

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. MACNEVEN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey, Judge  
Cause No. 10-1-01647-7

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court violated MacNeven's speedy trial when it continued the trial date.

2. Whether it was ineffective assistance of counsel when MacNeven's trial counsel failed to bring forth motion to dismiss based on speedy trial violation.

B. STATEMENT OF THE CASE.

The State accepts MacNeven's statement of the case, while noting the following clarifications, corrections, and additions:

The purpose of the ER 404(b) hearing was for both parties to litigate the admissibility of MacNeven's two prior convictions for violation of protection order. [2/15/11 RP 6].

C. ARGUMENT

1. The trial court did not violate MacNeven's speedy trial when it continued his trial date.

(a). MacNeven failed to preserve the issue of speedy trial violation under CrR 3.3.

Insofar as MacNeven relies on CrR 3.3, the issue cannot be raised on appeal. In the trial court, MacNeven never sought dismissal based on any speedy trial or time-for-trial argument. This failure precludes review of any argument based on the court rule. State v. Barton, 28 Wn. App. 690, 693, 626 P.2d 509, review denied, 95 Wn.2d 1027 (1981).

In Barton, the defendant did not have his preliminary hearing until 123 days after his arrest. Prior to trial, the defendant made a motion to dismiss pursuant to CrR 3.3. However, the basis of the motion was that more than 60 days had elapsed between the defendant's arraignment in superior court and his superior court trial. Barton at 692. On appeal, the defendant argued that the court's ruling in State v. Edwards, 94 Wn.2d 208, 616 P.2d 620 (1980) requires dismissal of the charges against him. However, the court denied his request for dismissal stating since the defendant failed to raise this specific argument in the trial court:

With the exception of jurisdictional and constitutional issues, appellate courts will review only issues which the record shows have been argued and decided at the trial court. CrR 3.3 does not create a constitutional right, nor is it jurisdictional. Although the right is to be strictly enforced, it is nonetheless a procedural rule.

Barton at 693. In reaching its ruling, the court reasoned:

Because CrR 3.3 has so "many facets"...its several amendments and the many appellate decisions interpreting its provisions, the trial court cannot reasonably be expected, nor does it have the obligation, to rule on every possible aspect of CrR 3.3 every time there is a general incantation of the rule's applicability or an issue raised concerning one of its provisions.

Id. Therefore, the court concluded a motion addressing the specific rule provision is required in order to give the trial court the opportunity to determine not only whether applicable time limits have elapsed, but to conduct a fact finding to determine whether any excluded periods apply. Id. at 694.

The language in the court's holding in Barton is also echoed in CrR 3.3(d):

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.

CrR 3.3(d)(3). When the trial setting procedure occurs fewer than 10 days before the expiration of the speedy trial period, the defense must notify the prosecutor and the court of its speedy trial objection in sufficient time for the trial to commence within the proper speedy trial period. State v. Austin, 59 Wn. App. 186, 200, 796 P.2d 746 (1990).

In the present case, neither MacNeven nor his attorney motioned the court for a hearing requesting a dismissal based on

speedy trial violation. Therefore, pursuant to Barton and CrR 3.3(d)(3), MacNeven loses the right to raise the issue of speedy trial violation on appeal.

(b). MacNeven failed to make a clear showing that the trial court abused its discretion in granting the continuances of the trial dates.

Assuming *arguendo* that MacNeven preserved the issue of speedy trial violation, the court should hold that the trial was timely. Because MacNeven was in custody pending trial, he was entitled to be tried within 60 days after arraignment. CrR 3.3(b)(1)(i), (c)(1). This computation, however, excludes “delay granted by the court pursuant to section (f).” CrR 3.3(e)(3). That section authorizes trial courts to grant continuances:

On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense...The court must state on the record or in writing the reasons for the continuance. *The bringing of such a motion by or on behalf of any party waives that party's objection to the requested delay.*

CrR 3.3(f)(2) (emphasis added).

The applicable standard of review regarding a trial court's grant or denial of a motion for a continuance is manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 14, 691 P.2d 929

(1984). The trial court's decision will not be disturbed unless the appellant makes a "clear showing...[that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

In the present case, the trial court did not abuse its discretion in granting the continuances of the trial date. The State requested to continue the trial date from January 18, 2011 to January 31, 2011 to accommodate an ER 404(b) hearing. [1/12/11 RP 3]. The trial court found good cause to continue the matter, noting MacNeven's objection at that time. [1/12/11 RP 4]. Because it is often disruptive during trial, an ER 404(b) hearing to determine the admissibility of prior misconduct is often determined prior to trial. Karl B. Tegland, Courtroom Handbook on Washington Evidence 259 (2011-2012 ed. 2011). Additionally, MacNeven did not suffer any prejudice in the presentation of his defense since his defense at trial was the State's failure to present sufficient evidence in

support of all the elements of the crime. [2/16/11 RP 45-48]. Therefore, pursuant to CrR 3.3(f)(2), the trial court did not abuse its discretion in continuing the trial date for two weeks to accommodate the ER 404(b) hearing.

After the trial court granted the first continuance, MacNeven, through his attorney, requested a continuance of the trial date from January 31, 2011 to February 7, 2011 in order for him to obtain his own counsel. [1/28/11 RP 3-4]. Although MacNeven was eventually unable to obtain his own counsel, his desire for one was echoed in his statement during motions *in limine*: "Well, tell you truth, Your Honor, all I wanted was some time to get a lawyer." [2/15/11 RP 7]. Therefore, pursuant to CrR 3.3(f)(2), because MacNeven, through his attorney, requested the second trial continuance, he has waived his right to object.

The final continuance, moving trial from the week of February 7, 2011 to February 16, 2011, resulted in the court's inability to hear the case due to the primary case proceeding to trial. [2/9/11 RP 6]. Although the record does not contain information on the availability of other courtrooms and judges, there was no prejudice to MacNeven. Pursuant to CrR 3.3(b), if a 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 that excluded period.” CrR 3.3(b)(5). One of the excluded time periods are continuances that are granted by the court pursuant to CrR 3.3(f). See CrR 3.3(e)(3). Thus, when the trial court continued the trial to January 31, 2011, pursuant to CrR 3.3(e)(3), the last allowable date for trial would have been March 2, 2011. Finally, when the trial date was continued to February 7, 2011 at the request of MacNeven, the last allowable date for trial would have been March 9, 2011. Therefore, when the trial court continued the trial date to February 15, 2011 due to court congestion, that continuance was within the speedy trial time as calculated pursuant to CrR 3.3(e)(3).

2. MacNeven did not receive ineffective assistance of counsel.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to

improve the quality of legal representation,” but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688-689. This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” Id. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an

insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice...then that course should be followed [first].” Strickland, 466 U.S. at 697.

In the present case, MacNeven argues that it was ineffective assistance of counsel when his counsel failed to motion the trial court for a dismissal based on speedy trial violation. In State v. Malone, 72 Wn. App. 429, 864 P.2d 990 (1994), the court of appeals was asked to consider a similar issue. In Malone, defense counsel motioned the court for a dismissal in violation of CrR 3.3. However, the trial court concluded that because defense counsel did not object to the trial date within 10 days of the trial setting, he waived his right to object. Id. at 432. On appeal, the defendant argued that it was ineffective assistance of counsel in waiving the speedy trial objection. Id. at 437. However, the argument was dismissed by the court of appeals, holding that the defendant had failed to establish prejudice:

“...a timely objection would not have changed the result. Instead of dismissing the charges because of the speedy trial violation, the court would have merely reset the trial date within the speedy trial period.”

Id. at 438.

Here, MacNeven makes two arguments in support of ineffective assistance of counsel. First, he argues that his counsel was ineffective in failing to ascertain his position regarding the request for continuance on February 9, 2011 in order for him to obtain his own counsel. However, the record suggests otherwise. According to MacNeven himself, all he wanted “was some time to get a lawyer.” [2/15/11 RP 7]. Furthermore, MacNeven cannot establish prejudice because on February 9, 2011, the court would have continued the trial date for one week regardless of his position.<sup>1</sup> At the time, there was no prejudice since the last allowable date for trial was moved to March 9, 2011 due to MacNeven’s request for a trial continuance on January 28, 2011.<sup>2</sup>

Additionally, MacNeven argues that it was ineffective assistance of counsel in waiving the speedy trial objection. However, he cannot establish prejudice; even if a timely speedy trial objection was made, the proper remedy for the court would have been merely resetting the trial date prior to the expiration of

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<sup>1</sup> The Court concluded that MacNeven’s trial needed to be continued for one week due to the “primary case” proceeding to trial on that date. [RP 2/9/11 RP 6].

<sup>2</sup> The trial court granted MacNeven’s request for a trial continuance in order for him to obtain his own counsel. Pursuant to CrR 3.3(b)(5), this continuance extended the last allowable date for trial to March 9, 2011.

speedy trial. Such action would not have changed the result of the verdict at trial. Therefore, just like the holding in Malone, this court should also conclude that it was not ineffective assistance of counsel in waiving a timely speedy trial objection.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm MacNeven's conviction.

Respectfully submitted this 12 of January, 2012.

  
\_\_\_\_\_  
Olivia Zhou, WSBA# 41747  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on the date below as follows:

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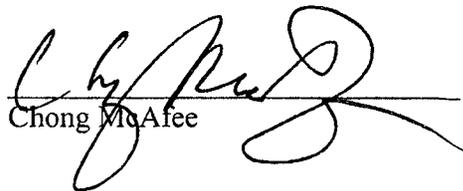
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of January, 2012, at Olympia, Washington.

  
Chong MaAfee

# THURSTON COUNTY PROSECUTOR

**January 12, 2012 - 4:28 PM**

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