

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 28462-0-III

IN THE COURT OF APPEALS  
OF THE  
STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

JOSE G. CHAVEZ-ROMERO,

Appellant.

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

The Honorable Cameron Mitchell

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APPELLANT'S REPLY BRIEF

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### **A. SUMMARY**

The defendant was denied his right to a speedy trial within the 60 days guaranteed by CrR 3.3. The State should not be permitted to use the immigration hold or detention as a means of keeping the defendant in a secure facility just to extend its own speedy trial period. This constituted an abuse of the court rules and a violation of speedy trial, especially where prosecutors have a duty to bring a defendant to trial without misusing the legal process. The State's crafty actions in this case should not be upheld else distrust be fostered in the legal system. Finally, the court abused its discretion by granting the State's request to release the defendant on personal recognizance since it was a virtual guarantee the defendant would not reappear at the next scheduled court date.

### **B. ARGUMENT ON REPLY**

**Issue 1: Whether the State can purposefully release a defendant to the custody of ICE merely to extend the time for trial from 60 to 90 days or more.**

The State argues that, ever since the 2003 amendments to CrR 3.3, prosecutors do not have any duty to demonstrate good faith or due diligence when it comes to bringing defendants to trial in a timely manner. Specifically, the State argues that this Court is limited to a strict review of the language of CrR 3.3, such that if no speedy trial violation is apparent on the language of that rule then no violation exists unless of

constitutional magnitude. But this is an overbroad interpretation of the rule and subsequent case law, and application of this theory as the State suggested would cause the speedy trial court rules to lose all meaning and render its provisions superfluous.

In 2003, the Legislature amended CrR 3.3 and added the following provision:

“Construction. 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 CrR 4.1 [on arraignment], the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.”

CrR 3.3(a)(4).

The Court in *State v. George* interpreted the parallel provision of CrRLJ 3.3(a)(4), noting that this rule “resulted from the task force's concern that the due diligence standards imposed by this court in applying certain sections of the rule were ‘vague and of limited value in predicting how other cases will be decided.’” *State v. George*, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007) (quoting WASHINGTON COURTS TIME-FOR-TRIAL TASK FORCE, FINAL REPORT II.B at 12-13 (Oct.2002)). The Court went on to state, however, that “the fundamental principle that the State must exercise due diligence in bringing a defendant to trial continues in force.” *Id.* at 738.

In *George*, the Supreme Court acknowledged the application of CrR/JL 3.3(a)(4) (same CrR 3.3(a)(4)), which appears to limit review only for technical violations evident in the precise language of the rule. *George*, 160 Wn.2d at 738-39. The issue there was whether the time for defendant's district court trial either *tolled* while the defendant was in custody for a charged felony in a separate county or whether the time for trial *recommenced* upon defendant's failure to appear due to being held in that other county. *Id.* at 734. As to the former, the court did hold that, particularly where the court of limited jurisdiction had no power to retrieve the defendant from custody in the other county, there was no additional duty of good faith or due diligence to attempt to secure defendant's presence for the district court matter. *Id.* at 739-41. Interestingly, however, despite CrR/LJ 3.3(a)(4)'s limit on construction of the speedy trial rules, the Court refused to limit its review to the precise language of the "failure to appear" rule, which directs the time for trial to recommence whenever a defendant fails to appear, regardless of the cause. *George*, 160 Wn.2d at 739; *see also* CrR 3.3(c)(2)(ii). Importantly, the Court stated:

"Interpreting "failure to appear" to refer to any absence, regardless of the circumstances, renders these provisions superfluous. We believe the "failure to appear" provision is intended to apply to a defendant who thwarts the government's attempt to provide a trial within the time limits specified under the rule by absenting himself

from a proceeding. Thus, the phrase “failure to appear” refers to a defendant's unexcused absence from a court proceeding.”

*George*, 160 Wn.2d at 739 (emphasis added).<sup>1</sup>

In other words, while the 2003 amendments limited construction of the speedy trial rule in some regards, courts must still interpret the speedy trial rules in a way that does not render its provisions “superfluous,” which sometimes requires courts to go beyond the strict language of the rule. Moreover, even since the 2003 amendments, “the fundamental principle that the State must exercise due diligence in bringing a defendant to trial continues in force.” *George*, 160 Wn.2d at 738.

Furthermore, contrary to the State’s argument, the 2003 amendments to CrR 3.3 (including the limit on construction found in CrR 3.3(a)(4)) did predate the rulings in both *State v. Welker*<sup>2</sup> and *State v. Olmos*<sup>3</sup>. In both of these cases, the Courts went outside the strict language of CrR 3.3 and analyzed whether a duty of good faith and due diligence existed and was violated in conjunction with the rules on Interstate Agreements on Detainers (IADs). *Id.* These Courts did not end the inquiry with CrR 3.3(a)(4) (limiting speedy trial review to circumstances

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<sup>1</sup> Ultimately, the Court held that, while defendant’s failure to appear would not restart the speedy trial clock, no violation occurred because the speedy trial clock tolled under CrRLJ 3.3(e) while the defendant was in custody in the other county. *George*, 160 Wn.2d at 739-41.

<sup>2</sup> *State v. Welker*, 157 Wn.2d 557, 565, 141 P.3d 8 (2006).

<sup>3</sup> *State v. Olmos*, 129 Wn. App. 750, 755, 120 P.3d 139 (2005).

covered by CrR 3.3) and CrR 3.3(e)(6) (time defendant is detained outside Washington is excluded from speedy trial calculations). Instead, the Courts in both *Welker, supra*, and *Olmos, supra*, acknowledged a prosecutorial duty of good faith and due diligence to attempt to acquire defendants' presence from the other jurisdiction (or at least file the IAD request) if defendants' whereabouts were known. *Welker*, 157 Wn.2d at 565-68; *Olmos*, 129 Wn. App. at 758 (“The time during which a defendant is incarcerated in an out-of-state or federal prison or jail is excluded from the speedy trial period. CrR 3.3(e)(6). But to avail itself of this exception, the State must exercise good faith and due diligence in attempting to return a defendant to Washington.”)

Here, the fact that CrR 3.3 does not address the specific effect of Immigration and Customs Enforcement (ICE) holds should not end the inquiry under CrR 3.3. As with *George, Welker*, and *Olmos*, there is an obligation to interpret the speedy trial rules so that the speedy trial provisions are not meaningless or render superfluous results. This does at times require interpretation beyond the strict language (such as in *George* when the Court addressed the “failure to appear” subsection of CrR 3.3) or even application of additional authorities such as IAD or immigration laws.

In this case, the speedy trial clock did not toll, like in *George*, when the defendant was transferred into ICE custody. The presence of an immigration detainer does not constitute any form of an additional “charge,” nor does presence in an immigration detention facility constitute “custody.” See CrR 3.3(e)(6) (speedy trial clock tolls while defendant is detained outside Washington or in a federal jail or prison) (emphasis added).<sup>4</sup> Furthermore, like in *George*, any “failure to appear” was not the result of any intentional or even negligent action by Mr. Chavez-Romero. It was a direct result of defendant being purposefully released to immigration rather than held in State custody so that he could be tried for the State charges in a timely manner. Thus, the speedy trial clock should not be reset.

The issue, then, is whether the time for trial extended from 60 days to 90 days when the State intentionally released the defendant to immigration enforcement. Mr. Chavez-Romero reiterates that his case is like *Olmos* and *Welker*, *supra*, in that, given the State’s ability and responsibility to bring him to trial in a timely manner when the defendant was within the State’s custody, the court should not have released the

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<sup>4</sup> See also *State v. Sanchez*, 853 N.E.2d 283, 288 (Ohio 2006) (immigration detainees do not constitute “custody” for speedy trial purposes); *State v. Montes-Mata*, 208 P.3d 770, 771 - 774 (Kan. App. 2009) (same). And see *Zolicoffer v. United States Dep’t of Justice*, 315 F.3d 538 (5th Cir.2003); *Prieto v. Gluch*, 913 F.2d 1159, 1162 (6th Cir. 1990); *Orozco v. United States Immigration and Naturalization Service*, 911 F.2d 539, 541 (11th Cir. 1990); *Campillo v. Sullivan*, 853 F.2d 593, 595 (8th Cir.1988), cert. denied, 490 U.S. 1082 (1989).

defendant solely to give the State more trial time. The State had Mr. Chavez-Romero in its custody. It would not have had to even exercise the barest amount of diligence to acquire defendant's presence since he was already in State custody. Furthermore, there is no indication that the State or court made even a minimal effort to acquire defendant's presence from ICE for the next hearing, as it had the ability to do, such as by filing a departure control order. *See* 8 C.F.R. 215.3(g). (The prejudice that resulted to the defendant was summarized in appellant's and amicus' opening briefs and is incorporated herein).

The more appropriate solution in this case may have been to keep defendant in custody, for the court to proceed under the original speedy trial clock of 60 days and to simply extend that period where necessary upon a proper showing for a "good cause" continuance. *See* CrR 3.3(e)(3); *State v. Williams*, 104 Wn. App. 516, 524, 17 P.3d 648 (2001) (where State moved to release defendant on personal recognizance to extend time for trial beyond 60 days, knowing defendant would remain in custody on separate charges anyway, Division II approved trial court's denial of State's motion to release defendant and trial court's decision to grant a continuance for cause instead).

Instead, here the court allowed the State to take advantage of the ICE hold and transfer the defendant to another detention outside of the

community just to maintain him in a secure facility while giving the State extra time for trial. This was a misuse of the court rules and was an overall abuse of the judicial system and court rules. A prosecutor's duty is not merely to zealously advocate for the State. *See State v. Monday*, 171 Wn.2d 667, 672, \_\_\_ P.3d \_\_\_ (2011). "A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice." *Id.* *See also State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008) ("A prosecutor's duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial."); *State v. Bradford*, 95 Wn. App. 935, 952, 978 P.2d 534 (1999) (Schultheis, J., dissenting) ("Due process requires fundamental fairness, integrity and honor in the operation of the criminal justice system.") (Internal quotations omitted.)

Prosecutors should not be permitted to use ICE holds or detentions as a means of maintaining defendants in secure facilities in order to gain more time for trial. While zealous advocacy is permitted, prosecutors must also champion justice and the integrity of the judicial system. The State's actions in this case did not do so.

Finally, it should be noted that the State's argument that the defense attorney in this case failed to object below is unsupported. Initially, there was no method by which defense counsel could procure

defendant's presence by the 60<sup>th</sup> day for trial (May 2<sup>nd</sup>) since defendant was transferred to ICE; the State and court had to work in collaboration with ICE to re-secure defendant's presence, as it finally did when a bench warrant was issued after the defendant could not appear on 4/28/09. Regardless, defense counsel repeatedly objected to moving the trial date beyond the 60-day timeframe and transferring the defendant to ICE custody, and she moved to dismiss for the speedy trial violation, including at the hearings on 4/21/09, 4/28/09, and 5/19/09. She also objected to the trial being set beyond the speedy trial period of CrR 3.3 by motion. CP 126. As such, this issue is preserved for review by this Court.

**Issue 2: Whether the trial court abused its discretion by releasing the defendant on personal recognizance where he was unlikely to appear at future hearings.**

The State argues that defendant's time for trial was properly extended from 60 to 90 days when the court released Mr. Chavez-Romero on personal recognizance, suggesting this was a proper use of the release procedure in CrR 3.2. But the court abused its discretion in releasing the defendant on personal recognizance given the circumstances in this case.

Generally, a defendant's release from custody on personal recognizance extends the time for trial from 60 to 90 days. *State v. Kelly*, 60 Wn. App. 921, 925-26, 808 P.2d 1150 (1991); CrR 3.3(b)(1) and (3). In *Kelly, supra*, defendants were released from custody when the court

calendar could not accommodate a trial within the 60-day time limit, thereby extending the time for trial to 90 days. *Id.* The defendants objected and demanded a trial within the 60 days or, alternatively, dismissal for the alleged speedy trial violation. *Id.* But the court held that the court rules did not permit a defendant to remain in custody for the sole purpose of causing speedy trial to expire. *Id.* Specifically, “[a]bsent a showing of prejudice, there is no violation of CrR 3.3 so long as the trial is within 90 days of arraignment with no more than 60 of those days in custody.” *Id.* (emphasis added).

The *Kelly, supra*, court did not address what kind of prejudice would have been sufficient to maintain the defendant(s) in custody rather than release on personal recognizance. However, the rule for pretrial release – CrR 3.2(a) – provides the necessary guidance. Pursuant to CrR 3.2(a)(1), a defendant is not to be released from custody if certain conditions exist, including where “the court determines that such recognizance will not reasonably assure the accused's appearance, when required.” CrR 3.2(a)(1). The trial court's pretrial release decisions are reviewed for an abuse of discretion. *Kelly*, 60 Wn. App. at 928.

Here, the trial court abused its discretion when it released the defendant on personal recognizance. A defendant is not to be released from custody if, in doing so, the court cannot reasonably assure the

accused's appearance when required. The court was well aware that the defendant would be transferred to federal immigration custody, such that he would be unable to appear at the next hearing. The court ignored the parameters for when defendants may be released from custody that are set forth in CrR 3.2(a)(1). Failure to follow these legislative guidelines constituted an abuse of discretion.

Furthermore, Mr. Chavez-Romero did not object to being released solely for the purpose of causing speedy trial to expire, as did the defendants in *Kelly, supra*. Instead, he objected due to the ICE hold that would not allow him to appear at future hearings and made timely resolution of his matter, not to mention communication with his attorney, much more difficult.

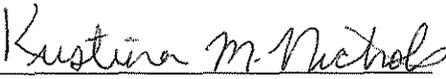
Simply put, Mr. Chavez-Romero should not have been released on personal recognizance where he was unlikely to appear at the next scheduled hearing. This constituted an abuse of discretion that calls for reversal of this matter.

#### F. CONCLUSION

The arguments not addressed herein have been thoroughly briefed by both parties and Mr. Chavez-Romero rests on the previously submitted briefing. As to the speedy trial issue and releasing the defendant on personal recognizance, Mr. Chavez-Romero reiterates that the State's

actions in this case constituted a misuse or abuse of the court rules. Mr. Chavez-Romero should have been tried within the initial 60 day period (or a continuance of that period had the State made the necessary showing). The trial court abused its discretion by instead releasing Mr. Chavez-Romero on personal recognizance, and failure to try Mr. Chavez within the 60 days required by CrR 3.3(b)(1) should result in a reversal in this matter.

Respectfully submitted this 10 day of August, 2011.

  
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