

No. 42715-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARIO GADEA-RIVAS

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

CrRLJ 3.3 governs the time for trial in courts of limited jurisdiction. The State is required to bring a criminal defendant to trial within 60 days after arraignment if the defendant is detained and within 90 days if the defendant is not detained. The time for trial is recommenced if any of the eight circumstances listed in the rule occur. CrRLJ 3.3(c)(2)(i)-(viii). Tolling of the time for trial occurs if one of nine enumerated events occur. CrRLJ 3.3(e)(1)-(9). If the State fails to bring a defendant to trial within the time limitations set by the rule, the charges lodged against the defendant must be dismissed with prejudice. CrRLJ 3.3(h). If, however, a trial is delayed by circumstances not addressed by CrRLJ 3.3, criminal charges are not to be dismissed, unless the defendant's constitutional speedy trial rights have been violated. CrRLJ 3.3(a)(4).

The Superior Court concluded that the circumstances in this case qualified as "circumstances not addressed" in CrRLJ 3.3, making a speedy trial violation under the rules inapplicable. The Superior Court also concluded that the Defendant, Mario Gadea-Rivas, failed to appear at a status hearing, thus resetting the speedy trial period. These conclusions of law are correct and should be affirmed. Alternatively, the Defendant constructively waived his right to a speedy trial.

II. STATEMENT OF THE CASE

On November 13, 2009, the Defendant, Mario Gadea-Rivas, was arrested for driving under the influence. The Defendant was arraigned in Thurston County District Court on December 2, 2009, at which time the first pre-trial was set. CP 23. His pre-trial was reset again on January 5, 2010, at defense counsel's request. CP 25. A speedy trial waiver was signed, with an expiration date of April 30, 2010. *Id.* Defense counsel asked for another continuance at pre-trial on March 4, 2010. CP 25. The Defendant signed another speedy trial waiver, with an expiration date of July 3, 2010. CP 22.

On April 22, 2010, defense counsel again moved for a continuance. *Id.* The Defendant signed a speedy trial waiver that expired on August 3, 2010. *Id.* At the next pre-trial, on May 27, 2010, defense counsel requested that the case be attached to the "Vosk Uncertainty Motion" (Vosk Motion), which was a multi-defendant suppression motion. CP 21. The Defendant only waived his presence for the Vosk Motion hearing. *Id.*

At the June 18, 2010, status hearing, the Defendant was not present. CP 20. Also on June 18, 2010, the District Court bifurcated the hearing on the Vosk Motion. *Id.* The defense portion was to be heard on

June 25, 2010, and the State's response was to be heard later to accommodate witnesses. *Id.* On June 22, 2010, the District Court sent notice, via e-mail to all parties, of a quick set status hearing on June 24, 2010. CP 19. On June 24, 2010, defense counsel filed a motion to continue. CP 19-20. The District Court granted the motion over the State's objection. *Id.* At this hearing, the District Court cautioned defense counsel about potential speedy trial issues. Defense counsel told the District Court, ". . . I think that we're willing to waive speedy," and "I will get the waivers in." RP 30; *Id.*

On July 6, 2010, defense counsel filed a speedy trial waiver through December 31, 2010. CP 19. This was the last waiver filed. On August 27, 2010, the District Court granted the State's motion to continue. CP 17-18. The Defendant was not present, and defense counsel, who was present, did not object to the continuance. *Id.* A status hearing was set for September 24, 2010. *Id.* No notice was sent with respect to this hearing. *Id.*

The Defendant was not present for the status hearing on September 24, 2010. CP 17. Defense counsel was present. *Id.* No waiver of the Defendant's presence was noted by defense counsel. *Id.*

The Vosk Motion hearing was then set for November 3, 2010. CP 16. The Defendant was not present. *Id.* Defense counsel was present. *Id.*

No waiver of the Defendant's presence was noted by defense counsel. *Id.* The District Court denied the State's motion to continue. *Id.* All the parties agreed to a teleconference to be held on November 4, 2010. *Id.*

On November 4, 2010, the teleconference was conducted. CP 15. The Defendant was not present. *Id.* Defense counsel was present and did not waive the Defendant's presence. *Id.* The State's motion to continue was granted, and the Vosk Motion hearing was scheduled for December 13, 2010. *Id.*

The Vosk Motion hearing was held on December 13, 2010. *Id.* The District Court indicated its intention to issue a ruling by January 10, 2011. *Id.* There was no objection on the part of Defendant's counsel to this date, which was after the speedy trial waiver date of December 31, 2010. *Id.* The Defendant was not present for the motion hearing and had not been present at any hearing since May 27, 2010. CP 15-21.

The ruling was issued on January 20, 2011. CP 14. The District Court denied the Defendant's motion to suppress. *Id.* The Defendant was present, for the first time since May 27, 2010, at his pre-trial on February 1, 2011. *Id.* At the February 1, 2011, hearing, the District Court set the trial for February 28, 2011. *Id.*

On February 7, 2011, the Defendant filed a motion, formally objecting to an alleged violation of speedy trial under CrRLJ 3.3. *See*

Defendant's Appendix A. On February 22, 2011, the motion was heard by the District Court and was denied based on the fact that the Defendant had not appeared for any hearing between May 27, 2010, and February 1, 2011. *See* State's Exhibit 1, p. 2. The District Court did not address the State's other arguments for denial of the motion. *Id.* Both parties confirmed for a trial on February 28, 2011. *See* Defendant's Appendix A.

On February 25, 2011, defense counsel filed with the Superior Court an application for a Writ of Prohibition and Mandamus arresting trial from proceeding, staying proceedings, and mandating dismissal of the charges. CP 3. On February 25, 2011, in an unrecorded session, the Superior Court heard argument from defense counsel and the State and denied the application, indicating that the speedy trial issue could be raised in a formal appeal. *See* Defendant's Appendix A.

On September 12, 2011, the Defendant filed an appeal in Superior Court. *See* Defendant's Appendix A. A RALJ hearing was held on September 22, 2011. *See* State's Exhibit 1 p.1. The Superior Court denied the appeal. *Id.* The Superior Court made the following conclusions of law:

1. Under CrRLJ 3.3(d), if a court sets a trial date outside of the period for speedy trial, a defendant must make a motion objecting to the trial date and move to have a trial date set within the time for

speedy trial within ten days, or the objection is waived. Here, no trial date was set, so the Defendants were not required to object.

2. CrRLJ 3.3(a)(4) states that:

The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrRLJ 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

Here, the setting of the trials was delayed because the Defendants wished to have an issue litigated prior to trial. This qualifies as a "circumstances not addressed in [CrRLJ 3.3]" and the case should not be dismissed. The Defendants' constitutional rights to a speedy trial were not violated.

3. CrRLJ 3.3(a)(3)(iii) states that:

'Appearance' means the defendant's physical presence in the trial court. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously placed on the record under the cause number of the pending charge.

Under the definition of "appearance" contained in CrRLJ 3.3(a)(3)(iii), the Defendants failed to appear at a status hearing on June 24, 2010, because, regardless of whether or not they were physically present in the courtroom, (1) the State was not notified

of their presence, and (2) their presence was not placed on the record. As a result, the speedy trial clock reset at their next court appearance and there was not a violation of the speedy trial rule.

4. The appearance by the Defendants' attorneys at the status hearing on June 24, 2010, constituted waiver of any notice issues. Furthermore, the Defendants' attorneys had an ethical duty under the Washington Rules of Professional Conduct to notify their clients of the hearing so that they could attend.

See State's Exhibit 1 p.1-3. This appeal followed.

III. ARGUMENT

A. Standard of Review

Issues of statutory construction and interpretation are questions of law, reviewed *de novo*. *State v. O'Connor*, 155 Wn.2d 335, 343, 119 P.3d 806 (2005). Courts are to interpret court rules as though they were drafted by the legislature. *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). Effect is to be given to the plain language of a court rule. Courts must read the entire rule, harmonize its provisions, while ensuring that portions are not rendered superfluous. *Id.*

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B. The Superior Court correctly ruled that the desire of the Defendant to litigate the motion to suppress prior to trial qualified as a circumstance not addressed by CrRLJ 3.3.

The Superior Court concluded that the circumstances in this case qualified as circumstances not addressed in CrRLJ 3.3, thereby eliminating the Defendant's claim to a rule-based speedy trial violation. This conclusion of law should be affirmed.

The case at hand has unique characteristics. The Defendant was one of a number of defendants who sought the suppression of the results of breath tests, which led to their initial charges. On May 27, 2010, defense counsel requested that the case be attached the Vosk Motion so that the suppression issue could be litigated prior to trial. These unique circumstances fit squarely within the language of CrRLJ 3.3(a)(4) because the remainder of the rule simply does not address the circumstances present in this case.

The Defendant makes essentially two arguments. First, the Defendant argues that because a trial date was not set, the exception to the speedy trial requirement located in CrRLJ 3.3(a)(4) was not triggered. Second, the Defendant argues that the Supreme Court's holding in *State v. George*, 160 Wn.2d 727, 158 P.3d 1169 (2007), made CrRLJ 3.3(a)(4)

inapplicable to the case at hand. Both of these arguments are without merit and are addressed in turn.

CrRLJ 3.3(a)(4) states that “[i]f a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrRLJ 4.1, the pending charged shall not be dismissed unless the defendant’s constitutional right to a speedy trial was violated.” The Defendant points to this language, claiming that a specific trial date must be set for the CrRLJ 3.3(a)(4) to be applicable. This reading of the rule is incorrect. The rule does not state that a trial date is a prerequisite, and the Defendant fails to provide any legal support for this claim. It only requires the trial to be “timely.” There is no doubt that a “timely” trial was contemplated by the District Court and the parties throughout all of the numerous hearings of this case. It was the Defendant’s desire to litigate the suppression issue that caused the trial date to be set after the ruling on the Vosk Motion. Therefore, the trial date was timely for the Defendant at the time. The Defendant’s first argument is without merit.

The Defendant next claims that the Superior Court’s decision is contrary to *George*; however, the Defendant’s reliance on that case is misplaced. In *George*, the Supreme Court of Washington held that the State’s duty to use due diligence when bringing a defendant to trial was subsumed into the new time-for-trial rule enacted in 2003 and was no

longer a separate requirement that needed to be independently met. 160 Wn.2d at 738. In reaching its holding, the Court briefly analyzed CrRLJ 3.3(a)(4) by quoting the Time-for-Trial Task Force:

Task force members are concerned that appellate court interpretation of the time-for-trial rules has at times expanded the rules by reading in new provisions. The task force believes that the rule, with the proposed revisions, covers the necessary range of time-for-trial issues, so that additional provisions do not need to be read in. Criminal cases should be dismissed under the time-for trial rules only if one of the rules' express provisions have been violated; other time-for-trial issues should be analyzed under the speedy trial provisions of the state and federal constitutions.

See George, 160 Wn.2d at 737; citing WASH. COURTS TIME-FOR-TRIAL TASK FORCE, FINAL REPORT ILB at 12-13 (Oct. 2002) (on file with Admin. Office of Courts), *available at* http://www.courts.wa.gov/programs_orgs/pos_tft. However, none of this language is relevant here.

In this matter, the Superior Court specifically concluded that the Defendant's trial was continued for an extended period of time at his own request because he wanted to litigate, along with numerous co-defendants, a motion to suppress evidence prior to trial. *See State's Exhibit 1*, p.1. The Superior Court also concluded that defense counsel orally represented to the District Court that speedy trial would not be a problem while the motion was pending. *Id.* The Superior Court concluded that this scenario

qualified as a “circumstance not addressed in [CrRLJ 3.3],” and that the Defendant’s constitutional right to a speedy trial had not been violated. *See* State’s Exhibit 1, p.2. Therefore, the Superior Court concluded that the matter should not be dismissed on speedy trial grounds. *See* State’s Exhibit 1, p.3. The Superior Court’s ruling is in accord with *George*, which neither states nor implies that the fact pattern present here does not fall under the “circumstances not addressed in this rule” language found in CrRLJ 3.3(a)(4). 160 Wn.2d at 727. Thus, the Defendant’s second argument should be disregarded as well.

Regardless of these arguments, because of the Defendant’s numerous failures to appear from May 27, 2010, until February 1, 2011, that will be addressed below, the trial date was timely under CrRLJ 3.3 and there was no delay that triggered CrRLJ 3.3(a)(4). The trial date was properly set within the speedy trial period.

- C. The Superior Court correctly concluded that the speedy trial commencement date reset because the Defendant did not appear at numerous court hearings as contemplated by CrRLJ 3.3(a)(3)(iii).

As an alternate ground for its decision, the Superior Court found that the Defendant’s speedy trial date reset when he failed to appear at a status hearing. *See* State’s Exhibit 1, p.2. CrRLJ 3.3(c)(2)(ii) mandates the resetting of the commencement date when a defendant fails “to appear

for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance." An appearance is defined as the "defendant's physical presence in the trial court," and a physical appearance only satisfies the rule if "(A) the prosecutor was notified of the presence and (B) the presence is contemporaneously placed on the record under the cause number of the pending charge." CrRLJ 3.3 (a)(3)(iii). The Superior Court concluded that on June 24, 2010, the Defendant did not "appear" for a status hearing, and the failure to appear served to reset the commencement date to the Defendant's next appearance on February 1, 2011. *See* State's Exhibit 1, p.2.

The Defendant claims that this conclusion also is in conflict with *George*. However, once again, the Defendant misreads *George* and quotes it out of context. In *George*, the defendant was absent from a court hearing because he was detained in another jurisdiction. The Supreme Court, while construing the act "as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous," held that the time for trial period should be extended under CrRLJ 3.3(e)(6) (Defendant subject to foreign or federal custody or conditions) and CrRLJ 3.3(e)(2) (Proceedings on unrelated charges) instead of reset under CrRLJ 3.3(a)(4) because to do otherwise would

render the former provisions superfluous. *George*, 160 Wn.2d at 739 (citing *Greenwood*, 120 Wn.2d at 594). In the instant case, there is no specific provision in CrRLJ 3.3(e)(1)-(9) that is rendered superfluous by the Superior Court's ruling. Instead, the Defendant simply failed to appear at a hearing, resetting the commencement date pursuant to CrRLJ 3.3(c)(2)(ii).

George explicitly states that “[a] defendant who negligently or even inadvertently fails to appear when required to do so forfeits the right to a trial within the statutory time-for-trial period, even if the defendant has not deliberately or intentionally absconded.” 160 Wn.2d at 739. Here, the Defendant, at the very least, inadvertently failed to follow the requirements of the rule needed to preserve the original speedy trial date. As a result, the commencement date reset, and there was no violation of CrRLJ 3.3. The Superior Court's conclusion of law should be affirmed.

- D. The Defendant constructively waived his right to a speedy trial by not raising the issue of a possible violation when action could have been taken to avoid such a violation.

Ultimately it is the responsibility of the court to ensure a trial in accordance with CrRLJ 3.3. *See* CrRLJ 3.3(a). However, defense counsel has a positive duty to raise speedy trial issues when action could still be taken to avoid violation of the speedy trial rule. *State v. Becerra*, 66 Wn. App. 202, 206, 831 P.2d 781 (1992).

In *Becerra*, the defendant's trial was set for August 13, 1990, the last day before the speedy trial period expired. *Id.* at 203. The trial was continued so that another case could proceed. *Id.* On that day, a jury was selected but not sworn. *Id.* at 205. On August 14, 1990, the defendant moved for a dismissal based on a violation of the speedy trial rule. *Id.* The trial resumed on August 15, 1990. *Id.* The jury was sworn, and pretrial motions were considered. *Id.* The trial court denied the defendant's motion to dismiss under the speedy trial rule because of the defendant's failure to object when the error could have been remedied. *Id.*

In *Becerra*, the defendant argued that a trial does not commence, for speedy trial purposes, until the trial judge hears and decides preliminary motions. *Id.* at 206. The Court of Appeals did not decide exactly when a trial commences for speedy trial purposes, citing conflicting authority on the matter. *Id.* Instead, the Court affirmed the lower court's ruling, stating that "by not objecting on August 13 when the trial was recessed until August 15, defense counsel waived any speedy trial objection. It was his responsibility to raise the issue when action could still be taken." *Id.* Thus, the Court held that the lack of an objection resulted in a constructive waiver of a speedy trial violation. *Id.*

For the sake of argument only, the State will assume that speedy trial ended on December 31, 2010, and was not affected by the

Defendant's absences from court hearings. The instant case is analogous and should be resolved in the same manner as *Becerra*. On December 13, 2010, defense counsel was given notice at the motion hearing that the District Court would not issue its ruling until January 10, 2011. CP 15. Defense counsel was aware that a speedy trial waiver was in effect through December 31, 2010. No trial date had been set, and the Defendant did not request one. *Id.* Any future trial date would have been after the District Court ruled on the Vosk Motion.

Under *Becerra*, such inaction constituted a constructive waiver of any alleged speedy trial violation. It was defense counsel's responsibility to object once he was on notice that the trial date would necessarily occur after the speedy trial period. There was ample time for the speedy violation to be remedied. The Defendant failed to do so. Thus, the Defendant's appeal should be denied.

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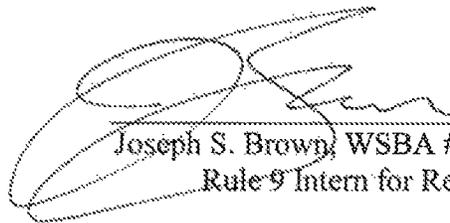
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V. CONCLUSION

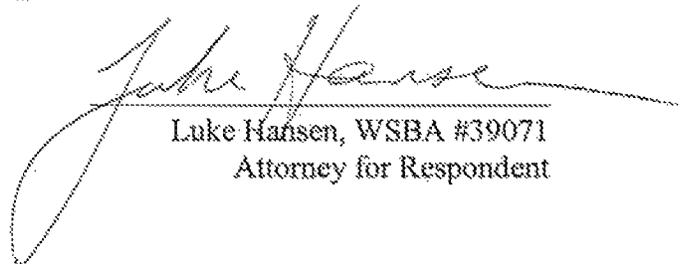
For the reasons set forth above, the State respectfully requests that the Court affirm the Superior Court's ruling.

Respectfully submitted this 20th day of September, 2012.

JON TUNHEIM
PROSECUTING ATTORNEY



Joseph S. Brown, WSBA #9127274
Rule 9 Intern for Respondent



Luke Hansen, WSBA #39071
Attorney for Respondent

State's Exhibit 1

Findings of Fact and Conclusions of Law, and Order

Superior Court of Washington – Thurston County

Honorable Judge Gary R. Tabor

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7 *IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY*

CASE NOS 11-1-01453-7 11-1-00753-1

8 STATE OF WASHINGTON,
9 Plaintiffs/Respondents,

10 vs.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW, AND ORDER

11 JEFFREY S. MOORE,

12 MARIO GADEA-RIVAS,

Defendants/Petitioners.

13 A RALJ hearing was held on September 22, 2011, to consider the appeal by the Defendants in
14 the above-entitled cause numbers; the Defendants, Jeffrey Moore and Mario Gadea-Rivas, appeared in
15 person and through their attorney, Chester Baldwin; the Plaintiff, State of Washington, appeared by its
16 counsel, Terra Evans, Special Deputy Prosecuting Attorney. The Court considered the trial court docket,
17 the written motions and memoranda of both parties, and the arguments of both parties. Based on the
18 above, the Court now enters the following:

19 I. FINDINGS OF FACT

- 20 1. The setting of both trials was delayed at the requests of the Defendants because they wished to
- 21 have an issue litigated prior to trial. As a result, the Defendants' attorneys orally represented to
- 22 the trial court that speedy trial would not be a problem, and would be waived for the time period
- 23 necessary for the issue to be litigated.
- 24 2. The trial court never set a firm date for trial.

25 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER --

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- 1 3. The presence of the Defendants was waived for motion hearings, but not for status hearings.
- 2 4. There is no evidence that the Defendants attended the status hearing held on June 24, 2010. The
- 3 State was not notified of their presence and their presence was not put on the record.

4 **II. CONCLUSIONS OF LAW**

- 5 1. Under CrRLJ 3.3(d), if a court sets a trial date outside of the period for speedy trial, a defendant
- 6 must make a motion objecting to the trial date and move to have a trial date set within the time
- 7 for speedy trial within ten days, or the objection is waived. Here, no trial date was set, so the
- 8 Defendants were not required to object.
- 9 2. CrRLJ 3.3(a)(4) states that:

10 The allowable time for trial shall be computed in accordance with this rule. If a

11 trial is timely under the language of this rule, but was delayed by circumstances

12 not addressed in this rule or CrRLJ 4.1, the pending charge shall not be dismissed

unless the defendant's constitutional right to a speedy trial was violated.

13 Here, the setting of the trials was delayed because the Defendants wished to have an issue

14 litigated prior to trial. This qualifies as a "circumstances not addressed in [CrRLJ 3.3]" and the

15 case should not be dismissed. The Defendants' constitutional rights to a speedy trial were not

16 violated.

- 17 3. CrRLJ 3.3(a)(3)(iii) states that:

18 'Appearance' means the defendant's physical presence in the trial court. Such

19 presence constitutes appearance only if (A) the prosecutor was notified of the

20 presence and (B) the presence is contemporaneously placed on the record under

the cause number of the pending charge.

21 Under the definition of "appearance" contained in CrRLJ 3.3(a)(3)(iii), the Defendants failed to

22 appear at a status hearing on June 24, 2010, because, regardless of whether or not they were

23 physically present in the courtroom, (1) the State was not notified of their presence, and (2) their

24 presence was not placed on the record. As a result, the speedy trial clock reset at their next court

25 appearance and there was not a violation of the speedy trial rule.

1 4. The appearance by the Defendants' attorneys at the status hearing on June 24, 2010, constituted
2 waiver of any notice issues. Furthermore, the Defendants' attorneys had an ethical duty under the
3 Washington Rules of Professional Conduct to notify their clients of the hearing so that they
4 could attend.

5 **III. ORDER**

6 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the Defendants' appeal be
7 denied for the aforementioned reasons.

8 DATED this 3 day of November, 2011.

9
10 
11 _____
12 HONORABLE JUDGE GARY R. TABOR

12 Presented By:

12 Approved as to Form, Notice of Presentment Waived:

13
14 
15 _____
16 LUKE HANSEN, WSBA #39071
17 DEPUTY PROSECUTING ATTORNEY

14 Approved telephonically
15 _____
16 CHESTER BALDWIN, WSBA #39789
17 ATTORNEY FOR DEFENDANTS

THURSTON COUNTY PROSECUTOR

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