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SUPREME COURT
STATE OF WASHINGTON

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NO. 78362-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH G. GEORGE,

Petitioner.

BRIEF OF
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
AS AMICUS CURIAE

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I. ISSUE

Should the existing versions of the time-for-trial rules be “construed” as containing “due diligence” requirements?

II. ARGUMENT

A. THE “DUE DILIGENCE” REQUIREMENTS UNDER THE FORMER VERSION OF THE TIME-FOR-TRIAL RULES LED TO INCONSISTENT AND UNPREDICTABLE RESULTS.

The petitioner contends that CrLJ 3.3 requires prosecutors to act with “due diligence” in bringing a defendant before the court. Such a requirement was applied in many cases that preceded the 2003 amendments. Those amendments, however, were intended to repudiate that requirement. This court should now make it clear that the rules will be applied in accordance with their language.

At an early date, this court recognized that time-for-trial rules had to be construed in accordance with ordinary principles of statutory construction:

As the author of these rules, this court, of course, is in a position to reveal the actual meaning which was sought to be conveyed. However, we approach them as though they had been drafted by the legislature, and give the words their ordinary meaning, reading the language as a whole and seeking to give effect to all of it.

One of the rules of statutory construction is that language which is clear upon its face does not require or permit any construction.

State v. McIntyre, 92 Wn.2d 620, 622, 600 P.2d 1009 (1979), quoting State ex rel. Schillberg v. Everett Dist. Justice Ct., 90 Wn.2d 794, 797, 585 P.2d 1177 (1978).

Even before the court wrote these words, however, it had departed from these principles. This departure first appeared in State v. Striker, 87 Wn.2d 870, 557 P.2d 847 (1976). Striker arose out of a version of CrR 3.3 under which the allowable time-for-trial was measured from the date of preliminary appearance. In Striker, there had been a substantial delay between the filing of the information and the preliminary appearance. The rule contained no provision addressing the possibility of such a delay. Under the plain language of the rule, there was no violation.

The court recognized that there was a “hiatus” in the rule. Striker, 87 Wn.2d at 873. Rather than apply the rule as written and enact an amendment to correct the perceived problem, the court decided to apply policy considerations:

[A] due regard for the protection of the [defendants'] constitutional rights, as well as considerations of policy in the administration of justice, compel us to the conclusion that where, contrary to the expectation expressed in the rules, a delay has occurred between the filing of the information and the bringing of the accused before the court, CrR 3.3 must be deemed to operate from the date the information is filed.

Id. at 875.

A week after the court decided Striker, it introduced the concept of “due diligence,” in State v. Williams, 87 Wn.2d 916, 557 P.2d 1311 (1976). The defendant there had been involuntarily committed to a mental hospital following his preliminary appearance. As a result, his trial was not held within the prescribed period. The State argued that this situation was covered by the exclusion in former CrR 3.3(d)(5) for “delay resulting from the absence of the defendant.” This court construed “absence” as including a requirement that the prosecutor exercise “due diligence” to obtain the defendant’s presence. Since this requirement had not been complied with, the exclusion was held inapplicable. Williams, 87 Wn.2d at 920.

In 1980, CrR 3.3 was substantially amended. The new version of the rule measured the allowable time-for-trial from arraignment, not preliminary appearance. It also provided specific time limits for arraignment, and it eliminated the “absence” exclusion. Amendment of Superior Court Criminal Rules, 93 Wn.2d 1122, 1123-32 (eff. 8/1/1980). Some judges believed that these amendments reflected the intent to overturn the Striker doctrine. State v. Greenwood, 57 Wn.2d 854, 790 P.2d 1243 (1990), rev’d,

120 Wn.2d 585, 845 P.2d 971 (1993). This court held to the contrary. In so holding, the court incorporated the “due diligence” doctrine into the Striker doctrine: “Striker does not require the court to establish a constructive arraignment date in cases where the prosecution acts in good faith and with due diligence in attempting to bring the defendant before the court to answer for the charge.” Greenwood, 120 Wn.2d at 601.

In subsequent years, “due diligence” was the primary concept applied in cases involving the time-for-trial rules. Numerous cases considered whether the State had or had not exercised “due diligence” under varying circumstances. Many of the holdings are hard to reconcile. See, e.g., State v. Huffmeyer, 145 Wn.2d 52, 32 P.3d 996 (2001) (State did not exercise “due diligence” when it failed to obtain transfer of defendant who was pending sentencing in another county); State v. Hudson, 130 Wn.2d 48, 921 P.2d 538 (1996) (State had no duty to obtain presence of defendant who was out of state and not incarcerated); State v. Bazan, 79 Wn. App. 723, 904 P.2d 1167 (1995), review denied, 129 Wn.2d 1023 (1996) (after notice of arraignment was returned unclaimed, State was required to attempt other means to notify defendant); State v. Miffitt, 56 Wn. App. 786, 785 P.2d 850,

review denied, 114 Wn.2d 1026 (1990) (State exercised “due diligence” when it sent summons to defendant at his last known address).

The concept of “due diligence” was also extended to several other provisions of the rule. See State v. Anderson, 121 Wn.2d 852, 855 P.2d 671 (1983) (exclusion under former CrR 3.3(g)(6) for “time during which a defendant is detained in jail or prison outside the state of Washington” only applied if State exercised “due diligence” to obtain defendant’s transfer); State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (delay resulting from continuance requested by defendant not excluded, if request resulted from State’s failure to use “due diligence” in disclosing material facts); City of Seattle v. Hilton, 62 Wn. App. 487, 815 P.2d 808 (1991) (rule provision setting time for re-trial following appeal only applied if defendant was brought before court within “reasonable time”). On the other hand, courts refused to apply a “due diligence” requirement with regard to some rule provisions. See State v. Hackett, 122 Wn.2d 165, 857 P.2d 1026 (1993) (when defendant had failed to appear for required proceeding, he had subsequent responsibility to make his presence known to the court on the record); State v. Pizzuto, 55 Wn.2d 421, 778 P.2d 42, review

denied, 113 Wn.2d 1032 (1989) (exclusion for “preliminary proceedings and trial on another charge” did not include “due diligence” requirement).

It was difficult if not impossible to predict whether or not a “due diligence” requirement would be applied to any particular rule provisions. Compare, e.g., State v. Carmichael, 53 Wn. App. 894, 771 P.2d 364, review denied, 113 Wn.2d 1001 (1989) (State not required to obtain transfer of inmate incarcerated out-of-state) with Anderson, 121 Wn.2d at 859-60 (dismissing case because State failed to exercise due diligence to transfer inmate). The sanction for incorrectly predicting the application of the requirement was dismissal of charges with prejudice, regardless of the seriousness of the crime or the strength of the evidence implicating the defendant. With the potential for such a windfall, the “due diligence” requirement, which was not even in the rule, led to a vast amount of litigation and uncertainty.

B. THE 2003 AMENDMENTS TO THE TIME-FOR-TRIAL RULES REPUDIATED THE “DUE DILIGENCE” DOCTRINE AND MANDATED THAT THE RULES BE APPLIED AS WRITTEN.

Re-examination of the time-for-trial rules was sparked by a tragedy. Time-for-Trial Task Force, Final Report at 10 (2002)

(hereinafter "Task Force Report").¹ On January 11, 2002, Bruce Smith entered an apartment and raped the occupant. While fleeing from police following this crime, he caused a collision that killed another driver. "Convicted rapist held in attack, fatal chase," Seattle Times 1/12/02²; see State v. Smith, 120 Wn. App. 1060, 2004 WL 569273 (2004).³ Smith had previous convictions for rape and attempting to elude a pursuing police vehicle, among other crimes. In 1999, he had been convicted of second-degree assault and sentenced as a persistent offender to life imprisonment. In 2001, however, the Court of Appeals overturned this conviction because of a violation of CrR 3.3. As a result, Smith was freed and able to commit the new rape and felony murder.

Responding to the public outcry over this case, 20 legislators co-sponsored a bill (HB 2704) that would have extensively revised the time-for-trial rules. This bill came up for hearing in the House

¹The report is on the Washington Courts website at http://www.courts.wa.gov/programs_orgs/pos_tft/index.cfm?fa=pos_tft.reportHome.

²This article is available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=chase12m&date=20020112&query=Kim>.

³This unpublished decision is not being cited as legal authority. See RAP 10.4(h) (unpublished decision may not be cited as authority). Rather, the opinion explains part of the historical background of the 2003 amendments to the time-for-trial rules.

Judiciary Committee on February 5, 2002.⁴ Hon. Gerald Alexander, the Chief Justice of this court, testified in opposition to the bill. He said that the court intended to establish “a broad-based task force” that would be responsible for “looking at the time-for-trial rules from top to bottom.”⁵ He assured the Committee that this was “not an effort to sweep the concerns that some have indicated about the rule under the rug.”

Chief Justice Alexander kept his word. On March 11, 2002, this court entered an order establishing a Time-for-Trial Task Force. The Task Force consisted of judges from all court levels, prosecutors, criminal defense attorneys, representatives of the Bar Association, legislators, and a crime victim’s advocate, with a law professor as Chair. The Task Force was directed to “conduct a comprehensive review” of CrR 3.3 and related rules. Task Force Report, appendix A at 1-2.

⁴A tape of this hearing can be heard on the TVW website at <http://www.tvw.org/MediaPlayer/Archived/REAL.cfm?EVNum=2002020059&TYPE=A>.

⁵CrR 3.3 and the corresponding rules for other courts have often been called “speedy trial rules.” In his testimony, however, Chief Justice Alexander specifically said that the proper terminology was “time-for-trial rules.”

The Task Force devoted more than five months to this review. Task Force Report at 11. In October, 2002, it issued a report recommending extensive changes to the time-for-trial rules. The Task Force criticized the “due diligence” requirement set out in Striker and Greenwood. This requirement was “vague and of limited value in predicting how other cases will be decided.” Task Force Report at 21. The requirement also imposed “heavy costs on society.” “If the court ultimately decides that the State failed to act with due diligence, even if the State simply failed to predict what steps the court would require in that case, the case becomes subject to dismissal with prejudice.” As a result, “[c]rimes go unpunished even in those cases when evidence of the defendant’s guilt is compelling.” Id. at 22.

Based on these concerns, the Task Force by a vote of 14-2 recommended a rule that abolished the “due diligence” requirement of Striker and Greenwood. In its place, the Task Force proposed requiring specific steps to obtain a defendant’s address before an arrest warrant could be issued. “This approach would take the guesswork out of the process, while still ensuring that due-diligence is performed, and without subjecting the case to dismissal with prejudice.” Task Force Report at 22. This court adopted this

recommendation, which is set out in CrR 2.2(a)(3) and CrRLJ 2.2(a)(3).

The Task Force also sought to change the manner in which the rule was interpreted:

Task force members are concerned that appellate court interpretation of the time-for-trial rules has at times expanded the rules by reading in new provisions. The task force believes that the rule, with the proposed revisions, covers the necessary range of time-for-trial issues, so that additional provisions do not need to be read in. Criminal cases should be dismissed under the time-for-trial rules only if one of the rules' express provisions have been violated; other time-for-trial issues should be analyzed under the speedy trial provisions of the state and federal constitutions.

Task Force Report at 12-13.

Because of these concerns, the Task Force recommended two separate provisions. The first is a rule of construction set out in CrR 3.3(a)(4):

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, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

CrRLJ 3.3(a)(4) is identical, except that the cross-reference is to CrRLJ 4.1.

The second provision addressing this point is the portion of the rule dealing with dismissal:

A charge not brought to trial within the time limit determined under the rule shall be dismissed with prejudice. . . . No case shall be dismissed for time-for-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

CrR 3.3(h); CrRLJ 3.3(h). The Task Force report does not reflect any dissent concerning these recommendations. Both were adopted by this court.

To someone unfamiliar with the history of the rules, these provisions may seem peculiar. Essentially, they say that a case should not be dismissed for violation of the rule unless the rule was violated. Such an obvious statement might seem superfluous to say even once. Yet it is set out twice. To those familiar with the rules' history, the reason is clear. The twice-repeated statement that the rules mean what they say is an emphatic rejection of the historical practice of expanding them beyond their language.

Since 2003, this court has decided three time-for-trial cases that discuss "due diligence." State v. Welker, 157 Wn.2d 557, 141 P.3d 8 (2006); State v. Hessler, 155 Wn.2d 604, 121 P.3d 92 (2005); City of Seattle v. Guay, 150 Wn.2d 288, 76 P.3d 231 (2003). In all of these cases, the relevant events occurred before

September 1, 2003, the effective date of the amendments to the time-for-trial rules. These cases thus shed no light on the interpretation of the current version of the rules.

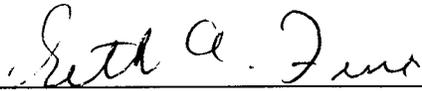
The words “due diligence” do not appear anywhere in the rules. This is deliberate. The Task Force that drafted the current versions carefully considered a proposal to add those words. Task Force Report, app. H. This proposal was rejected by a majority of 14-2. Task Force Report at 21. Those words should not now be added under the guise of “construction.” To do so would restore the pre-amendment practices that the Task Force unanimously condemned – practices whose tragic effects had been clearly shown.

III. CONCLUSION

Case law applying a “due diligence” requirement was superseded by the 2003 amendments to the time-for-trial rules. This court should make it clear that this requirement is no longer applicable. CrR 3.3 and CrRLJ 3.3 now mean what they say. Any “hiatus” in the rules must be resolved by application of constitutional speedy trial principles, not by re-writing the rules under the guise of “interpretation.”

Respectfully submitted on January 24, 2007.

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