

No. 41802-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY ASHBORN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Rosanne Buckner (trial),
the Honorable Linda C.J.Lee (motion) Judges

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in failing to dismiss the charges for violation of appellant Jeffrey Ashborn's rights to a speedy trial and in holding that a pro forma motion started the trial.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Because of budgetary concerns, Pierce County Superior Court decided to cut costs by not calling or having jurors available to hear trials during several weeks of the year.

Over defense objection, the judge in this case set the trial for a date when it knew no trial could occur, because no jurors would be available as a result of the county's budgetary woes. On that date, it then granted a pro forma motion to exclude witnesses and set the case over several weeks, until jurors would be available. Were Ashborn's rights to a speedy trial violated?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jeffrey Ashborn was charged in Pierce County by third amended information with second-degree assault and a deadly weapon enhancement, unlawful possession of 40 grams or less of marijuana, unlawful use of drug paraphernalia, driving while license suspended or revoked in the third degree, second-degree assault, interfering with reporting of a domestic violence incident, and two counts of felony harassment, one of which carried a deadly weapon enhancement. CP 30-33; RCW 9.94A.510; RCW 9.94A.530; RCW 9.94A.825; RCW 9A.36.021(1)(c) and (g); RCW 9A.36.150; RCW 9A.46.020(1)(a)(i)(b); RCW 9A.46.020(2)(b); RCW 10.99.020; RCW 46.20.267(1); RCW 69.50.101(q); RCW 69.50.102; RCW 69.50.4014; RCW 69.50.412(1). Pretrial proceedings were held before the Honorable Linda CJ Lee on December 13, and the Honorable Judge Rosanne Buckner on December

22, 2010, after which trial was held before Judge Buckner on January 3-6 and 10-11, 2011.¹ Ashborn was found guilty of lesser offenses of two counts of fourth-degree assault, as well as the marijuana possession, driving while license suspended and interfering with reporting with “domestic violence” allegations but was acquitted of unlawful use of drug paraphernalia and harassment charges. CP 164-82. On January 21, 2011, Judge Buckner imposed a standard-range sentence for each offense. CP 236-42.

Mr. Ashborn appealed, and this pleading follows. See CP 255-57.

2. Overview of trial facts²

On April 12, 2010, Rita Rose called police on her boyfriend, Jeffrey Ashborn. 3RP 90-91. She said that Ashborn had gotten angry, thrown her on the bed and then started choking and strangling her. 3RP 81-93. Rose also said that he threatened to kill her or anyone who helped her and that he pulled the phone out of the wall at some point. 3RP 93-107. She ran out of the apartment when he went to grab the phone from her and, a little later, police stopped Ashborn’s car when he was starting to leave the hotel. 3RP 109-10. Ashborn was arrested and Rose went to the hospital, where it was noted that she had bruised wrists, a raspy, sore voice and a mark on her neck. 3RP 111.

¹There are five volumes of transcript, which will be referred to as follows:
-the proceedings of December 13, 2010, as “1RP;”
-December 22, 2010, as “2RP;”
-the three chronologically paginated volumes containing January 3-6, 10-11 and 21, 2010, as “3RP.”

²More detail about that facts relevant to the issues on appeal are presented in the argument section, *infra*.

Although at trial she claimed that she had lost consciousness or “blacked out” during the incident while he was choking her, when she saw a triage nurse after being taken to the emergency room, Rose specifically said she had not lost consciousness during the incident. 3RP 230. To another medical professional, she made the claim that she had. 3RP 230. She also made that claim to a police officer. 3RP 243. Rose did not have a specific type of bruise which often occurs when people are choked. 3RP 231.

Despite this incident, Rose nevertheless went to pick up Ashborn when he was released from jail, several months later. 3RP 113. They got back together and Rose claimed that, on October 8, 2010, they were just sitting in the living room of the mobile home where they were renting a room when Ashborn physically attacked her for no reason. 3RP 115-16.

Like during the April incident, Rose admitted, they were drinking, this time “high gravity alcohol” named “Four Loko.” 3RP 116. Again she said he damaged the phone at some point during the incident. 3RP 116. Rose also claimed that, at one point in the afternoon, he had put a BB gun to her head, threatening to pull the trigger. 3RP 123. When police arrived, however, no such gun could be found, and she never said anything about it when discussing the incident with defense counsel. 3RP 123. She had apparently said something about a “pellet gun” in the 9-1-1 tape. 3RP 171.

For the offenses against her, the jury did not find Rose completely credible and found, *inter alia*, that Ashborn had only committed fourth-degree assaults rather than the second degree assaults, also acquitting him of harassment for the alleged threats to kill she claimed he made. CP 164-

82.

D. ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE
CASE FOR VIOLATION OF MR. ASHBORN'S SPEEDY
TRIAL RIGHTS

Under CrR 3.3, a criminal charge must be brought to trial within a certain time or else the charge must be dismissed. The trial court bears the ultimate responsibility to ensure a "speedy" trial, based upon the specific provisions of the "speedy trial" rule. See State v. Jenkins, 76 Wn. App. 378, 383, 884 P.2d 1356 (1994). Review of this issue is de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

Applying such review here, this Court should reverse and dismiss all of the charges, because the trial court erred and Ashborn's rights to a speedy trial were violated when the court continued the matter to a specific date when it knew that trial could not occur due to a lack of court resources. Further, the pro forma motion granted by the court was not sufficient to start the trial.

a. Relevant facts

On May 19, 2010, a Pierce County Superior Court administrator or employee, Andra Motyka, sent an email to various interested parties in which she informed them that there would be several weeks where, to cut costs, the court would not bring in jurors for trial cases:

As you know Superior Court has been required to cut it's [sp] 2010 budget by \$420,000. This was a significant reduction. Part of our cut included \$58,000 in jury costs. Therefore, we have targeted the following weeks where no new jurors will be brought in for superior court cases: . . . **December 20 and December 26.**

CP 28. The email also said that the situation might change but that further communication would occur in that event. CP 28.

Ashborn was initially charged on October 11, 2010, with multiple crimes, based on the October 8, 2010, incident. CP 1-3. On the Declaration for Determination of Probable Cause filed at that time, the prosecutor declared:

According to LINX, the defendant was charged in Pierce County Superior Court under 10-1-01600-9 for Assault 2, Felony Harassment and Interfering with Reporting of DV. That case involved the same victim. The case was dismissed when Rita Rose, apparently uncooperative, could not be located.

CP 5.

On November 16, 2010, defense counsel sought, over Mr. Ashborn's objection, a continuance based on the need for further investigation and because the prosecutor was "going to refile old charge."

CP 7. On the written order, the trial date for the existing charges was continued from December 2, 2010, to January 20, 2011, and the new expiration date for speedy trial was listed as 2/20/11. CP 7.

On December 2nd, however, the prosecutor filed an amended information which added multiple charges based upon the April 12, 2010, allegations. CP 8-10. All of those had previously been filed under the other cause number and dismissed without prejudice on July 21, 2010. CP 16.

Ashborn was arraigned on the new information, over his objection. IRP 3-5. A few days later, on December 10, 2010, he filed an objection to the currently set trial date of January 20, noting that, because the prosecution had chosen to add the previously dismissed charges, it was

required to bring Ashborn to trial within 24 days, the amount of time counsel thought was left on speedy trial for the April charges. CP 15-17.

On December 13, 2010, the parties appeared before the Honorable Linda CJ Lee. 1RP 2. The prosecutor said that he had made a plea offer to Mr. Ashborn after the original information was filed, and had threatened that, if the offer was not accepted, the prosecution would refile charges on the April incident. 1RP 2. The prosecutor said that he had spoken with prior defense counsel about it and the decision was made to amend the information in this case rather than refile the other case separately. 1RP 3.

Defense counsel stated that, at the time of the amendment of the information, regardless of discussions prior counsel might have had, she had objected, but that the Commissioner had decided “how they do this.” 1RP 4. Counsel pointed out that the prosecution had been on notice that there was only 24 days left of speedy trial on the April charges when they filed the amended information adding those charges. 1RP 4. It was the prosecution’s own choice, she said, to refile in that way, so they should not now be allowed to do “an end run around speedy trial.” 1RP 4-5.

The prosecutor also proposed continuing the case a few days, to that coming Thursday, even though the prosecutor admitted that he was going to be in a trial that day. 1RP 3. Counsel objected, arguing that it would be improper for the court to continue the case to a day when it knew that the trial could not occur because the prosecutor was going to be in trial. 1RP 4-5. She reminded the court that there would be “no jurors the week after” due to the budget decisions of the county, so trial could not commence then, either. 1RP 5.

The court “set the trial for December 22, knowing that there are no new jurors coming in,” with the intent to “send the case out for trial and address all preliminary pretrial issues” but actually start jury selection and hold trial more than a week later, on January 3, 2011. 1RP 8.

On December 22, 2010, the parties appeared and the prosecutor declared the appearance just a formality, saying, “[e]ssentially we’re only coming before Your Honor just so Your Honor can officially call the case,” but that everyone understood, under the previous ruling, that the case would then be “recessed” until January 3rd . 2RP 2. Counsel objected that she would be done with her case that afternoon and she wanted to go to trial then, although she had not interviewed Rose. 2RP 3. The prosecutor presented a second amended information, which added an additional charge of felony harassment for the October incident. 2RP 4. There was no further discussion of the speedy trial issue. 2RP 5.

When the parties appeared again before the court on January 3, 2011, counsel moved to dismiss for violations of Ashborn’s speedy trial rights. 3RP 3. Counsel restated the facts about the April incident and charges and the prosecution deciding to add those charges, although she concluded that, under CrR 3.3, the state had 30 days from the refiling, not 24 as previously believed. 1RP 30-31. With that, counsel argued that the time for speedy trial had expired on January 1. 3RP 31.

Again counsel noted that the continuance to December 22 was improper because “this court had no jurors available” that week, nor were there any the week following. 3RP 31. Counsel stated that it was, in fact, possible to have jurors present and available, because at least one judge

had simply “held over a panel of jurors” for that purpose. 3RP 31. Counsel concluded that, because Ashborn’s trial was set for a week when “it simply could not be sent out to trial” (i.e., because there were no jurors available), setting trial that day was “really form over substance.” 3RP 31-32.

In ruling, the court said what it thought was “pivotal” was that the trial “did commence on December 22,” because there was a defense motion to exclude witness and it was “unlikely” that the parties could have picked a jury on December 23 because of timing. 3RP 54. The judge conceded there were no jurors called in for the following week, December 27, but said that, on the 22nd, they “could have attempted to call some jurors in.” 3RP 54. The judge also said that the main prosecutor would not have been available on the 22nd and the 23rd so that a continuance would have been granted even if there had been jurors available, so that “the fact that we did not have jurors available right then and there” did not “prejudice” Ashborn. 3RP 54. The court denied the motion to dismiss. 3RP 54.

b. The case should have been dismissed

The Court erred in failing to dismiss the charges, because Ashborn’s rights to a speedy trial were violated. Under the speedy trial rule, for a defendant detained in jail, the trial date must be set within 60 days of arraignment. CrR 3.3(b)(1). There are certain periods of time which are excluded from this calculation, including, under CrR 3.3(e)(8), “[u]navoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or the parties.” Another is continuances

granted by the court. CrR 3.3(e), (f).

Here, at the time the court originally set the trial date as January 20, that was consistent with the speedy trial rule as applied to the existing charges. But when the prosecution chose to add onto the information the previously dismissed charges in order to revive them, the speedy trial period had already run for those charges, except for 30 days, so that the date of trial had to be reset. Recognizing this, the court specifically set the trial date for December 22, even knowing that trial could not actually go forward because of the lack of jurors. See 1RP 8. And it then refused to dismiss when the trial did not occur within the required time, based on the theory that trial had “started” on December 22, 2010, because there was a pro forma motion to exclude the witnesses who might testify. 2RP 2, 5.

It is Ashborn’s position that his speedy trial rights were violated and trial did not truly commence on December 22, 2010, because the trial could not, in fact, have occurred at that time and the granting of the pro forma motion to exclude witnesses was insufficient under these unique circumstances. First, Mr. Ashborn did not waive his rights to a jury trial. He was constitutionally entitled to have a jury decide his case. But that could not have occurred on December 22, 2010 or, in fact, through the next two weeks because there were no jurors available - something the court **knew** when it decided to set trial to start that day.

Further, the pro forma motion was not sufficient to start the trial, because there was no expectation that trial would then commence and the delay after that motion was granted was, in fact, expected and anticipated.

Compare, In re Andrews, 66 Wn. App. 804, 832 P.2d 1373 (1992), review denied, 120 Wn.2d 1022 (1993) (where there was no evidence that it was “the design of the State that resulted in the trial not proceeding immediately” after the motion to exclude witnesses, the speedy trial rule was not violated). Here, it was, in fact, the design of the State i.e., both the prosecutor and county and even the judge that the actual trial proceedings would still not occur. The absence of the jurors was known about in advance, as was the fact that no jury trials could thus likely occur. And that absence was based upon money.

Failure to have sufficient resources to have a jury pool in order to hold a jury trial, however, is not an “unavoidable or unseen circumstance[.]” supporting a continuance under the speedy trial rule. See, e.g., Kenyon, 167 Wn.2d at 137-38; see also, Jones v. State, 707 So.2d 905, 905-906 (Fla. 1998). Such a lack of resources to bring a case actually to trial is akin to “court congestion,” such as a lack of judges to hear a case or courtrooms in which to hold the trial. See State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005); see also, Kenyon, 167 Wn.2d at 137-38. “Court congestion” or a lack of resources to try a case is not a basis for continuing a case beyond the speedy trial limit, because there is a very significant interest in “prompt resolution of cases, and excusing such delays removes the inducement for the State” to fix the problem. Flinn, 154 Wn.2d at 200.

Thus, in order to justify a continuance based on such situations, the court is required to document the details of why there are no available courtrooms, judges or, in this case, jurors, and those details are then to be

weighed to determine whether there were indeed “unavoidable or unforeseen circumstances” requiring and supporting going outside the time for trial rules. See Kenyon, 167 Wn.2d at 139.

Here, the county administrator’s emails establish that the lack of jurors was not an “unavoidable or unforeseen circumstance” - it was a planned event, decided upon to save money. Such routine decision-making, affecting all cases at the same time and planned in advance rather than the result of some unexpected incident, is not “unforeseen.” See, e.g., State v. Smith, 104 Wn. App. 244, 15 P.3d 711 (2001). Indeed, this type of expected, routine “congestion” is instead “antithetical to the due administration of justice, and neither unforeseeable nor unavoidable.” Id.; see also, Jones, supra (the routine practice of not empaneling jurors during a regularly scheduled time is not “an exceptional circumstance” for the purposes of the Florida speedy trial rule). The lack of jurors here was known about in *May*, even before the charges were filed in this case. And it was not the result of some unexpected event but rather a specific, political decision.

At the time the court granted the continuance to December 22, it knew that no jury trial could commence on that day - nor could one go forward for approximately two weeks thereafter. By continuing to that date with the intent of then entering a pro forma motion on that date in order to technically start the trial without having to actually do so for several weeks after the time for trial expired, the court violated Mr. Ashborn’s rights to a speedy trial. This Court should so hold and should reverse and dismiss with prejudice all of the convictions.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss all of the charges with prejudice.

DATED this 22nd day of November, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL AND ELECTRONIC FILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, or by e-filing, as follows:
to Ms. Kathleen Proctor, Esq., via e-filing this date; and
to Mr. Jeffrey Ashborn, 4109 Yakima Ave., Tacoma, WA. 98409.

DATED this 22nd day of November, 2011.

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