

NO. 47209-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

BRUCE E. BRATTON,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it denied the defendant's motion to dismiss because the state failed to meet its burden in rebutting the presumption that its almost 17 month delay in seeking to enforce the appellate court's mandate did not prejudice the defendant.

Issues Pertaining to Assignment of Error

In a case in which a defendant remains out on appellate bond for almost 17 months after the Court of Appeals issues its mandate affirming the defendant's judgment and sentence, does a trial court err if it denies that defendant's motion to dismiss when the state fails to meet its burden to rebut a presumption that its almost 17 month delay in seeking to enforce the appellate court's mandate did not prejudice the defendant?

STATEMENT OF THE CASE

On July 3, 2010, the Jefferson County Prosecutor charged the defendant with one count of possession of cocaine. CP 1-2. On April 15, 2011, the court found the defendant guilty of that charge following a bench trial. CP 3. A little over one and one-half months later on June 7, 2011, the court sentenced the defendant to 12 months and one day in prison on a range of 6 months in jail to 18 months in prison. CP 3-11. The defendant thereafter filed a timely notice of appeal. CP 12-18.

By unpublished opinion filed on March 19, 2013, the Court of Appeals affirmed both the judgment and sentence in this case. CP 26-32. Four months later the appellate court issued its mandate, which the Clerk of Jefferson County Superior Court filed on July 25, 2013. CP 22-23. The mandate indicates that a copy of the document was served upon the Jefferson County Prosecuting Attorney. CP 23. In spite of this fact, the prosecutor did not take any steps for almost 17 months to summons the defendant into court to appear on the mandate and at no time during the pendency of the appeal or after the return of the mandate did the prosecutor attempt to have the defendant's appellate bail revoked. CP 51, 55-56; RP 12-15.¹

¹The record on appeal includes three volumes of continuously numbered verbatim reports of three hearings held in this case on 12/19/14, 1/16/15 and 1/30/15. They are referred to herein as "RP [page #]."

Finally, on November 19, 2014, the Jefferson County Prosecutor filed a Motion to Impose Stayed Sentence, seeking to enforce the mandate of the court, revoke the defendant's release and to remand him to the custody of the Department of Corrections. CP 34-45. The defendant answered with a Motion to Dismiss, arguing that under the decision in *State v. Ellis*, 76 Wn.App. 391, 884 P.2d 1360 (1994); and *State v. Modest*, 106 Wn.App. 660, 24 P.3d 1116 (2001), the trial court should dismiss the charges because (1) the state had failed to allege or prove any basis for its dilatory failure to act and (2) the delay had caused prejudice to the defendant. CP 50-53.

Following a hearing on January 30, 2015, the trial court denied the defendant's motion to dismiss, remanded the defendant to the Department of Corrections to serve his sentence, and denied bail on the new appeal. RP 12-19; CP 93-94. The trial court apparently did not enter findings or conclusions to support this decision. CP 93. The defendant thereafter filed timely Notice of Appeal. CP 91, 97.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO DISMISS BECAUSE THE STATE FAILED TO MEET ITS BURDEN IN REBUTTING THE PRESUMPTION THAT ITS ALMOST 17 MONTHS DELAY IN SEEKING TO ENFORCE THE APPELLATE COURT'S MANDATE DID NOT PREJUDICE THE DEFENDANT.

In the decisions in *State v. Ellis*, 76 Wn.App. 391, 884 P.2d 1360 (1994); and *State v. Modest*, 106 Wn.App. 660, 24 P.3d 1116 (2001), the Court of Appeals addresses the rights of a defendant to a timely resolution of a case following the return of a verdict or the return of a mandate from the appellate courts. In those two cases the Court of Appeals sets up a dichotomy between those appellants who were out of custody pending resolution of their cases and those appellants who were in custody having been unable to secure release. In cases in which a defendant or appellant is out of custody pending sentencing or appeal, the state's unexcused failure to bring the defendant before the court in a timely manner for sentencing or following the return of a mandate creates a rebuttable presumption of prejudice. No such presumption exists when a defendant or an appellate is in custody and the state fails to bring that person before the court for a timely resolution of the case. The following addresses these two cases.

In *State v. Ellis, supra*, a jury found the defendant guilty of delivery of a controlled substance. Upon receipt of the verdict the court released the

defendant pending a sentencing hearing that the state had indicated it would note. Almost two years later the state finally noted the case for sentencing. The defense responded with a motion to dismiss under CrR 7.8. In its motion, the defense argued that sentencing following such a long delay would be oppressive given the facts that during the 23 months following entry of the verdict, the defendant had reconciled with his divorced wife, had been promoted to a supervisory position at work, and had become an upstanding citizen. The state responded by admitting that it had no excuse for the failure to timely note the case for sentencing. In fact, the state admitted that the case “fell through the cracks.” Based upon these facts the trial court granted the motion to dismiss upon its finding that the delay had been “oppressive.” The state then sought review.

In addressing these issues the court first noted that there was both a constitutional as well as a statutory right to a timely sentencing hearing following entry of a verdict. The court stated the following on this issue:

Under the Sixth Amendment and the Washington Constitution, if a delay is “purposeful or oppressive”, it violates speedy sentencing rights. A determination whether a delay is “purposeful or oppressive” is made by balancing the following: the length and reason for the delay, the defendant’s assertion of his or her rights, and the extent of prejudice to the defendant.

Constitutional rights notwithstanding, speedy sentencing rights are required by court rule and statute. CrR 7.1 requires the court to set a date, time, and place for sentencing in compliance with RCW 9.94A.110. RCW 9.94A.110 requires a sentencing hearing within 40

court days following conviction, subject only to an extension for good cause on a motion by either party or the court. RCW 9.94A.110. The same factors established in *Barker [v. Wingo]*, 407 U.S. 514, 533, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972)] are of guidance in determining whether a delay is unreasonable under CrR 7.1. Johnson.

State v. Ellis, 76 Wn.App. at 394-95 (citations omitted).

The court then went on to rule that under the facts before it the trial court had not erred when it granted the defendant's motion to dismiss. The court held:

Here, there were no motions to extend time, nor does the State point to any good cause basis for an extension or delay. The delay of almost 2 years was presumptively prejudicial, and the State failed to rebut the presumption. The trial court found the reason for the delay of almost 2 years was the fault of the court and prosecutor, not the defendant. The court also found the defendant was in a good employment and family situation. We agree that sentencing Mr. Ellis after such a lengthy delay would be oppressive.

State v. Ellis, 76 Wn.App. at 395 (citation omitted).

In *State v. Modest, supra*, the defendant was convicted of numerous offenses related to running a prostitution business. The trial court thereafter imposed an exceptional sentence of 360 months in prison following entry of a number of aggravating facts and remanded the defendant to the custody of the Department of Corrections. The defendant then appealed. However, while the Court of Appeals affirmed the convictions, it vacated the sentence after invalidating all but one of the aggravating facts. The court then remanded the case back to the trial court for a new sentencing hearing.

Following the filing of the mandate this case also “fell through the cracks” as did the case in *Ellis* with the state and the clerk failing to note the case for review of the mandate. Finally, after two years, the state noted the case for the new sentencing hearing that the Court of Appeals had ordered. At the new sentencing hearing the defense, citing *Ellis*, moved to resentence the defendant to time served, given the state’s unexcused failure to act after the return of the mandate. The trial court refused and imposed another exceptional sentence although only 180 months as opposed to the original 360 months. The defendant then appealed.

Unlike the decision in *Ellis*, in this case the Court of Appeals rejected the defendant’s argument finding no prejudice given the fact that he was in custody during the two years delay. The court held:

Although there was no valid excuse for the State’s procrastination, the delay of over two years did not prejudice Mr. Modest since it did not affect the amount of time he served prior to the resentencing hearing. Mr. Modest’s reduced sentence was further reduced by the time he spent incarcerated on the longer sentence. Mr. Modest’s claims of prejudice amount to mere speculation, which is an insufficient reason to dismiss his case. Although we refuse to condone the act, the State’s delay in scheduling the resentencing hearing was neither purposeful nor oppressive. Because there is no evidence of abuse of judicial discretion in denying Mr. Modest’s motion for release, we affirm.

State v. Modest, 106 Wn.App. at 665.

As a careful review of both *Ellis* and *Modest* reveals, in both cases the state was dilatory in the extreme in bringing the defendant before the

respective trial courts for an ultimate resolution of the cases. However, two facts distinguish these related cases and explain why the defendant in the first was entitled to relief while the defendant in the second was not. These two facts are: (1) the defendant in the first case was out of custody while the defendant in the second was in custody, and (2) the defendant in the first case suffered prejudice by the state's unexcused delay while the defendant in the second did not.

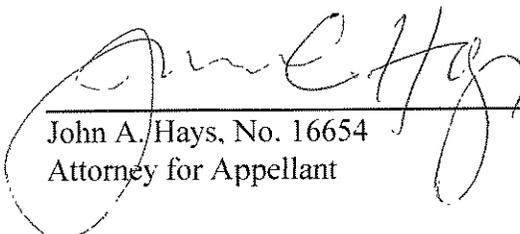
In the case at bar, as in both *Ellis* and *Modest*, the state failed to bring the defendant before the court for an ultimate resolution of the case. In *Ellis* and *Modest* the unexcused delay was 24 months; in the case at bar the unexcused delay was almost 17 months. Thus, the delay in the case at bar was extreme and sufficient to invoke the remedy recognized as potentially available in both cases. Further, in the case at bar two facts support the conclusion that the trial court erred when it did not grant the defendant the relief afforded the defendant in *Ellis*. The first fact is that the defendant in the case at bar was out of custody for almost 17 months following the filing of the mandate. The second fact is that the defendant presented evidence that he was prejudiced by the significant deterioration in his physical state. Thus, in this case the trial court erred when it failed to apply the decision in *Ellis* and grant the defendant's motion to dismiss.

CONCLUSION

The trial court erred when it denied the defendant's motion to dismiss following the state's unexcused failure to bring the defendant before the court for a review of the mandate for almost 17 months. As a result, this court should vacate the conviction and remand with instructions to dismiss the charge with prejudice.

DATED this 30th day of June, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 47209-1-II

vs.

**AFFIRMATION
OF SERVICE**

BRUCE E. BRATTON,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 30th day of June, 2015, at Longview, WA.



Donna Baker

HAYS LAW OFFICE

June 30, 2015 - 1:09 PM

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