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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 42010-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN DAVID WILES,

Appellant

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

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

John David Wiles # 892100
Cedar Creek Corrections Center
P.O. Box 37
Littlerock, WA 98556

pm 1/24/12

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1 A. ASSIGNMENT OF ERROR

2

3 The trial court erred and abused its discretion when it denied Appellant's
4 motion to dismiss with prejudice pursuant to CrR 3.3 (Time for Trial).

5 Further, the trial court erred when it originally violated the Appellant's
6 right to a speedy trial by continuing the date for trial past the 60 day time
7 limit of CrR 3.3 without a valid reason and without making an adequate
8 record of findings or entering findings of facts concerning the
9 circumstances surrounding the granting of the continuance over the
10 Appellant's objection and without his agreement.

11

12 Issues Pertaining to Assignment of Error

13

14 CrR 3.3(b)(1)(i) provides that: "[F]or a defendant who is detained
15 in jail, the trial court must set a trial date within 60 days of the defendant's
16 arraignment." Certain periods are excluded from this 60 day period, such
17 as continuances granted under CrR 3.3(f) and CrR 3.3(e)(3). The court is
18 required to "state on the record or in writing the reasons for the
19 continuance" when made in a motion by the court or a party. CrR
20 3.3(f)(2).

21

22 In light of the above described constitutionally protected
23 provisions, as well as the aforementioned rules, did the trial court abuse its
24 discretion when it denied the Appellant's motion to dismiss pursuant to
25 CrR 3.3; and pursuant to appellate review, did the trial court violate the
26 requirements of CrR 3.3 and Appellant's right to a speedy trial in granting
27 the continuance on January 4, 2011?

28

1 B. STATEMENT OF THE CASE

2

3 The Appellant (hereafter Wiles) incorporates by reference the
4 Statement of the Case as set forth in counsel's Brief of Appellant.

5

6 1. Procedural Facts

7

8 As they pertain to this Statement of Additional Grounds for
9 Review, the relevant facts are thus: Wiles' arraignment was on November
10 9, 2010 and the speedy trial period was therefore set to expire on January
11 8, 2011 absent a valid continuance or exclusionary period. On the
12 scheduled trial date of January 4, 2011, the trial court continued the trial
13 date over Wiles' objection and without his agreement until February 14,
14 2011. On the next scheduled trial date of February 14, 2011, the trial
15 court continued the trial date again over Wiles' objection and without his
16 agreement.

17 On March 8, 2011, Wiles moved the court to dismiss the charge
18 with prejudice based on a violation of the CrR 3.3 sixty-day speedy trial
19 right. RP 23, 36-52. On March 9, 2011, the trial court went through a
20 lengthy colloquy before finally denying the motion to dismiss. RP 52.
21 The trial court stated that the court's order denying Wiles' motion to
22 dismiss was based on CrR 3.3(b)(5), (e)(3), (e)(8), and (f)(2). RP 51 at
23 20-23.

24 Neither the judge denying the motion to dismiss, nor the deputy
25 prosecutor arguing against the motion were present at the original January
26 4 trial date or had any personal knowledge of the proceeding or of the
27 facts as they pertained to the continuance for trial. Since there was no
28 record of findings for the January 4 proceeding, the trial court's denial was

1 based solely on the January 4 order of continuance itself and the facts and
2 arguments as stated in Wiles' motion to dismiss.

3 Wiles was subsequently convicted for one count of violation of a
4 no-contact order and sentenced to 40 months incarceration.

5
6 C. ARGUMENT

7
8 THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION
9 IN DENYING WILES' MOTION TO DISMISS WITH PREJUDICE
10 AND IN CONTINUING THE TRIAL DATE PAST THE 60 DAY TIME
11 LIMIT REQUIRED BY CrR 3.3 WITHOUT A VALID BASIS AND
12 WITHOUT CREATING A RECORD OF FINDINGS FOR REVIEW AS
13 REQUIRED BY LAW.

14
15 CrR 3.3 and precedent require that since Wiles was in custody at
16 the time, his trial was to commence within 60 days after arraignment,
17 excluding valid continuances or enumerated exclusionary periods. CrR
18 3.3; *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009); *State v.*
19 *Saunders*, 153 Wn.App. 209, 220, 220 P.3d 1238 (2009)

20 Once the time-for-trial date expires without a stated lawful basis
21 for further continuances, the rule requires dismissal, and the trial court
22 loses the authority to try the case. CrR 3.3(b), (f)(2), (g), and (h); *Saunders*
23 *supra*.

24 Wiles moved the court to dismiss the charge against him with
25 prejudice for violation of CrR 3.3 and his speedy trial right. The trial
26 court then abused its discretion when it denied the motion to dismiss on
27 untenable grounds and for untenable reasons and without a record of

1 findings for the January 4 proceeding. The trial court also misapplied the
2 legal standard and court rule in considering Wiles' motion.

3 The standard of review as it applies to Wiles' motion to dismiss is
4 for an abuse of discretion. The appellate court reviews de novo whether
5 the trial court correctly applied CrR 3.3 to the facts of this case. State v.
6 Kindsvogel, 49 Wn.2d 477, 480, 169 P.3d 870 (2003). "Thus, to
7 determine whether the trial court committed an error of law, which is
8 included in the abuse of discretion standard, we review the alleged error of
9 law itself de novo." State v. Lamb, No 39849-4-II, 2011WL4036096
10 Wash. Ct.App (2011).

11 According to this standard of review, we must focus on the alleged
12 violation of CrR 3.3 and the right to speedy trial itself. The examination
13 then becomes: was Wiles' right to a speedy trial as protected by the
14 requirements of CrR 3.3 violated? It is clear that Wiles' trial was
15 continued on January 4, 2011 until February 14 and then again until it
16 actually commenced on March 8, 2011. However, there exists no record
17 of findings of the January 4 proceeding and therefore we have only the
18 order extending trial time.

19 In fact, no record was made about the underlying circumstances of
20 the periods of delay until Wiles' aforementioned motion to dismiss was
21 heard on March 9, 2011. This was 63 days after the January 4 proceeding
22 was held. As previously noted, neither the judge making the ruling to
23 deny the motion to dismiss nor the deputy prosecutor advocating for the
24 State were present at the January 4 proceeding.

25 CrR 3.3 clearly requires that a motion with a stated reason and
26 lawful basis must be made on the record **prior** to the continuance being
27 granted. State v. Saunders supra; CrR 3.3(b), (f)(2), (g), (h). (emphasis
28 added).

1 Further, the rule governing motions requires that the grounds of all
2 motions shall be stated “**with particularity**”. CrR 8.2 (to CR 7(b)).
3 (emphasis added).

4 On March 9, 2011, the trial court did not have the authority or
5 possess the facts necessary to make a determination or to create a record
6 of findings after the expiration of speedy trial time had already occurred
7 on January 8. Since there was not a recorded adequate basis for the
8 continuance, regardless of its competency, the trial court had already lost
9 the authority to try the case further.

10 In Wiles’ case, at a minimum, a record should have been made on
11 January 4 of any motion and findings concerning the specific reasons and
12 circumstances surrounding the extension of time for trial in order to meet
13 the requirements of CrR 3.3, protect the right to speedy trial, and preserve
14 an adequate record for appellate review.

15 The record should have included at least some basic, although
16 particular, findings of facts and circumstances including, but certainly not
17 limited to: (1) the identity of the absent DPA referenced on the order
18 continuing trial to confirm any existence of case-specific scheduling
19 conflict(s), (2) the exact nature of any scheduling conflict(s) with other
20 trials including whether such trials were civil or criminal, (3) the dates of
21 any conflict(s), (4) the estimated time(s) of the conflict(s), (5) any ability
22 or disability to reschedule said conflict(s), and (6) the possibility of
23 appointing other counsel or stand-in counsel for the State.

24 There is no such record of a motion with grounds in particular or
25 case-specific findings in the verbatim report of proceedings nor do any
26 appear in any of the clerk’s papers or transcripts provided to Wiles. CrR
27 3.3 uses language which commands that a record “must be made”
28 concerning the reasons and examination of facts surrounding a motion for

1 continuance. Case law dictates that without this mandatory record, a
2 continuance is invalid and the subsequent extension of time is not
3 excluded from the speedy trial timeline.

4 The requirement for the record of a well-grounded motion and
5 case-specific findings found within the carefully crafted language of CrR
6 3.3 is readily relevant in this case when one considers the fact that the
7 absent DPA with the purportedly conflicted schedule on January 4 was not
8 the DPA (Ms. Sievers) who eventually tried Wiles' case. RP 41.

9 Additionally, by the State's own admission, Wiles' trial was
10 estimated to last only two days and then only five witnesses were called at
11 trial. This considered, this was not a complicated trial and required only
12 nominal preparation by counsel and indeed no such claim of any need for
13 pre-trial preparation time was ever made or even implied.

14 Even if we accepted the State's contention that there was a
15 scheduling conflict on January 4, which we do not, pre-scheduled events
16 by definition are not "unforeseen" nor "unavoidable" and therefore are not
17 circumstances warranting an extension of time for trial past the 60 day
18 limit. As Washington Supreme Court Justice Chambers wrote in *Kenyon*,
19 "the purpose of excluding periods of "unavoidable and unforeseen
20 circumstances" in computing the speedy trial deadline is to allow the court
21 flexibility to deal with **truly** exceptional circumstances." (emphasis
22 added).

23 Similar to the spirit of the ruling in *Kenyon*, a deputy prosecutor
24 choosing to attend one previously scheduled proceeding in preference over
25 another previously scheduled proceeding is not exceptional. Also not
26 exceptional in this case is the fact that trials other than Wiles' may have
27 been in queue or that an individual unknown counsel may have had a
28 purportedly pre-planned vacation scheduled to begin at some unknown

1 time in the future. While a busy caseload is unfortunate, it is neither
2 unforeseen nor unavoidable.

3 Even more importantly in this case, a heavy or mismanaged
4 caseload in the prosecutor's office was in no way a "case-specific" issue to
5 Wiles' trial.

6 All of the enumerated exclusionary periods described in CrR
7 3.3(c)(2) and (e)(3) entail reasons or circumstances which are either
8 explicitly or implicitly related to the case in question. Even the federal
9 equivalent to CrR 3.3 has automatic exclusionary periods which are all
10 limited to "case-specific" issues. It requires that when considering a
11 motion to extend time for trial with reasons not automatically excluded (ie
12 specifically enumerated), "such time may be excluded only if a court
13 makes **case-specific** findings ..." (emphasis added). *Bloathe v. US*, 130 S.
14 Ct. 1345 (2010).

15 The absent DPA referenced on the January 4 continuance form was
16 obviously aware of his or her schedule and must have been aware of any
17 alleged conflict prior to that day. He or she apparently chose one
18 proceeding over the other without making the court aware of any details
19 regarding a purported scheduling conflict and how it might possibly be
20 resolved in order to ensure that the requirements of CrR 3.3 were met,
21 Wiles' speedy trial right was protected, and an adequate record was
22 preserved.

23 Any alleged scheduling conflict in Wiles' case was more likely a
24 result of caseload mismanagement or mishandling rather than a surprising
25 confluence of prearranged dates concerning an unknown individual DPA.

26 Allowing continuances beyond the sixty day time limit based on an
27 anonymous deputy prosecuting attorney's choice to prioritize one
28 scheduled proceeding over another without even a basic explanation of

1 facts and findings on the record would render the speedy trial rule virtually
2 meaningless.

3 Regardless of the reason used on the January 4 continuance form,
4 and especially because the defendant objected and did not agree to the
5 extension of time, a record of a well-grounded motion with particular
6 findings was required concerning the extension of time for trial; but no
7 such record exists.

8 Therefore, in Wiles' case, the speedy trial time expired on January
9 8, 2011. Consequently, CrR 3.3 was violated sixty days prior to Wiles'
10 motion to dismiss was denied, and could not be remedied after the fact
11 with anything other than the requested dismissal with prejudice.

12

13 D. CONCLUSION

14

15 Based on the facts of this case and the previous argument, Wiles
16 respectfully requests that this court reverse his conviction and dismiss with
17 prejudice the charge against him pursuant to CrR 3.3.

18

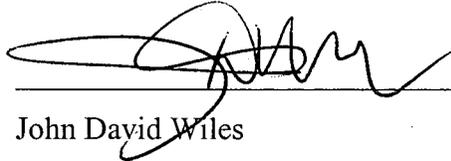
19 Dated this 23rd day of January, 2012.

20

21 Respectfully submitted,^

22

23



24

John David Wiles

25

Appellant

26

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 Appellant)

No. 42010-4-II
DECLARATION OF SERVICE BY
MAILING

I, John David Wiles, the Appellant, in the above-entitled cause, do hereby declare that I have served the following document:

No. 42010-4-II, Statement of Additional Grounds for Review

And that the document listed above has been served to:

1. David Ponzoha, Clerk, Court of Appeals Division II, 950 Broadway, Suite 300, Tacoma, WA 98402
2. Valerie Marushige, Attorney for Appellant, 23619 55th Place South, Kent, WA 98032

Also that I deposited this document with the Unit Officer's Station, by processing as Legal Mail with First Class Postage (prepaid) at:

Cedar Creek Corrections Center, PO Box 37, Littlerock, WA 98556

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

Dated this 23rd day of January, 2012.

[Signature]

John David Wiles
Appellant