

No. 45063-1-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,  
vs.  
**Jeremy Frieday,**  
Appellant.

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Clark County Superior Court Cause No. 13-1-00476-3  
The Honorable Judge Robert Lewis

## **Appellant's Reply Brief**

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## ARGUMENT

### **I. WITNESS UNAVAILABILITY CANNOT JUSTIFY A CONTINUANCE BEYOND SPEEDY TRIAL IF THE STATE HAS NOT EVEN ATTEMPTED TO PROPERLY SUBPOENA THE ALLEGEDLY “UNAVAILABLE” WITNESS.**

A continuance may be granted for witness unavailability, but only upon a showing of diligence. *City of Seattle v. Clewis*, 159 Wn. App. 842, 847, 247 P.3d 449 (2011). Courts have applied the diligence requirement in superior court; it is not merely an artifact from a since-amended juvenile court rule. *State v. Nguyen*, 68 Wn. App. 906, 915, 847 P.2d 936 (1993); *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989). Respondent’s contrary assertion is without merit. Brief of Respondent, pp. 5-7.

The prosecution must “make ‘timely use of the legal mechanisms available to compel the witness’ presence in court.’” *Nguyen*, 68 Wn. App. at 915 (internal citations and quotation marks omitted) (quoting *State v. Adamski*, 111 Wn.2d 574, 579, 761 P.2d 621 (1988)). Failure to properly subpoena a witness shows lack of diligence. *Clewis*, 159 Wn. App. at 847; *Wake*, 56 Wn. App. at 476; *Adamski*, 111 Wn.2d at 577. Absent proper service, a subpoena has no effect. *Adamski*, 111 Wn.2d at 578-579.

Here, the trial court continued Mr. Frieday’s criminal case beyond the expiration of speedy trial. This was done even though the state hadn’t

attempted to properly serve its “unavailable” witness.<sup>1</sup> RP 2, 7, 10, 52; CP 3-4, 33, 54-61; Ex. 1. The court did not make a finding that proper service had occurred.<sup>2</sup> CP 3-4. Under these circumstances, the continuance violated Mr. Frieday’s right to a speedy trial. *Adamski*, 111 Wn.2d at 577-579.

The state does not suggest the prosecutor properly served its witness in this case. Brief of Respondent, pp. 4-8. Instead, Respondent argues for an exception where police officers are concerned. Brief of Respondent, pp. 7-8 (citing *State v. McPherson*, 64 Wn. App. 705, 829 P.2d 179 (1992)). But neither CrR 3.3 nor CR 45 (governing service of subpoenas) creates an exception for law enforcement.

Nor does Respondent’s complaint regarding the “extreme cost and burden on the State” ring true. Brief of Respondent, p. 8. Personal service can be accomplished internally within a police department, and established through written proof of service (or, presumably, a written acceptance of service).

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<sup>1</sup> Who, in the end, did not even testify at Mr. Frieday’s trial.

<sup>2</sup> The court found only that he “received notice of his subpoena.” CP 4. Receiving notice of a subpoena is not the same as receiving the subpoena, by personal service or otherwise. And providing such notice does not qualify as due diligence. *Adamski*, 111 Wn.2d at 577-579. In addition, the record does not support the court’s finding that Martin received notice “of his subpoena.” CP 54-61; Ex. 1. At most, the evidence suggests he received notice of the trial date.

The *Wake* and *Nguyen* courts did not allow the state to dispense with personal service, even though both cases involved law enforcement professionals.<sup>3</sup> Respondent's plea for an exception for subpoenas to police officers should be refused.

The trial court violated Mr. Frieday's right to a speedy trial. The charges must be dismissed with prejudice.

## **II. THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION.**

A. The state didn't prove Mr. Frieday drove the car.

No one testified that Mr. Frieday drove the green Honda pursued by Officer Donohue. RP 78-115. Based on a glimpse of the driver's hand, Donohue concluded that the driver was white. RP 89, 109. Donohue also saw "darkish brown hair." RP 89.

A bill of sale listed Mr. Frieday as the owner. He resided at the house where the car was found (along with three or four others) following the chase. RP 96, 98, 108, 115.

Even when taken in a light most favorable to the prosecution, this evidence does not establish beyond a reasonable doubt that Mr. Frieday drove the car. Instead, conviction required jurors to speculate as to whether or not any other white people with darkish brown hair had some

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<sup>3</sup> A detective in *Nguyen*; a crime lab expert in *Wake*.

relationship to the car. It is entirely possible that Mr. Frieday loaned the car to a friend, a housemate, a neighbor, a family member, or the prior owner.

Speculation cannot provide sufficient evidence to sustain a conviction. *State v. Garcia*, 318 P.3d 266, 274 (Wash. 2014). Instead, any inferences drawn from the evidence “must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The evidence here did not prove Mr. Frieday drove the car. His convictions must be reversed and the charges dismissed. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. The state didn’t prove recklessness.

A conviction for attempting to elude requires proof that the accused person drove in a “rash or headless manner, indifferent to the consequences.” RCW 46.61.024; CP 120. Reckless driving requires proof of driving “in willful or wanton disregard for the safety of persons or property.” RCW 46.61.500; CP 1-2. The evidence here does not meet either standard.

No one testified that the driver of the car put any people or property at risk. RP 78-110. The car went faster than the 25 mph speed,

but the evidence doesn't show how much faster.<sup>4</sup> RP 90. The car stopped at an intersection before driving through a red light. RP 90-91. Traffic was light, and no evidence suggests other cars were approaching the intersection. RP 90-91. The car went through a stop sign, but nothing established that this maneuver put anyone at risk. RP 92.

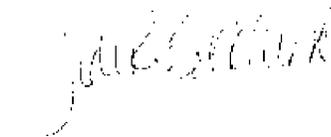
The evidence was insufficient for conviction on counts one and three. The convictions must be reversed and the charges dismissed with prejudice. *Chouinard*, 169 Wn. App. at 899.

### **CONCLUSION**

Mr. Friday's convictions must be reversed and the charges dismissed with prejudice.

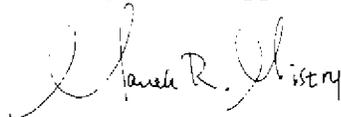
Respectfully submitted on April 16, 2014,

#### **BACKLUND AND MISTRY**



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<sup>4</sup> Donohue was able to catch up driving 40-50 mph. RP 90.

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Jeremy Frieday  
4607 NE 59<sup>th</sup> Ave  
Vancouver, WA 98661

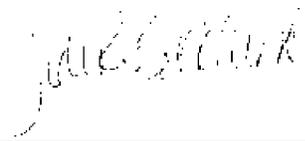
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 16, 2014.



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## BACKLUND & MISTRY

**April 16, 2014 - 3:25 PM**

### Transmittal Letter

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