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May 20, 2013
Court of Appeals
Division III
State of Washington

NO. 31395-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,
V.
MALCOLM CONRAD ENGLE,
Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. Malcolm Conrad Engle's time-for-trial rights were violated.
2. Mr. Engle's right to a speedy appeal was violated.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did the trial court and State fail to comply with the provisions of CrR 3.3?
2. Has Mr. Engle been deprived of due process due to the delay in processing his appeal?

STATEMENT OF CASE

Laytonya Lee was twenty-two (22) years old at the time she met Mr. Engle. Ms. Lee has a disability which affects her comprehension of various matters. Her mother, Corinna Lee is her guardian. (Howze RP 42, ll., 19-20; Bartunek RP 4, ll. 22-25; RP 5, ll. 1-8)

Ms. Lee and Mr. Engle began living with his mother and sister in various locations in Grant County. They lived in an RV that was moved from place to place. (Howze RP 44, ll. 11-15; RP 45, ll. 11-21)

Mr. Engle uses morphine and methamphetamine. He introduced Ms. Lee to the drugs. They were using them on a daily basis. (Howze RP 47, ll. 10-24; RP 50, ll. 2-3)

On September 24, 2010 Mr. Engle, his mother and Ms. Lee were watching movies in the RV. They were all using drugs. Mr. Engle took a knife/leatherman's tool and cut on Ms. Lee's nipple to remove what he believed was a cyst. Ms. Lee thought he was also looking to see if there was any milk since she thought she was pregnant. (Howze RP 50, l. 6 to RP 51, l. 10)

Ms. Lee told Mr. Engle not to cut her approximately five (5) to six (6) times. He finally stopped cutting on her nipple when she pushed him away. (Howze RP 51, ll. 11-16; RP 52, ll. 15-19)

Prior to cutting her Mr. Engle had used either alcohol or hydrogen peroxide to clean the nipple area. The knife/tool was also disinfected. (Howze RP 72, l. 25 to RP 73, l. 14)

When Ms. Lee's mother came to pick her up she saw cut marks and needle punctures. The cut marks were small. Ms. Lee was taken to

the hospital for an examination and drug test. The drug test was negative. (Howze RP 52, ll. 20-24; RP 82, ll. 7-12; Bartunek RP 14, ll. 2-4)

An Information was filed on November 5, 2010 charging Mr. Engle with second degree assault - domestic violence. Conditions of release were entered on December 22, 2010. (CP 1; CP 7)

A scheduling order was entered following Mr. Engle's arraignment on January 4, 2011. Jury trial was scheduled for March 29, 2011. The outside date for trial was April 4, 2011. (CP 9)

On April 12, 2011 another scheduling order was entered. It re-scheduled the jury trial to April 19, 2011. Additional scheduling orders were later entered. (CP 10; CP 11; CP 28)

An Amended Information was filed on April 26, 2011. A bench warrant was issued on April 27, 2011. New conditions of release were imposed on April 28, 2011. Mr. Engle posted a bail bond on May 9, 2011. (CP 13; CP 23; CP 26; CP 29)

A jury trial was held on July 7 and 8, 2011. The jury found Mr. Engle guilty of fourth degree assault - domestic violence. (CP 62; CP 63)

Judgment and Sentence was entered on August 16, 2011. Mr. Engle filed his Notice of Appeal that same date. (CP 65; CP 72)

SUMMARY OF ARGUMENT

Mr. Engle's jury trial was not held within the appropriate time limits of CrR 3.3. No provision of the rule relieves the State of its obligation to bring Mr. Engle to trial in a timely manner. CrR 3.3(h) mandates dismissal with prejudice.

Mr. Engle's constitutional due process rights were violated by the fact that the Grant County Clerk delayed processing his appeal for over a year. He is entitled to have his conviction reversed and the case dismissed.

ARGUMENT

A. TIME-FOR-TRIAL

CrR 3.3(a)(1) states: "It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."

The State and the trial court failed to comply with CrR 3.3(a)(1).

Mr. Engle's initial trial date was scheduled for March 29, 2011. The trial court correctly calculated the outside date as April 4, 2011. Mr. Engle was not brought to trial within the requisite time frame.

It was not until April 12, 2011 that a new scheduling order was entered (8 days beyond the time-for-trial). It does not appear that there is a waiver of time-for-trial on file.

CrR 3.3(b)(2) states:

A defendant who is not detained in jail shall be brought to trial within the longer of

- (i) 90 days after the commencement date specified in this rule; or
- (ii) The time specified in subsection (b)(5).

Mr. Engle was arraigned on January 4, 2011. He was not in custody. Thus, his trial was required to commence no later than April 4, 2011.

CrR 3.3(b)(5) is inapplicable to the facts and circumstances of Mr. Engle's case. There do not appear to be any excluded periods as they are listed in CrR 3.3(e).

There does not appear to have been any record made with regard to why the trial was not held in a timely manner.

The purpose underlying CrR 3.3 is to protect a defendant's constitutional right to a speedy trial. *State v. Mack*, 89 Wn.2d 788, 791-92, 576 P.2d 44 (1978); *State v. Cummings*, 87 Wn.2d 612, 615, 555 P.2d 835 (1976). "[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976).

State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009).

CrR 3.3 must be strictly construed. The rule provides numerous “outs” for the trial court and the State. These include excluded periods under CrR 3.3(e) and provisions for resetting the commencement date under CrR 3.3(c).

The record does not reflect that any of the listed provisions under CrR 3.3(c) apply.

A criminal charge not brought to trial within the time limits of CrR 3.3 must be dismissed with prejudice. CrR 3.3(h). We review the application of the speedy trial rule *de novo*. *State v. Carlyle*, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996).

The trial court is ultimately responsible for ensuring compliance with the speedy trial period. CrR 3.3(a). But the State bears the primary duty to bring the defendant to trial in a timely manner. *State v. Jenkins*, 76 Wn. App. 378, 383, 884 P.2d 1356 (1994), *review denied*, 126 Wn.2d 1025 (1995). ... When the applicable speedy trial period has expired, the court must dismiss the charges if the defendant objects within 10 days of the trial, **even if the defendant has not suffered prejudice.** CrR 3.3(d)(3). [Citations omitted.]

State v. Kenyon, 143 Wn. App. 304, 312, 177 P.3d 196 (2008). (Emphasis supplied.)

Mr. Engle contends that CrR 3.3(d)(3) does not apply under the

facts and circumstances of his case. CrR 3.3(d)(3) provides, in part:

A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits.

As previously noted the trial court set Mr. Engle's trial within the parameters of CrR 3.3(b)(2). However, trial did not occur within that time frame. Thus, there was no need for Mr. Engle to object to the setting of the initial trial date.

CrR 3.3 provides another "out" for the trial court and the State.

This "out" is contained in CrR 3.3(g). The subsection states, in part:

The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time-for-trial has expired. Such a continuance may be granted only once in the case **upon a finding on the record or in writing** that the defendant will not be substantially prejudiced in the presentation of his or her defense.

(Emphasis supplied.)

It does not appear that either the trial court or the State exercised the cure period provided for in CrR 3.3(g) since there is no document in the record asking for a cure period.

Mr. Engle contends that the violation of the rule requires mandato-

ry dismissal under CrR 3.3(h).

B. SPEEDY APPEAL

Mr. Engle filed his Notice of Appeal on August 16, 2011. The Grant County Superior Court Clerk did not transmit the file to the Court of Appeals until January 18, 2013. A total of five hundred and twenty-one (521) days elapsed between the filing and the transmittal.

Mr. Engle's due process rights have been violated by the delay caused by the State.

The Fourteenth Amendment to the United States Constitution provides, in part:

No State ... shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Const. art. I, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law."

Mr. Engle has only located one (1) case in the State of Washington that discusses the right to speedy appeal. The Court, in *State v. Lennon*, 94 Wn. App. 572, 577-78, 976 P.2d 121 (1999) adopted a modified version of the *Barker v. Wingo*¹ test.

In ascertaining whether or not there was a constitutional right to

¹ *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed.2d 101 (1972)

speedy appeal the Court ruled at 577:

The United States constitution does not require the states to provide convicted defendants a right to appellate review. [Citations omitted.] While the right to a speedy appeal is not contemplated in the Sixth Amendment, federal courts have held that undue delay in processing an appeal may rise to the level of a violation of due process. *United States v. Smith*, 94 F.3d 204, 206-07 (6th Cir. 1996), *cert. denied*, 519 U.S. 1133 (1997); *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1983), *cert. denied*, 469 U.S. 1033 (1984). ... It is ... established that when a state has provided a constitutional right to appeal and has established appellate courts as an integral part of the criminal justice system, an appeal must comport with due process. [Citations omitted.] **Washington guarantees the right to appeal criminal prosecutions, and substantial delay in the appellate process may constitute a due process violation.** WASH. CONST. art. I, § 22; *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990).

(Emphasis supplied.)

The delay in Mr. Engle's case violates his constitutional right to due process. There is no credible reason why the Grant County Superior Court Clerk did not timely transmit his appeal to the Court of Appeals.

The *Lennon* Court went on to hold at 578:

The length of the delay acts as a triggering mechanism, meaning that unless the delay is unreasonable under the circumstances, there is no necessity to inquire further. *Doggett v.*

United States, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed.2d 520 (1992); *Barker*; 407 U.S. at 530. In extreme circumstances, an inordinate delay may give rise to a presumption of prejudice. *Doggett*, 505 U.S. at 655-57, cited in *Smith*, 94 F.3d at 209.

The *Lennon* case involved a court reporter's dilatory filing of the appeal transcript. There was a ten (10) month delay.

Here, the Grant County Superior Court Clerk merely had to transmit Mr. Engle's file to the Court of Appeals. A delay of almost two (2) years is more than presumptively prejudicial.

Washington courts have not addressed the due process standards for delayed appeals, but it is clear that the primary consideration will always be the degree to which a defendant is prejudiced by the delay. [Citation omitted.] The question of prejudice concerns three interests of a convicted defendant seeking a prompt appeal: (1) to prevent oppressive incarceration pending review; (2) to minimize the defendant's anxiety and concern; and (3) to limit the possibility that the grounds for the appeal or the defenses in the case of a retrial might be impaired. [Citations omitted.]

State v. Lennon, supra, 378-79.

Mr. Engle's sentence was stayed pending appeal. (CP 74) Even though he has not been incarcerated, he has still been subject to the onus of a conviction and the apprehension that goes along with it pending the outcome of the appeal.

CONCLUSION

Mr. Engle has been prejudiced on two (2) different occasions as a result of the inept handling of his case by the State.

Initially, he was denied his right to a timely trial under CrR 3.3(b)(2).

Next, he was denied his right to a timely appeal due to the inaction by the Superior Court Clerk.

Under either scenario, Mr. Engle is entitled to have his conviction reversed and the case dismissed for these respective violations.

DATED this 17th day of May, 2013.

Respectfully submitted,

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NO. 31395-6-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	GRANT COUNTY
Plaintiff,)	NO. 10 1 00592 0
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
MALCOLM CONRAD ENGLE,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 18th day of May, 2013, I caused a true and correct copy of the *APPELLANT'S BRIEF* and *MOTION TO EXTEND TIME TO FILE APPELLANT'S BRIEF* to be served on:

Court of Appeals, Division III
Attn: Renee Townsley, Clerk
500 N Cedar St
Grant, WA 99201

E-FILE

CERTIFICATE OF SERVICE

