

FILED  
June 19, 2013  
Court of Appeals  
Division III  
State of Washington

No. 31395-6-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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State of Washington, Respondent

v.

Malcom Conrad Engle, Appellant

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BRIEF OF RESPONDENT

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GRANT COUNTY PROSECUTOR'S OFFICE  
P.O. BOX 37  
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(509) 754-2011

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## **I. STATEMENT OF THE ISSUES**

- A. Under CrR 3.3, was Mr. Engle's time for trial violated when he never objected to any of his trial settings?
- B. Was there a denial of due process to Mr. Engle when (1) a clerical error delayed the filing of his appeal by 17 months; (2) the trial court stayed the sentence pending the appeal; and (3) Mr. Engle took no action to correct the delay during this 17 month period?

## **II. STATEMENT OF THE CASE**

### **Statement of Facts**

Malcom Engle and Laytonya Lee became friends and started living together in 2010. RP 44-45. Mr. Engle used morphine and methamphetamine and eventually introduced these drugs to Ms. Lee. RP 47, 50. On September 24, 2010, Mr. Engle used a knife or multi-tool to cut Ms. Lee's nipple. RP 50. Ms. Lee repeatedly told Mr. Engle to stop cutting her and eventually pushed him away. RP 51-52. Shortly after this, Ms. Lee's mother picked her up from Mr. Engle's residence and observed the cut marks and needle punctures on her daughter's body. RP 15, 52, 82.

### **Procedural History**

On November 5, 2010, the State charged Mr. Engle with one count of Assault in the Second Degree, with a domestic violence allegation. CP 1. Mr. Engle was arraigned on January 4, 2011, and trial was scheduled for

March 29, 2011, with an outside date for trial of April 4, 2011. CP 9. On March 1, 2011, an omnibus order was entered that moved the trial date to April 12, 2011, and moved the trial deadline to May 12, 2011. CP 76. Subsequently, the trial was continued first to April 19, 2011, and then to April 26, 2011. CP 10, 11, 28.

On April 27, 2011, Mr. Engle failed to appear for the start of his trial, and the trial court issued a bench warrant. CP 23. Shortly after being picked up on the bench warrant, Mr. Engle posted a bail bond on May 9, 2011. CP 29.

A jury trial was held on July 7 and July 8, 2011. Mr. Engle was found guilty of the lesser included crime of Assault in the Fourth Degree, with a domestic violence allegation. CP 62, 63. A Judgment and Sentence was entered on August 16, 2011, and Mr. Engle filed his Notice of Appeal on the same day. CP 65, 72. The court stayed Mr. Engle's sentence pending the outcome of his appeal. CP 74.

### III. ARGUMENT

A. Mr. Engle waived his right to argue that a CrR 3.3 violation occurred when he failed to object within the necessary time limit.

In general, an out of custody defendant has a right to a trial within 90 days of his arraignment. CrR 3.3(b)(2). If the court sets the trial outside of this time limit, then a defendant must,

within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedure. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(3); *see also State v. Bobenhouse*, 143 Wn. App. 315, 322, 177 P.3d 209 (2008). In the present case, there is nothing in the record indicating that Mr. Engle objected to any of the trial dates, either orally or in writing. Because of this failure to make a timely objection as required by 3.3(d)(3), Mr. Engle lost his right to object to any potential violation.

On a related note, even if Mr. Engle had make a timely objection to his trial date(s), it is unclear if there was even a CrR 3.3 violation to begin with. The March 1, 2011, omnibus order continued the trial to April 12. CP 76. If this continuance was proper under CrR 3.3(f), it would have extended the trial deadline

30 days past the new trial date. CrR 3.3(b)(5). Interestingly enough, the omnibus order appears to comply with CrR 3.3(b)(5) by setting the new outside date as May 12, 2011.

The court should affirm Mr. Engle's conviction because he failed to make a timely objection to his trial settings.

B. Mr. Engle's right to a speedy appeal was not violated.

When a state has provided a constitutional right to appeal, the appeal must comport with due process. *State v. Lennon*, 94 Wn. App. 573, 577-78, 976 P.2d 121 (1999) (citing *U.S. v. Smith*, 94 F.3d 204, 206 (6th Cir. 1996)). Washington guarantees the right to appeal criminal prosecutions, and a substantial delay in the appellate process may constitute a due process violation. *Lennon*, 94 Wn. App. at 577; *see also Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990).

A four-prong test is applied in determining whether an inordinate delay in the appeal process constitutes a denial of due process; this test is a modified version of the *Barker v. Wingo* test. *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)); *Lennon* at 577-78. This test weighs four factors in determining whether there has been a violation of due process: (1) the length of the delay; (2) the reason for the delay; (3) Mr.

Engle's diligence in pursuing the right to appeal; and (4) the prejudice to Mr. Engle. *Lennon* at 578.

A number of court cases have applied the four-prong test for a due process violation. In *Lennon*, the court held that a 10 month delay did not constitute a due process violation. *Lennon* at 578. The court reasoned that although Mr. Engle had taken efforts to expedite his appeal, the most important factor was that Mr. Engle failed to show that his appeal was prejudiced by the delay. *Id.* In weighing the issue of prejudice, the court considered three interests that Mr. Engle had: (1) to prevent oppressive incarceration pending review; (2) to minimize Mr. Engle'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. *Id.* at 579 (citing *Smith*, 94 F.3d at 207).

In *Smith*, the Sixth Circuit held that a three year delay in Mr. Engle's appeal was not a denial of due process when the four-prong test was applied. *Smith*, 94 F.3d at 207-13. Specifically, the court found that "only the first factor, the length of delay, weighs in [Mr. Engle's] favor, and not overwhelmingly so." *Id.* at 213. The court found the remaining three factors favored the state: there was a reasonable delay in the proceedings due to the court waiting for guidance from the Supreme Court, *Id.* at 209-210, Mr. Engle never protested his delay, *Id.* at 210-211, and he was not

prejudiced by the delay due partly to his release from incarceration pending appeal, *Id.* at 211-212.

In the present case, there was no denial of due process under the four-prong test. With regards to the length of the delay, although a 17 month delay at least raises the issue of due process, it is not unreasonable. *See Lennon* at 578. The reason for the delay is largely unknown, but one can infer that the failure by the clerk's office to transmit the file to the Court of Appeals was nothing more than a mere oversight.

The third and fourth factors fall strongly in the State's favor. During this 17 month delay, Mr. Engle took no proactive steps in correcting the delay in his appeal. Most importantly however, is that Mr. Engle has not been prejudiced by this delay. Mr. Engle has not been incarcerated during this delay because his sentence was stayed pending this appeal. CP 74. Furthermore, there is no evidence that this delay has negatively impacted his grounds for appeal.

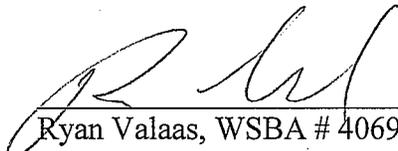
Because the four-prong test supports the conclusion that no due process violation occurred, the court should affirm Mr. Engle's conviction.

#### IV. CONCLUSION

Mr. Engle lost any right to object to his trial setting when he failed to object within the 10 day limit. Furthermore, there was no due process violation of Mr. Engle's right to a speedy appeal when the four-prong test is applied. For these reason, the State respectfully requests that the Court affirm the trial court's conviction.

DATED: June 18, 2013

Respectfully submitted:  
D. ANGUS LEE,  
Prosecuting Attorney



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Ryan Valaas, WSBA # 40695  
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent.	)	No. 31395-6-III
	)	
v.	)	
	)	
MALCOM ENGLE,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
_____	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and his attorney, Dennis W. Morgan, containing a copy of the Brief of Respondent in the above-entitled matter.

Mr. Malcom Engle  
c/o Mr. Dennis W. Morgan  
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Dated: June 19, 2013.

  
\_\_\_\_\_  
Kaye Burns

State of Washington  
 Court of Appeals, Div. III  
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