

FILED

OCT 28 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 29093-0-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

WILLIAM DAVIS,

Defendant/Appellant.

APPELLANT'S BRIEF

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Attorney for Appellant
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Ritzville, Washington 99169
(509) 659-0600

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ASSIGNMENTS OF ERROR

1. William Davis was denied the right to a constitutionally speedy trial under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.
2. Mr. Davis did not receive effective assistance of counsel as guaranteed by the same constitutional provisions.
3. The State failed to establish, beyond a reasonable doubt, that Mr. Davis was the person who committed the robbery on November 16, 2008.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did defense counsel's inaction, resulting in excessive pre-trial delay, constitute ineffective assistance of counsel and deprive Mr. Davis of his constitutional right to a speedy trial?
2. Was identification testimony sufficient to establish beyond a reasonable doubt that Mr. Davis committed the offense of first degree (1st) robbery?

STATEMENT OF CASE

A robbery occurred at See's Candy on November 16, 2007. The robber was described as dark complected, wearing a puffy white parka and jeans. He was carrying what appeared to be a small bore pistol. (Trial RP 64, ll. 12-13; ll. 19-24; RP 65, ll. 3-10; ll. 15-16; RP 65, l. 22; RP 66, ll. 6-12).

After the cashier opened the register, the person stepped forward and removed money from the drawer. He then turned around and left. (Trial RP 68, l. 1; l. 20).

Officers responded to a 911 call. As Officers Lyons, Howe and Huett of the Spokane Police Department responded they came upon an accident scene near Lacrosse and Lidgerwood. There was a truck on its side and a car which had hit a building. Mr. Davis was the driver of the car. (RP 7, l. 12; RP 8, ll. 3-20; RP 137, ll. 17-18; RP 142, ll. 23-24; RP 69, l. 10).

Brandie Meyers saw the accident occur. She also saw Mr. Davis remove a bag from the car and put it behind a house. (RP 104, ll. 20-24; RP 109, ll. 7-13).

Officer McIntyre arrived at See's Candy. She obtained an additional description of the robber. He was described as a mulatto male wearing a white puffy jacket, glasses and gloves. (RP 85, ll. 8-10; RP 88, ll. 3-8).

Mr. Davis was nervous and sweating profusely. He gave officer Lyons a false name and date of birth. Officer Howe saw money stuffed in Mr. Davis's waistband and down the front of his pants. (RP 145, ll. 19-23; RP 146, ll. 8-13; RP 179, ll. 3-4).

After an I.D. card was found in Mr. Davis's wallet, he told the officers he was a drug dealer and normally keeps money down the front of his pants. He denied having a gun. (RP 180, ll. 7-11, RP 180, l. 21 to RP 180, ll. 7-11; RP 180, l. 21 to RP 181, l. 1; RP 181, ll. 18-21).

Deborah Paine is the owner of the car Mr. Davis was driving. She gave him permission to use it. Earlier in the day she saw him spray paint a toy gun. Receipts from K-Mart were located in the car. The receipts were for a toy gun and spray paint. (RP 115, ll. 19-21; RP 118, ll. 4-11; RP 161, ll. 1-2; RP 162, ll. 6-8; RP 162, l. 24 to RP 163, l. 1; RP 164, ll. 8-10).

During a search of the car a large puffy white coat was located behind the driver's seat. A dark cotton glove was located under the front passenger seat. \$740.00 cash was removed from Mr. Davis's pants at the accident site. (RP 118, ll. 12-16; RP 119, ll. 14-15; RP 138, ll. 8-10; RP 139, ll. 4-8).

Larry Roscoe, one of the See's employees, was driven to the accident scene for an on site "show-up". Mr. Davis was the only person present. He was in handcuffs. Mr. Roscoe identified him at the scene. His in-court identification was equivocal: "I think I do." (RP 70, ll. 23-25; RP 72, l. 16 to RP 73, l. 4; RP 182, ll. 12-23; RP 184, ll. 8-10; RP 185, ll. 9-13).

Mr. Roscoe further indicated that an officer told him that Mr. Davis was the driver of the car and specifically directed his attention to him. (RP 76, ll. 4-10).

An Information was filed on December 13, 2007 charging Mr. Davis with first degree robbery. (CP 1).

The trial court entered a stay on February 14, 2008 pending a Sanity Commission report. The Sanity Commission was appointed on February 15, 2008. Defendant received a discharge notice from Eastern State Hospital (ESH) dated March 6, 2008. It was filed with the Court on March 17, 2008. (CP 12; CP 13; CP 53).

Scheduling orders were entered on March 17 and March 20, 2008 pending receipt of the Sanity Commission report. That report, dated May 21, 2008, was finally received on May 28, 2008. It determined that Mr. Davis was competent, sane and dangerous. He was described as having attention deficit hyperactivity disorder, psychosis not otherwise specified, polysubstance abuse and an anti-personality disorder. (CP 54; CP 55; CP 58; CP 59).

An Order lifting the stay was not filed until March 16, 2009. (CP 85).

Various scheduling orders continuing the stay were entered pending receipt of an independent defense evaluation. The orders are dated May 29, 2008; June 20, 2008; July 18, 2008; August 15, 2008; August 29, 2008; October 3, 2008; October 17, 2008; October 31, 2008; November 21, 2008; December 5, 2008; January 9, 2009; January 23, 2009; January 30, 2009; February 13, 2009 and February 27, 2009. (CP 68; CP 69; CP 70; CP 71; CP 72; CP 73; CP 74; CP 75; CP 77; CP 78, CP 79; CP 80; CP 81; CP 82; CP 83).

Mr. Davis refused to sign many of the continuances and scheduling orders that were requested by the defense counsel. He eventually filed an action against the prosecutor and defense counsel in the District Court for the Eastern District of Washington. Defense counsel was dismissed on October 8, 2009. (CP 103; CP 188; 12/03/09 RP 11, ll. 9-23; RP 16, ll. 1-4).

Mr. Davis sent a letter to the Court dated October 27, 2008. He raised an issue concerning his constitutional right to speedy trial. The trial court returned the letter to Mr. Davis. It was later filed on November 21, 2008. (CP 76).

Dr. Mark Mays conducted the independent evaluation for defense counsel. His report was received on February 27, 2009. Dr. Mays filed an

affidavit in connection with Mr. Davis's motion to dismiss. He described defense counsel's non-responsiveness to his various inquiries. (CP 241).

On December 3, 2009 the trial court heard argument on Mr. Davis's motion to dismiss. Mr. Davis' *pro se* motion for dismissal was discussed. The argument centered around the delay caused by defense counsel in connection with the independent competency evaluation. The motion to dismiss was denied by the Court. An order was entered on December 21, 2009. (CP 105; CP 177; CP 178; CP 180; CP 181; CP 254). (12/03/09 RP 4, ll. 1-5; RP 5, ll. 23-25; RP 9, ll. 4-12).

Additional scheduling orders were entered on May 5, 2009, October 8, 2009 and February 16, 2010. A motion to renew Mr. Davis's motion to dismiss was filed on April 13, 2010. It was denied. (CP 87; CP 104; CP 258; CP 265).

After the State rested its case Mr. Davis filed a motion to dismiss for insufficient identification that he was the robber. The motion was denied. (RP 186, ll. 8-9; RP 187, l. 6 to RP 191, l. 2).

Judgment and Sentence was entered on May 20, 2010. Mr. Davis was determined to be a persistent offender based upon prior robbery convictions in Lewis County and Pierce County. (CP 356; CP 371; CP 378; CP 412).

Mr. Davis filed his Notice of Appeal on May 26, 2010. (CP 431).

SUMMARY OF ARGUMENT

Inexcusable neglect by defense counsel causing an unnecessarily long delay in competency proceedings constitutes ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22. The delay violated Mr. Davis' right to a constitutionally speedy trial.

There was insufficient evidence identifying Mr. Davis as the person who committed the robbery.

ARGUMENT

A. Competency Proceedings

CrR3.3(e) provides, in part:

The following periods shall be excluded in computing the time for trial:

- (1) *Competency Proceedings*. All proceedings **relating to the competency of a defendant to stand trial** on a pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(Emphasis supplied.)

Mr. Davis contends that the language of the rule does not contemplate the type of delay that occurred in his case. In actuality, the competency proceedings terminated once the Sanity Commission report was filed with

the Court. An order lifting the stay should have been entered. The delay from May 28, 2008 to March 16, 2009 is untenable.

The record clearly reflects that the delay was the direct result of defense counsel's dilatory interactions with Dr. Mays. Mr. Davis, because of defense counsel's actions, raised the constitutional speedy trial issue *pro se*. The trial court declined to take any action on the issue.

It was only after defense counsel was disqualified in October 2009, and new counsel was appointed, that the motion to dismiss was considered. Thus, for a period of time in excess of twelve (12) months (October 2008 to December 2009), Mr. Davis remained in custody and deprived of his constitutional right to a speedy trial.

The Sixth Amendment to the United States Constitution states, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... .

Const. art. I § 22 provides, in part: "In criminal prosecutions the accused shall have the right... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed... ."

Mr. Davis did not receive a constitutionally speedy trial. Whether as the result of ineffective assistance of counsel, lack of enforcement by the trial court, or otherwise, Mr. Davis has been denied his constitutional rights.

“The right to effective assistance of counsel in criminal proceedings is a constitutional right. “*State v. Horton*, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

Mr. Davis asserts that the trial court’s denial of his dismissal motion further exacerbates the constitutional implications in his case. The trial court’s analysis is flawed. It determined that there was no presumptive prejudice and invoked CrR3.3 which served to cloud examination of the necessary constitutional standards. (12/03/09 RP 33, ll. To RP 41, l. 25).

The trial court did address *State v. Iniguez*, 167 Wn. 2d 273 (2009). However, Mr. Davis maintains that it misread the case and misapplied it to the facts and circumstances of his case.

The *Iniguez* Court ruled at 292-293:

...[T]he passage of time is an important factor in this analysis. The length of delay is not, however, the only factor. The complexity of the charges and reliance on eyewitness testimony are two other factors that also can be examined in this analysis.

...[T]he length of delay was substantial and Iniguez spent all of it in custody. Second, Iniguez was not facing complex charges involving multiple actors.... Lastly, the State’s case rested in large part on eyewitness testimony from multiple people.... In light of all these circumstances, the over eight-month delay was presumptively prejudicial.

...[T] lapse of a lengthy period of time compels a court to give “ ‘an extremely careful

appraisal of the circumstances.’ “*Alter*, [State v. *Alter*, 67 Wn. 2d 111, 121, 406 P. 2d 765 (1965) (quoting *Fouts v. United States*, 253 F.2d 215, 217 (6th Cir. 1958))]. In other words, **the longer the pretrial delay, the closer a court should scrutinize the circumstances surrounding the delay.**

(Emphasis supplied.)

As in *Iniguez*, Mr. Davis remained in custody. The fact that continued custody was occasioned by defense counsel’s dilatory actions should not be held against Mr. Davis.

The *Iniguez* Court stated at 294: “We look to each party’s level of responsibility for the delay and assign different weights to the reasons for delay.”

As in *Iniguez*, Mr. Davis faced a charge of robbery. There were no accomplices. The State’s case relied on eyewitness testimony.

It is Mr. Davis’s position that the delay was presumptively prejudicial. The trial court’s determination that it was not is in error.

Mr. Davis recognizes that the standard of review is an abuse of discretion. *See: State v. Davis*, 2 Wn. App. 380, 382, 467 P. 2d 875, *reviewed denied, certiorari denied*, 401 U.S. 943, 91 S. Ct. 952, 28 L. Ed. 2d 224 (1970).

The *Davis* Court recognized that in a constitutional speedy trial challenge it is incumbent upon a criminal defendant to demand a speedy trial. The demand must be made upon the court having jurisdiction over the of-

fense. Mr. Davis did this in October 2008 and the trial court ignored the demand. *See: State v. Davis, supra* 382-83.

As in *Iniguez, supra* 294, Mr. Davis asserted his speedy trial rights and continued to do so. The *Iniguez* Court stated at 295: "...[W]e give 'strong evidentiary weight' to a defendant's assertion of his speedy trial right."

Mr. Davis contends that defense counsel's dilatory actions are equivalent to either prosecutorial mismanagement of a case or the failure of a trial court to ensure speedy trial in accord with both constitutional provisions and court rule. *See: CrR3.3(a); CrR8.3.*

In *State v. Poulos*, 31 Wn. App. 241, 242, 640 P. 2d 735 (1982), it was held that:

Our time for trial rule CrR3.3, is a tool to protect the integrity of the judicial process and is an additional safeguard against arbitrary, oppressive delay but does not purport to mark the bounds of the Sixth Amendment's speedy trial clause. *Federated Publications Inc. v. Swedberg*, 96 Wn. 2d 13, 633 P. 2d 74 (1981). If a trial is postponed within the framework of the criminal rule, then the defendant must show violation of constitutional standards beyond delay itself to constitute denial of his Sixth Amendment right.

As previously noted, CrR3.3(e)(1) appears to exclude the time frame being argued by Mr. Davis. However, the rule is not meant to unduly restrict the constitutional speedy trial right of a criminal defendant.

The *Iniguez* Court addressed the constitutional standards to be applied in connection with any challenge to lack of a constitutionally speedy trial. See: *Mattoon v. Rhay*, 313 F. 2d 683 (9th Cir. 1963); *State v. Brewer*, 73 Wn. 2d 58, 436 P. 2d 473, cert. denied, 393 U.S. 970, 21 L. Ed. 2d 381, 89 S. Ct. 407 (1968); *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

The remaining factor to be addressed is “prejudice.” “Prejudice is a major factor, but not an essential one.” *State v. Higley*, 78 Wn. App. 172, 185, 902 P. 2d 659 (1995), citing *Moore v. Arizona*, 414 U. S. 25, 26, 38 L. Ed. 2d 183, 185, 94 S.Ct. 188 (1973).

The *Iniguez* Court addressed prejudice at 295:

Prejudice is judged by looking at the effect on the interest protected by the right to a speedy trial: (1) to prevent harsh pre-trial incarceration, (2) to minimize the defendant’s anxiety and worry, and (3) to limit impairment to the defense.

...[W]e presume...prejudice to the defendant intensifies over time.

Mr. Davis remained in custody from his arrest on November 16, 2007 until his trial on April 19, 2010. It is obvious that this pre-trial incarceration was harsh. It created anxiety and worry on the part of Mr. Davis. Moreover, it impacted witness memories with regard to the issue of identification.

As in *Iniguez*, Mr. Davis has satisfied those factors to establish that his trial was not a constitutional speedy trial.

Mr. Davis opines that the speedy trial issue is intricately intertwined with his claim that defense counsel was ineffective. A claim of ineffective assistance of counsel is reviewed *de novo*. See: *State v. Horton, supra*.

Mr. Davis contends that when Dr. Mays's affidavit is reviewed in conjunction with the extensive delay between arrest and actual trial, there is no doubt that his rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22 were denied.

B.Eyewitness Identification

Reliability of identification testimony is the critical factor in determining its admissibility. To be considered are: (1) the witnesses' opportunity to view the suspect at the time of the crime; (2) the witnesses' degree of attention; (3) the accuracy of prior descriptions of the suspect; (4) the witnesses' level of certainty at the time of the confrontation; and (5) the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977).

State v. Hebert, 33 Wn. App. 512, 514, 656 P. 2d 1106 (1982).

The *Hebert* case involves a "show-up" identification. Larry Roscoe, the See's cashier, was the only identification witness at trial.

Mr. Roscoe's in-court identification with regard to Mr. Davis was: "I think I do" recognize him. Mr. Davis contends that this is not a reliable identification.

The "show-up" identification must be called into question when viewing the reliability factors set forth in the *Hebert* case.

Mr. Roscoe had the opportunity to observe Mr. Davis at the time of the robbery. He recalled a mixed race male wearing a white puffy coat and blue jeans. (RP 9, ll. 13-14).

Mr. Roscoe's attention to detail was distracted when opening the cash register. He did not note additional suspect identification. (RP 65, l. 24 to RP 66, l. 2; RP 67, ll. 13-16).

At the "show-up" Mr. Davis was in handcuffs. He is a light-skinned black male. He was wearing a blue shirt, blue jeans and a blue bandana around his neck. He also had glasses. (RP 9, ll. 16-19; RP 88, ll. 7-8).

Mr. Davis was the only suspect in the "show-up". An officer pointed to Mr. Davis and asked whether or not Mr. Roscoe could identify him.

Mr. Davis concedes that there was a short period of time between the robbery and the confrontation.

The dangers concerning "show-up" identification are addressed in *State v. King*, 31 Wn. App. 56, 60-61, 639 P. 2d 809 (1982).

[A] famous trilogy of cases... point out the dangers of a showup identification...[and] address their concerns to the proper identification of the person. *See United States v. Wade*, 399 U.S. 218, 18 L. Ed. 2d 1149, 87

S. Ct. 1926 (1967); *Gilbert v. California*, 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967); *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967). ...

Witnesses routinely make identifications of individual persons.... Distinctive of the former category is the uniqueness of every person. Indeed, Sir Thomas Browne once quipped: “It is the common wonder of all men, how among so many millions of faces there should be none alike.” *Religio Medici*, Pt. 2, § 2 (1642). If, then, a witness identifies an individual as the perpetrator of a crime, not only will that be direct and highly persuasive evidence against the defendant, but also the eyewitness will be reluctant to change his identification. See *United States v. Wade*, *supra*, at 229. Any misidentification of a person’s visage is thus likely to become irreparable. The *Wade-Gilbert-Stovall* trilogy, therefore, recognized the importance of eyewitness identifications, which, by their very nature, carry so much weight with juries... .

Mr. Davis asserts that his “show-up” identification was impermissibly suggestive. He was in handcuffs. He was the only suspect present. An officer pointed Mr. Roscoe in his direction.

... [A]dmission of a witness’s identification evidence may also violate a defendant’s right to due process of law. The Court [in *Stovall v. Denno*, 388 U. S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967)] held that it must be determined whether, considering “the totality of the circumstances” the confrontation between the witness and the defendant was “unnecessarily suggestive and conducive to irreparable mistaken identification.” *Stovall* at 302.

State v. McDonald, 40 Wn. App. 743, 745-46, 700 P. 2d 327 (1985).

The procedure used in Mr. Davis's case was unnecessarily suggestive and adversely impacted both the show-up identification and in-court identification.

CONCLUSION

Mr. Davis was denied his right to a constitutionally speedy trial. His conviction should be reversed and dismissed.

Alternatively, identification of Mr. Davis as the person who committed the offense was both impermissibly suggestive and insufficient to independently establish identity beyond a reasonable doubt. As such, his conviction should be reversed and dismissed.

DATED this 27th day of October, 2010.

Respectfully submitted,



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STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 07 1 04704 3
Respondent,)	
)	AFFIDAVIT OF MAILING
v.)	
)	
WILLIAM DAVIS,)	
)	
Defendant,)	
Appellant.)	
_____)	

STATE OF WASHINGTON)
: ss.
County of Adams)

CONNIE HILLE, being first duly sworn upon oath, deposes and says:

That on this date I mailed in the mails of the United States of America a properly stamped and addressed envelope directed to:

RENEE S. TOWNSLEY, CLERK
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WILLIAM DAVIS #954646
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Walla Walla, Washington 99362

Containing a copy of the *APPELLANT'S BRIEF*.

Connie Hille
CONNIE HILLE

SUBSCRIBED AND SWORN to before me this 27th day of October, 2010.

DENNIS W. MORGAN
Notary Public
State of Washington
My Commission Expires
December 28, 2013

Dennis W. Morgan
NOTARY PUBLIC in and for the State of
Washington, residing at Ritzville.
My commission expires: 12/28/2013.