factored heavily in the court’s decision to deny him the substance abuse treatment program he desperately needed. 8RP 21.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Laine requests this Court reverse his conviction and dismiss for violation of his constitutional rights to a speedy trial or, alternatively, to remand for resentencing with consideration of a prison-based DOSA.

DATED this 22nd day of August, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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Respondent,)	
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v.)	COA NO. 41130-0-II
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JOHNATHON LAINE,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF AUGUST, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] BRIAN WENDT
CLALLAM COUNTY PROSECUTOR'S OFFICE
223 E. 4TH STREET, SUITE 11
PORT ANGELES, WA 98823-0037

- [X] JOHNATHAN LAINE
P.O. BOX 2142
SEQUIM, WA 98382

STATE OF WASHINGTON
BY _____
DEPUTY
11 AUG 2011 11:50
CLALLAM COUNTY PROSECUTOR'S OFFICE

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF AUGUST, 2011.

x Patrick Mayovsky