

No. 42611-1-II  
COURT OF APPEALS, DIVISION TWO,  
OF THE STATE OF WASHINGTON  
CLALLAM COUNTY No. 10-1-00313-3

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STATE OF WASHINGTON,  
*Respondent/Plaintiff,*  
vs.  
JONATHAN GRANTHAM,  
*Appellant/Defendant.*

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BRIEF OF RESPONDENT

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## COUNTER STATEMENT OF ISSUES

### ISSUE ONE

*Did the trial court abuse its discretion by finding "good cause" to continue Mr. Grantham's restitution hearing more than 180 days from the date of his sentencing, when Mr. Grantham changed attorneys one month before the restitution hearing and was unavailable for hearing until after 180 days?*

### ISSUE TWO

*Do the findings of fact support the trial court's conclusion that it had good cause to continue the restitution hearing from June 9<sup>th</sup> to June 16<sup>th</sup>?*

## STATEMENT OF FACTS

On October 21, 2010, Mr. Grantham pleaded guilty to residential burglary, theft in the first degree, possessing stolen property in the first degree, unlawful possession of a firearm in the second degree, and hit and run property (RP 7-8). Mr. Espinoza appeared for the State. Mr. Anderson represented Mr. Grantham (RP 2). The State and Mr. Grantham presented an offer of 70 months, with no community placement (RP 8-9). The offer was made by the State in exchange for his agreement to make restitution to the victim (RP 11-12). Mr. Grantham sought a sentence without community custody because he is facing federal or state charges in Kitsap County (RP 25), but sought to return to Georgia as soon as possible (RP 6). Mr. Grantham assured the Court the Snohomish charges were resolved (RP 15). The amount of the restitution was not agreed (RP 12), so a hearing was set for January 12, 2012 (RP 14). Mr. Grantham waived his appearance at the restitution hearing (RP 18). Mr. Anderson told Mr. Grantham that he "was not formally the attorney on a forfeiture" but that he would work with the State to resolve forfeiture issues (RP 18).

On January 21, 2011, the restitution hearing was continued because "Defense advises defendant is in custody in another county. State is still working on restitution issues due to staffing. Advises they are

waiting documentation from the victim. Court sets matter over. Agreed.” (CP 91).

On February 25, 2011, the restitution hearing was continued because “State advises the victim is meeting w/PAPD to identify property in order to get a dollar figure. Makes motion to set matter over. Defense counsel has no objection as he will need to review #'s w/ his client. Court grants motion.” A new hearing date is set for April 1, 2011 (CP 90).

On March 2, 2011, the matter came before the Court on Mr. Grantham’s request to be present for the restitution hearing and for Mr. Anderson’s motion to withdraw as counsel. Mr. Grantham was on the telephone and indicated he could hear (CP 72). Mr. Anderson was withdrawing because of allegations Mr. Grantham had made about his representation (CP 73). New counsel had to be appointed. Mr. Anderson informed the trial court the April 1, 2011 hearing would be too close in time because the restitution matters were very complicated (CP 72). The court notes state “Defense reports his client wants to be present at the restitution order [sic]. Court will grant & signs a transport order. Mr. Anderson moves to withdraw as counsel of record & presents argument. State has no objection to the withdrawal motion. Defendant does not object & wishes to have the Court appoint new counsel. Mr. Oakley presents argument regarding a conflict in the Public Defender’s office.

Court appoints Mr. Lauer as conflict counsel. New restitution hearing is set.” (CP 86-7).

During the part of the hearing related to whether April 28, 2011 is a good date for the State, Mr. Espinoza answered:

“Yes. The Defendant was sentenced on October 31<sup>st</sup>, so the 180 day period will be fine for the State” (CP 77).

The Court then asked defense counsel if April 28, 2011 worked for him. Mr. Lauer answered that it did (CP 78).

The Court then asked Mr. Grantham if he knew which institution he would be at on April 28<sup>th</sup>, because the Court knew that Mr. Grantham was “in transit at this point” (CP 78). Mr. Grantham responded that he did not know where he would be. The Court decided to send the order for transport to Clallam Bay (CP 78).

On March 25, 2011, Mr. Grantham was ordered transported to Snohomish County (CP 112).

On April 1, 2011, the restitution hearing was called but stricken because it had been reset to April 28, 2011 (CP 85).

On April 12, 2011, Clallam Bay Corrections Center administrator Tammy MacNaughton advised Clallam County Court Administrator Melinda (Lindy) Clevenger that Mr. Grantham was currently in Snohomish County. There was no expected date of return so Clallam Bay would advise Clallam County when he is available (CP 84).

On April 28, 2011, the restitution hearing was continued again because "State updates the Court, defendant wants to be present now, defense requires presence of his client, Court will con't 06-02-11 @ 9:00 a.m. Defendant was not available today & wishes to be present. Court will sign order of transport for June hrg" (CP 83).

On May 27, 2011, Mr. Lauer and Mr. Espinoza agreed to continue the June 2, 2011 hearing to June 9, 2011 (CP 82).

On June 9, Mr. Lauer appeared, with Mr. Grantham on the telephone (RP 19). Ms. Kelly appeared for the State because Mr. Espinoza was in trial (RP 19). Mr. Grantham immediately objected to resetting the restitution again, stating "at this point we're well past 180 days. I don't think the Court has jurisdiction to consider restitution at this point" (RP 19-20). The Court pointed out that "everybody has agreed to the continuances up to this point. And Mr. Espinoza is in trial today in another courtroom, so he's not available to do the trial – or to do the hearing today. So I think there's reasonable grounds to continue it briefly." (RP 20). The Court pointed out that the hearings had been continued by agreement up to that point. Mr. Grantham responded "I didn't object to the last one because I believe the Court would have found good cause for a one-week continuance when the witness is unavailable" (RP20-21). The Court responded, "Okay. So weren't we already outside

the 180 days at that point?" Mr. Grantham responded, "Yes" (RP 21). Mr. Grantham conceded that all the continuances up to June 9, 2011 had been by agreement or for good cause (RP 20), but he believed the State had erred because "the motion to continue [the June 9<sup>th</sup> hearing] should have been filed prior to the expiration of the period, which it wasn't. There were some continuances. Some of them were due – there were [sic] (inaudible) good cause. And, basically, to go outside 180 days as to a finding of good cause, there has to be a request of that finding be made [sic] prior to the expiration. None of that was done." Mr. Grantham finished with "[ ] there's certainly an argument that some of the earlier continuances were agreed to. This one wasn't." (RP 20).

After hearing further argument from Mr. Grantham, the Court stated "I think the last continuance that occurred was by agreement, and that was after 180 days. It was continued to today's date. And I think there's good cause to continue it to one more week" (RP21-22).

The matter came on for hearing on June 16, 2011 (RP 24). During the course of the hearing, the parties reached an agreement about the amount of restitution and offsets for the restitution order (RP 34-50). Mr. Grantham, however, renewed his objection to the timeliness of the hearing. He stated: "This case was continued on the State's motion from June 2, 2011 until June 9, 2011. That was the date that the State

specifically requested in their motion to continue. They specifically asked for the June 9 date. There was a one-week continuance because the victim was unavailable to testify. I didn't object to that because, realistically, I don't think it would have done any good." (RP 24). Mr. Grantham's issue was that, while he had agreed to all the other continuances, whether by agreement or because of circumstances, he would not have agreed to a continuance past June 9, 2011 (RP 25).

Mr. Grantham explained the court administrator called him on the 8<sup>th</sup>, indicating the hearing had to be reset because Mr. Espinoza was in another matter. (RP 25). His attorney, Mr. Lauer, came to court but Mr. Grantham's transport had been cancelled (RP 25). Mr. Grantham argued that mere unavailability was legally insufficient as a basis for a continuance. Finally, Mr. Grantham stated:

"The Court made some observation that the matter had already been set outside of 180 days, and I guess the Court's position seemed to be that somehow that constituted a continuing waiver of the 180-day period. And I don't see it that way. I mean, this case was set outside the 180 days because of what I considered a good cause. I don't feel I have to object for the record when – I think when the State presents good cause for a matter to be continued, and I don't think by agreeing to good – when there is good cause, by agreeing to continue it, I don't think that somehow means that I can never object again in the future as I did on June 9 when there was no good cause." (RP 27).

Further facts were developed about why Mr. Espinoza was not available. He was supposed to be in a two-day trial beginning on June 7<sup>th</sup>,

a Tuesday. He would then be available for the June 9<sup>th</sup> hearing, a Thursday. Instead, he was ordered to start a different two-day trial on June 6<sup>th</sup>, a Monday. The Court then ordered him to start a second trial on Wednesday, the 8<sup>th</sup> (RP 28, 30). Mr. Espinoza was in trial on the second trial, on Wednesday, the 8<sup>th</sup>, and Thursday, the 9<sup>th</sup>. The Grantham restitution hearing was set for a continuance hearing by the court administrator (RP 31). The Court ruled that Mr. Grantham suffered no prejudice by the one week continuance. It also reiterated that there was good cause to continue it a week because Mr. Espinoza “has been handling this matter from day one, was in court in another trial. I don’t think it’s unreasonable to have somebody else try and do this at the last minute.” (RP 32). However, the Court set August 4, 2011 for continued argument on Mr. Grantham’s motion to dismiss the restitution proceedings (RP 51).

On August 4, 2011, Mr. Grantham renewed his objection to “improper ex parte communication” by the court administrator and her apparent role in bringing the State’s dual settings to the Court’s attention (RP 56). The Court reminded Mr. Grantham that ex parte communication was not involved in this situation; it is the court administrator’s role to find out which cases can be presented on any given day (RP 57). Rather than bring Mr. Grantham from Clallam Bay unnecessarily, she probably

decided not to waste the resources to bring him for a hearing that was not going to go (RP 57). The court administrator did not decide there was good cause to continue the case; that decision was made by the Court when it came up on June 9<sup>th</sup> (RP 58). Mr. Grantham renewed his arguments that Mr. Espinoza should have noted a hearing to continue the matter (RP 59). After hearing all of Mr. Grantham's reasons why Mr. Espinoza should have either filed a motion to continue or been present on June 9<sup>th</sup> for the restitution hearing, the Court summed up by stating the matter was supposed to be done by "late April" but, for reasons related to a change in counsel, Mr. Grantham's decision to be present for the restitution hearing, the State's unavailable witness, the hearing did not happen, nor was it ready to happen, until June 9<sup>th</sup> (RP 66). The Court stated "I don't think there's any argument by Mr. Grantham or anybody else that it was all agreed to January [sic-June] 9." (RP 66). The Court agreed there must be good cause to continue the hearing beyond the 180 day period, but, because Mr. Espinoza had been the attorney on the file and restitution included substantial issues, there was good cause to continue the matter because he was in trial in another case (RP 67-69).

Findings and conclusions were presented on August 25, 2011 (RP 72). Mr. Grantham did not object to any findings. He asked to revise finding 8, and then agreed with the new language. The Court changed the

date in finding 5 to June 8 rather than June 9 and added that the court administrator had not consulted with the defense before setting the hearing (RP 76). Mr. Grantham did not object to any finding after the Court amended them to address his concerns. This appeal followed.

## ARGUMENT

### ISSUE ONE

*Did the trial court abuse its discretion by finding "good cause" to continue Mr. Grantham's restitution hearing more than 180 days from the date of his sentencing, when Mr. Grantham changed attorneys one month before the restitution hearing and was unavailable for hearing until after 180 days?*

RESPONSE: Based on the facts of this case (change of attorney, assertion of constitutional right to be present, a hold from Snohomish County), the Trial Court did not err in conducting the restitution hearing later than 180 days. Moreover, contrary to the position on appeal, trial counsel waived all the delays that occurred until June 9, 2012.

A. The trial court did not err when it found good cause to hold the restitution hearing after 180 days had expired.

Mr. Grantham has stated two assignments of error. The first assignment reads:

1. The court erred in entering a restitution order after the 180 day statutory time limit expired.

Mr. Grantham's first argument focuses on the April 28<sup>th</sup> setting, arguing that, because the prosecutor misstated the sentencing date, good cause did not exist to continue the hearing date beyond the 180 limit. The argument focuses on the date to which the hearing was reset (April 28<sup>th</sup>),

and not on when the hearing occurred, and is therefore incorrect.

Mr. Grantham's argument misses the point. The issue is not whether the prosecutor made a mistake about the new setting date. The issue is whether good cause existed on March 2<sup>nd</sup> to continue the hearing. Wash. Rev. Code Ann. § 9.94A.753(1) states in pertinent part:

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days [ ]. The court may continue the hearing beyond the one hundred eighty days for good cause.

Mr. Grantham reads this statute to say the Court erred when it *set* the hearing date past 180 days because the deputy prosecutor forgot the sentencing was October 21, 2010. The statute reads, however, that the restitution amount must be *determined* at sentencing or at a hearing within one hundred eighty days, unless good cause is shown to continue the hearing beyond the one hundred eighty days. The issue then, is whether "good cause" existed to conduct the restitution hearing more than 180 days after sentencing.

As the trial court stated, there was good cause to continue the hearing because Mr. Grantham requested that he be present at the restitution hearing and because Mr. Anderson withdrew. The sentencing record shows these two issues were presented to the trial court at the sentencing hearing. First, Mr. Grantham was facing charges, either state

or federal, arising out of activities in Kitsap County. It was known then that Mr. Grantham may not be in Clallam County when the restitution hearing was heard. It was known on March 2<sup>nd</sup> that Mr. Grantham was in Clallam Bay but may be sent to another county, so the Court opted to send the transport order to Clallam Bay (CP 78). Second, Mr. Anderson indicated at sentencing he was not Mr. Grantham's attorney for forfeitures, an issue involved in the restitution hearing. Even without Mr. Grantham's comments that led to appointment of a new attorney,<sup>1</sup> the trial court was made aware that a new attorney would most likely appear. The Court had Mr. Grantham's transfer to other counties to consider, Mr. Grantham's new decision he wanted to be present for the restitution hearing, Mr. Anderson's withdrawal, the Public Defender's conflict, and the need to appoint a new attorney. The Court considered all these things in its decision to continue the case from March 2, 2011. Nobody questioned that Mr. Grantham was unavailable within the 180 period. Then, Mr. Grantham was transported to Snohomish County shortly after March 25, 2011 (CP 112). The email from Clallam Bay Correction Center warned the court administrator that Mr. Grantham was in Snohomish County on April 15, 2011 (CP 111). Even if the hearing had been *set* within 180 days, the

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<sup>1</sup> Neither Mr. Anderson nor the trial court could anticipate Mr. Grantham's apparently scathing comments about Mr. Anderson's representation, which led to the hearing on March 2, 2011. The obvious purpose of the hearing was to appoint new counsel.

Court would not have been able to conduct a hearing to determine the amount of restitution because Mr. Grantham was unavailable as early as March 25, 2011.

The *only* thing the Court did not consider was that April 28, 2011 was approximately seven days past the 180 day limit. Mr. Grantham cited to *State v. Tetreault*, 99 Wn.App 435, 998 P.2d 330, *review denied*, 141 Wn.2d 1015 (2000) to indicate a continuance request made past the 180 limit is a basis for dismissal. In *Tetreault*, the state was not prepared to go to hearing within the statutory time period and struck the hearing. After the period expired, the state moved to continue the hearing. Defense counsel objected to the continuance request. *Tetreault*, 99 Wn.App. 436. *Tetreault* does not apply to the facts of this case because, here, (1) the motion to continue past the 180 time limit was made well before the period's expiration and (2) the defendant did not object. As will be developed later in this case, defense counsel never, in the next two months, objected, and therefore waived the issue.

As Mr. Grantham argues, an untimely restitution order must be reversed. *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996). The issue in *Moen*, 129 Wn. 2d 535 was complicated by the style of the order and the lack of a hearing to determine the amount of restitution owing. The decision to permit the defendant to challenge the order for the first time on

appeal permitted the defendant to raise the issue of compliance with the existing-sentencing [sic] statutes. *Moen*, 129 Wn.2d, 546-547. Unlike *Moen*, the facts in Mr. Grantham's case show all that occurred from sentencing to hearing, leaving no doubt the hearing was continued either for good cause or by agreement. *Moen* does not apply to this set of facts.

Moreover, the restitution hearing was continued because Mr. Grantham had asked to be present at the restitution hearing and he was not available within 180 days. It was not continued past April 19, 2011 or April 28, 2011 because the prosecutor forgot which day Mr. Grantham was sentenced. Mr. Grantham's decision that he wanted to be present at the hearing and the need to appoint new counsel had nothing to do with the state's mistake. The "good cause" required by *State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997) and *State v. Johnson*, 96 Wn.App. 813, 817, 981 P.2d 25 (1999) has been shown because the external impediment was these two items, plus Mr. Grantham's unavailability.

Mr. Grantham's trial counsel understood all this. Mr. Grantham's attorney did not feel he could be ready for hearing by April 1, 2012. He knew Mr. Grantham was in Snohomish County on April 28, 2011. He knew everything that transpired below, from his appointment to the restitution hearing. He was the person present as each event unfolded, from March 2, 2011, on. Competent counsel assisted Mr. Grantham. Mr.

Lauer agreed with the Court's assessment that the hearing could not have been held before June 9<sup>th</sup>, not only because of agreed continuances but also because of Mr. Grantham's unavailability.

B. Mr. Grantham's constitutional right to be present at a phase of sentencing interfered with his statutory right to conduct a restitution hearing within 180 days.

Even more important than the issue of waiving his right to have the restitution amount determined within 180 days, Mr. Grantham had a constitutional right to be at the restitution hearing. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). As *Moen* made clear, the restitution hearing is part of sentencing. Once Mr. Grantham changed his mind and requested to be present at the restitution hearing, both the Court and his attorney were required to wait until he became available. He was not available within 180 days. Mr. Grantham asserted a constitutional right to be present but he was not available until after April 28th. His constitutional right to be present at sentencing takes priority over his statutory right to have a restitution hearing within 180 days.

C. Mr. Grantham waived his right to raise the timeliness issue until June 9, 2011.

Mr. Grantham next contends he did not waive his statutory right to have a hearing within 180 days. He acknowledges that a defendant can

waive a statutory right on the record<sup>2</sup> (e.g., he waived his right to be present at the restitution hearing and then changed his mind), but argues he was essentially unrepresented by counsel on March 2, 2011 when the continuance was entered. Mr. Grantham is correct that Mr. Anderson had withdrawn a few minutes earlier, but new counsel was appointed. Mr. Lauer had from March 2, 2011 to April 28, 2011 to determine that the hearing was set for a date outside of the 180 period. Mr. Lauer saw the facts of the situation the same as everyone else: Mr. Grantham was not going to be available at any time within the remaining 180 period because he was incarcerated out of Clallam County. Competent counsel understood what appellate counsel is missing, that all the continuances up to June 9<sup>th</sup> were caused by circumstances or by agreement, not by state error. Mr. Grantham waived his right to challenge the timeliness of the restitution order before June 9, 2011. By failing to make a timely objection to the April 28, 2011 setting, trial counsel waived whether the setting exceeded 180 days.

Mr. Grantham's new argument on appeal (that the trial court did not have good cause to set the hearing date past 180 days), is an argument

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<sup>2</sup> A defendant can waive sentencing issues that involve a matter of court discretion or are basically factual. *In re Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). Continuing a restitution hearing is a matter of trial court discretion.

not presented below (that the trial court did not have good cause to set the hearing date past June 9<sup>th</sup>). The new argument presents an interesting question: Is a defendant permitted to argue on appeal that the restitution order is untimely because a hearing did not occur within the 180 day period, when he alleged below that there was good cause to continue the hearing to June 9<sup>th</sup>? The State does not believe so.

*Moen* held at page 546-47 that a defendant should be permitted to raise the timeliness issue for the first time on appeal because “[a]n objection on the basis that a restitution order has been entered after the sixty-day time limit has passed arises under circumstances where the trial court would be unable to set restitution in a timely fashion.” *Moen* continued: “All that is involved is a court ruling the restitution order invalid because the timeliness requirement has not been met.” Did *Moen* intend to say that a defendant can raise the issue of timeliness for the first time on appeal when he had an opportunity to correct the error below? It did not.

*Moen* presented itself as an exception to *State v. Wicke*, 129 Wn.2d 638, 591 P.2d 452 (1979). The language applicable to the issue in *Moen*, 129 Wash. 2d 535 is found in *Wicke*, 91 Wn. 2d at 642-643:

Under most circumstances, we are simply unwilling to permit a defendant to go to trial before a trier of fact acceptable to him, speculate on the outcome and after receiving an adverse result,

claim error for the first time on appeal which, assuming it exists, could have been cured or otherwise ameliorated by the trial court. Even an alleged violation of such an important policy rule as CrR 3.3, our speedy trial rule, is subject to waiver if not raised timely.

The setting error could have been corrected between the day new counsel was appointed (March 2, 2011) and approximately 180 days after sentencing (April 19th or 21st, 2011, depending on who is counting).

*State v. Sanders*, 66 Wn.App. 878, 888 n. 3, 833 P.2d 452 (1992), review denied, 120 Wn.2d 1027, 847 P.2d 480 (1993) held that the defendant “has failed to argue on appeal that this alleged error is constitutional and thus may be reviewable absent an adequate exception below pursuant to RAP 2.5(a)” and therefore waived the issue on appeal. A timely restitution hearing is a statutory issue. While *Moen* created an exception permitting an appeal when an untimely restitution order is a *fait accompli*, it does not hold that a defendant does not waive the timeliness issue if the defendant has an opportunity to address it. Mr. Grantham had almost all of March and all of April, 2011 to raise the timeliness issue related to April 28, 2011.

## ISSUE TWO

*Do the findings of fact support the trial court’s conclusion that it had good cause to continue the restitution hearing from June 9<sup>th</sup> to June 16<sup>th</sup>?*

RESPONSE: Even though the issue on appeal has changed from the issue stated below, the findings still are sufficient to determine the conclusions are correct.

A. There is substantial evidence to support the one finding challenged by Mr. Grantham. The remaining unchallenged findings are verities.

*State v. Madarash*, 116 Wn.App. 500, 66 P.3d 682 (2003), establishes the framework for analysis:

We determine whether substantial evidence supports a trial court's challenged findings of fact and, in turn, whether they support the conclusions of law. *State v. Broadaway*, 133 Wash. 2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez*, 137 Wash. 2d 208, 214, 970 P.2d 722 (1999) abrogated by *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). We treat unchallenged findings of fact as verities on appeal. *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 42-43, 59 P.3d 611 (2002) Finally, we review challenges to a trial court's conclusions of law de novo. *Robel*, 148 Wash. 2d at 42-43.

Mr. Grantham challenged finding of fact number 3, which reads:

3. On Mar. [sic] 2, 2011, the restitution hearing set for Apr. [sic] 1, 2011, was continued to Apr. [sic] 28, 2011 because the defendant's attorney withdrew without objection from the defendant, new counsel was appointed, and the defendant, who was in prison, demanded to be present for the hearing after having waived his presence at sentencing.

Mr. Grantham claims the finding misrepresents by oversimplification what occurred on March 2, 2011. He does not say how it misrepresents or oversimplifies, however. A review of the record shows the finding states exactly what happened on March 2, 2011. The trial court summed the facts up clearly and correctly when it stated:

Mr. Grantham was sentenced in October, October 21, 2010. 180 days from that date is sometime late April of 2011. It didn't go,

and for a number of reasons it didn't go. It wasn't – from my reading of the minutes in the file, it wasn't because the State wasn't ready to proceed; it was an issue –one of the issues was Mr. Grantham had to switch attorneys at the last minute. Mr. Grantham also chose to be present now, even though he waived that at his sentencing, so we had to make arrangements to get him here. (RP 66).

A review of the record does not disclose any other reasons why the hearing did not go forward on April 1, 2011. The trial court's analysis about the reason for the continuance on March 2, 2011 is supported by substantial evidence. The remaining findings of fact are unchallenged and are therefore verities.

B. The findings support the conclusion that “good cause” existed to continue the hearing from June 9<sup>th</sup> to June 16<sup>th</sup>.

Mr. Grantham challenged Conclusion of Law 1:

1. The defendant waived his right to a restitution hearing within 180 days from sentencing until the hearing scheduled for June 9, 2011.

Conclusion of law 1 is supported by finding of fact 3. Everybody, including Mr. Grantham, believed the delays beyond the 180 period from sentencing were agreed to or because Mr. Grantham was unavailable for the hearing.

The remainder of the conclusions are not challenged.

Because the issue on appeal was not presented below, many of the findings do not fully support Mr. Grantham's revisionist “conclusion of law”:

a. The continuance to April 28 was not based on “good cause.”

Where there are no findings, however, the appellate court may look to the trial court’s oral opinion to determine whether oral findings are sufficient to permit appellate review. *State v. Clark*, 46 Wn.App. 856, 859, 732 P.2d 1029, *review denied*, 108 Wn.2d 1014 (1987) (“the trial court’s oral decision is more than adequate to allow review”). The trial court’s opinion reads:

Mr. Grantham was sentenced in October, October 21, 2010. 180 days from that date is sometime late April of 2011. It didn’t go, and for a number of reasons it didn’t go. It wasn’t – from my reading of the minutes in the file, it wasn’t because the State wasn’t ready to proceed; it was an issue –one of the issues was Mr. Grantham had to switch attorneys at the last minute. Mr. Grantham also chose to be present now, even though he waived that at his sentencing, so we had to make arrangements to get him here.

The State also, I noted in the file, also had an issue with availability of witnesses and so forth. So the matter was continued, essentially, by agreement of the parties because of these issues, beyond 180 days. And the parties had agreed to a date of June 9, that they would continue the matter to that time without objection, and so I don’t think there’s any argument by Mr. Grantham or anybody else that it was agreed to [June] 9.

So if you look at some of these cases that deal with this issue, one of the cases dealt with an issue that the order – there was never put on the record there was an agreed continuance past 180 days – or the 60 days at that time. So that was an issue. But here I don’t think there’s an issue – June 9 was certainly there.

The statute reads “The Court may continue the hearing beyond 180 days for a good cause.” So the issue is whether or not here was good cause to change that. And I agree with Mr. Lauer’s reading of this, that the statutory time mandate, the rule seems to prevail over the victim’s right to restitution unless there’s good cause. So there has to be a finding of good cause.

One of the issues as to what is good cause, what is not good cause, good cause is not a self-created hardship by the prosecutor. In other words, you know, we just haven't got our act together and we're not ready to go here even though the 180 days is there. So the self-created hardship.

One of the other is court congestion is not a reason for good cause. So the issue here is not court congestion because the Court was available and ready to hear the matter. The issue is whether or not the prosecutors had good cause to not be present and not be available to hear the case on the 9<sup>th</sup>.

Okay. And going back to the 9<sup>th</sup>, there was not a whole lot – I agree with Mr. Lauer, there was not information provided at that time, at that hearing as to why Mr. Espinoza was suddenly tied up on Thursday. I mean, he was clearly in trial. I mean, there is no question about that, and I think the Court can take – well, the Court can take notice of its own calendar procedure here in Clallam County, and we start jury trials on Monday and we start them on Wednesday. So Mr. Espinoza was in trial that had started either on a Monday or a Wednesday, but it was continued – as far as the Court knew, he was in trial which started on a – either a Monday or a Wednesday. So this took place on a Thursday. So he was still in trial. He was not available on that Thursday.

So the Court found – and all the Court really heard there on the 9<sup>th</sup> was from Ms. Kelly saying Mr. Espinoza is in trial, he's the attorney that's handling this matter and he's unavailable, so we're not available to do it today. So the Court – and then Mr. Lauer did [make] his arguments at that time about speedy – getting this matter beyond the 180 days, and the Court did find on the record good cause.

And the Court found good cause because this case had been assigned to Mr. Espinoza. If you look through the file, Mr. Espinoza handled this case all the way through. There were substantial issues regarding restitution, and so he was the attorney assigned to prepare the witnesses and to gather the evidence for the restitution hearing. He was not available because he was in court in another case, a jury trial that was taking place in Judge Wood's courtroom. So the Court found that that was good cause.

Again, on the issue too, I think there had been – some matters had been raised about whether or not this was a properly filed motion in time and so forth. Well, the Court mentioned in the [June] 9 proceedings that, well, we've already passed 180 days,

so there's no way this could have – and what I meant by that – and I think I made it clear on the record – that the 180 days had already passed, so there was no way he could file the motion prior to the 180 days that had already passed, and – so that's the reason that was brought up, and I think I mentioned that the last time we were here, that I was not saying that Mr. Grantham necessarily waived forever. He waived to the 9<sup>th</sup>.

So what I found, and I am going to find today, is that the – there was good cause. I think Mr. – the fact that Mr. Espinoza was in trial in another case, he was the attorney assigned to this case, which had substantial restitution issues, that that was good cause.

If you look at the cases – the closest cases – there's not too many cases on restitution, but there's some cases dealing with the speed trial issues, which in a – as far as I'm concerned, are probably more important than the restitution hearing. But to look at some of those cases, the Court held that the prosecutor's scheduling conflict constituted good cause to continue the case beyond the relevant time restrictions of [3.3], and that's – as long as it's not a self-inflicted or self-created hardship. And I don't see any evidence that it was self-created or self-inflicted.

We're a busy court, and if this is not – and as a trial judge, if this is not good cause, then I don't know what would be good cause to continue a restitution hearing. When the attorney assigned to the case finds himself in a criminal case on another issue, another jury trial that he's involved in, how that is not good cause to continue it one week – and that's all that was done here. So I'm going to deny the motion to dismiss the restitution amount, and the order is in effect. (RP 66-70).

The trial court's opinion supports the conclusion the trial court did have good cause to hold a restitution hearing later than April 21, 2011. The State has already shown that Mr. Grantham's failure to object to the restitution hearing setting outside 180 days, even though he had almost two months to object, is a waiver. Further, Mr. Grantham agreed to a continuance on April 28, 2011 because he could not be available.

Conclusion of law number 1 is supported by substantial evidence, by the trial court's oral opinion, and by finding of fact number 3.

Conclusion of law number 2 reads:

2. On June 9, 2011, the State requested that the hearing be continued for good cause because the deputy prosecutor assigned to the restitution hearing was still in another jury trial.

The conclusion is supported by the trial court's oral opinion and findings of fact 5, 6 and 7. The findings read:

5. On June 8, the court administrator scheduled the defendant's restitution to be reset after being advised by the prosecuting attorney's office that the deputy prosecuting attorney assigned to handle the defendant's restitution hearing was still in a jury trial on another matter. The Defense was not consulted by the court administrator or by the State.

6. The court canceled the order to transport the defendant from Clallam Bay Correction Center knowing that the prosecuting attorney would not be available for the restitution hearing although there was room on the calendar for the matter to be heard.

7. On June 9, 2011, the Prosecuting Attorney, on behalf of deputy prosecuting attorney Mr. Espinoza, requested that the restitution hearing set for June 9, 2011, be continued because Mr. Espinoza was still in trial in a different courtroom.

Conclusion of law 3 reads:

3. There was good cause to continue the restitution hearing set for June 9, 2011 one week to June 16, 2011, because the deputy prosecuting attorney assigned to handle the case was currently in trial on a different matter, the restitution issues were complex, and the deputy prosecuting attorney assigned to the matter had been handling the case from the outset.

The conclusion is supported by finding of fact 8 and the court's opinion:

8. Over the defendant's objection, the court found good cause to continue the restitution hearing one week to June 16, 2011, because the deputy prosecuting attorney assigned to the case from the outset, was still in a jury trial and there were substantial and complex issues regarding the restitution sought by the State.

Conclusion of law 4 reads:

4. There is no evidence that the unavailability of the deputy prosecuting attorney was self-created.

This conclusion is supported by findings 9, 10, and 11 and the court's opinion:

9. In a subsequent hearing, it was learned that [t]he Williams trial initially commenced on June 1, 2011, but resulted in a mistrial during jury selection due to an insufficient number of jurors to proceed. The Williams trial was reset for 2 days on Tues., June 7, 2011.

10. In a subsequent hearing, it was learned that [o]n Tues., June 7, 2011, the State moved to continue *State v. Williams* because the deputy prosecuting attorney, Mr. Espinoza, was still in a jury trial for *State v. Suzannah Kenoyer* which commenced on June 6, 2011.

11. The Court continued the 2-day trial for *State v. Williams* one day to June 8, 2011.

Below, the State presented two decisions related to unavailability of a prosecutor for a trial (CP 102). *State v. Stock*, 44 Wn.App. 467, 473, 722 P.2d 1330 (1986) held the trial court exercised sound discretion when it continued a trial because a deputy prosecutor was unavailable because he was already in a jury trial. *State v. Palmer*, 38 Wn.App. 160, 684 P.2d 787 (1984) held that a "delay in assignment" and "the particular complications" of a negligent homicide trial created "specific,

unpredictable, and certainly not self-created” reasons why the deputy prosecutor could not begin Mr. Palmer’s trial. Both of these problems arose in Mr. Grantham’s case. There was uncertainty about trial settings and the facts of this particular restitution hearing were complicated. The trial court referred to these cases when it stated that a week’s delay in a restitution hearing did not prejudice Mr. Grantham. There are findings and substantial evidence to support conclusion 4.

Conclusion of law 5 reads:

5. The contacts between the Court Administrator and the prosecuting attorney’s office on June 8, 2011 was not ex-parte communication but an administrative action and did not violate the Def[endant]’s due process rights.

Finding of fact 5 shows the court administrator does what court administrators do: administer the court. The second half of the finding, that the Defense was not consulted by the court administrator or by the State, however, is not supported by the record. Mr. Lauer stated on June 16<sup>th</sup> he received a telephone call on June 8<sup>th</sup> in the afternoon from the court administrator informing him the restitution hearing would have to be reset because Mr. Espinoza was in trial on another matter (RP 25). If there was ex-parte communication, it was with Mr. Lauer, too, but there was none. *See State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (ex parte communication applies generally to communications made by a

judge during a proceeding, without notice to a party). The court administrator did not err when she contacted both parties to discuss the reset issue.

C. Equitable tolling is not at issue. Mr. Grantham's hearing was continued for "good cause" only.

The State concurs with Mr. Grantham that the concept of equitable tolling is not applicable to these facts. The State does not believe it is necessary in order to affirm the trial court. The trial court summed it up when it held that all the continuances from March 2, 2011 were by agreement or by a new situation created by Mr. Grantham's legal issues in other counties.

#### CONCLUSION

Every decision cited by Mr. Grantham holds the state must proceed with a restitution hearing prior to the expiration of the 180 period. None of the cases hold the restitution hearing cannot be continued for either an unavailable defendant or an agreed continuance by the defendant. With the defendant in this case unavailable after March 25, 2011 and not available again until after the 180 period expired, there could not be a restitution hearing within 180 days. The trial court correctly decided there was "good cause" to continue the restitution hearing. This court should affirm.

Respectfully submitted this 16th day of April, 2012.

DEBORAH KELLY, Prosecutor,

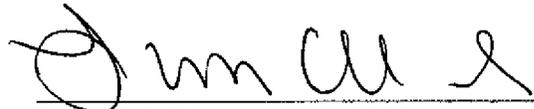


Lewis M. Schrawyer, #12202  
Clallam County Deputy Prosecutor

CERTIFICATE OF DELIVERY

LEWIS M. SCHRAWYER, under penalty of perjury under the laws of the State of Washington, does swear or affirm that a copy of this document was sent to: Jennifer Winkler by electronic copy at WinklerJ@nwattorney.net on April 16, 2012.

Signed at Port Angeles, Washington on April 16, 2012.



Lewis M. Schrawyer, #12202

# CLALLAM COUNTY PROSECUTOR

**April 16, 2012 - 3:47 PM**

## Transmittal Letter

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