

NO. 81750-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Petitioner,

vs.

RICARDO INIGUEZ,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE

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ARGUMENT

(I) A balancing of the four Barker factors shows the constitutional speedy trial right of Ricardo Iniguez was not violated.

(1) Length of the delay. Even though the Court of Appeals used the date of Iniguez's first trial in deciding whether he received a speedy trial under Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), amicus argues at 3 for basing that decision on the date of his second trial. His first trial started on February 8, 2006 (14 days after the eight-month anniversary of his arrest on May 25, 2005), a mistrial was declared on February 16, 2006, and the second trial began 55 days later on April 12, 2006 (18 days after the ten-month anniversary of his arrest).

While the constitutional speedy trial right continues to apply after a defendant's first trial, the scheduling of a retrial "is of necessity left to the discretion of the trial court." State v. Miller, 72 Wash. 154, 161, 129 P. 1100 (1913). In a case applying the Sixth Amendment to the United States Constitution and Article 3, § 16 of the Montana Constitution of 1889 (adopted the same year as the Washington Constitution), the Montana Supreme Court followed *American Bar Association Standards for Criminal Justice, Speedy Trial* § 2.2, which provides in pertinent part:

When time commences to run.

The time for trial should commence running . . .

(c) if the defendant is to be tried again following a mistrial . . . from the date of the mistrial[.]

State v. Sanders, 163 Mont. 209, 214, 516 P.2d 372, 375 (1973).

See also State v. Strong, 258 Mont. 48, 851 P.2d 415 (1993) (same result under Montana's time-for-trial statute). Especially since the constitutional speedy trial clock is reset and begins to run anew from the date of a mistrial, the trial court in the instant case did not abuse its discretion in scheduling the retrial for April 12, 2006.

Amicus further attempts to assign fault to the trial court and the State for the certified interpreter's inadequate performance at the first trial. However, RCW 2.43.030(1)(b) requires only that the trial court utilize a certified interpreter. Court interpreters are certified by an examination proctored by the Administrative Office of the Courts. RCW 2.43.020(4); RCW 2.43.070. Amicus's argument is akin to saying that a trial court should conduct its own bar examination before permitting licensed attorneys to practice in its courtroom. The Court of Appeals correctly treated the start of the first trial as the relevant date for purposes of a speedy trial determination.

Amicus next argues that even assuming the delay here was just over eight months, this court should adopt a rule that an eight-month delay is presumptively prejudicial. In State v. Nguyen, 165 Wn.2d 428, 436, 197 P.3d 673 (2008), this court recently recognized WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE (3d ed. 2008) (hereinafter LAFAVE & ISRAEL) as being “a leading treatise”. It is stated in LAFAVE & ISRAEL § 18.2(b) as follows:

The lower courts have been inclined to apply the first Barker factor [the threshold requirement for a delay of presumptively prejudicial length] without any extensive assessment of the unique facts of the particular case. Rather, the courts have usually tried to settle upon some time period after which, as a general matter, it makes sense to inquire further into why the defendant has not been tried more promptly. Though there are some cases that do not fit the mold, it was said some years back that

any delay of eight months or longer is “presumptively prejudicial.” . . . Furthermore, there is apparent consensus that delay of less than five months is . . . insufficiently “prejudicial” to trigger further constitutional inquiry. . . . There is judicial disagreement as to the six to seven month range, the majority holding a delay of this length “presumptively prejudicial.”

While some courts still follow the eight-month mark or even something shorter, most have settled on a somewhat longer period, such as nine months or,

more commonly, a time “approaching,” at, or slightly (or even more than slightly) beyond one year.

(emphasis added; footnotes omitted). Like the Court of Appeals, amicus relies on the rule from “some years back” without noticing the modern trend identified by the leading treatise in the field. Amicus offers no rationale of any kind for adopting eight months as the threshold delay for initiating a constitutional speedy trial inquiry.

Unlike CrR 3.3 and similar provisions in other jurisdictions that are designed to ensure all criminal defendants receive prompt disposition of their cases, the Barker rule establishes “the right of a few defendants, most egregiously denied a speedy trial, to have the criminal charges against them dismissed on that account.” LAFAVE & ISRAEL § 18.3(a) (footnote omitted). Since the Barker doctrine is designed for the most egregious cases, it makes sense to require a higher threshold before conducting a Barker analysis.

Amicus also gives no consideration to nature of the case. Barker suggests a longer time period may be necessary for presumptive prejudice when a more serious crime is involved. Barker, 407 U.S. at 530-31. As noted above in LAFAVE & ISRAEL § 18.2(b), in practice most courts have attempted to settle on a standard time threshold without assessing the nature of the

particular case. But to the extent the seriousness of the crime is considered, it certainly supports a longer time frame here. Iniguez was charged with four Class A felonies with firearm enhancements. (Iniguez CP 168-72). His crimes are classified as “most serious offenses” by RCW 9.94A.030.

At 4, amicus claims that in State v. Corrado, 94 Wn. App. 228, 972 P.2d 515 (1999), “Division 2 of the Court of Appeals expressly held a delay of eleven months to be ‘presumptively prejudicial’.” However, Corrado actually involved a “delay of over eleven months”. Id. at 233 (emphasis added). Since a period over eleven months is arguably “approaching” one year, Corrado is not inconsistent with the modern trend noted by LAFAVE & ISRAEL. Corrado also recognized that “[i]f the defendant makes this [threshold] showing [of presumptive prejudice], then the court must consider the extent of the delay” along with the other three Barker factors. Id. at 233 (citing Doggett v. United States, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). The Corrado court then concluded that “[t]he length of the delay was not excessive[.]” Id. at 235. In other words, even though the delay approaching one year was enough to trigger a speedy trial inquiry, that did not end the consideration of the first Barker factor; the

length of the delay was not excessive and weighed against finding a speedy trial violation. After balancing the four Barker factors, the Corrado court easily rejected the defendant's speedy trial claim. Id. In the instant case, the Court of Appeals ended its analysis of the first Barker factor upon finding an eight-month delay is presumptively prejudicial; it failed to consider that the delay stretched just 14 days beyond the bare minimum needed to trigger judicial examination of the claim. 143 Wn. App. 859. Not only does Corrado not benefit Iniguez, it cannot be reconciled with the Court of Appeals opinion in the instant case.

(2)(a) Reason for delay: The joinder policy. Amicus states at 5 that "Division 1 of the Court of Appeals has explicitly recognized that 'the trial court *should* sever to protect a defendant's right to a speedy trial.' State v. Eaves, 39 Wn. App. 16, 19, 691 P.2d 245 (1984) (court's emphasis)." However, the Eaves court was actually referring to CrR 4.4(c)(2) and italicized the word "should" to emphasize its non-mandatory character (in contrast to CrR 4.4(c)(1), which requires that severance "shall" be granted if necessary to prevent the improper use of a codefendant's statement). As noted in the State's Petition for Review at 12-14, Washington appellate courts have consistently held that severance

of defendants is not mandatory even when one defendant's speedy trial rights are at issue. See, e.g., Eaves, 39 Wn. App. at 19-20; State v. Melton, 63 Wn. App. 63, 67, 817 P.2d 413 (1991); State v. Dent, 123 Wn.2d 467, 484-85, 869 P.2d 392 (1994); State v. Nguyen, 131 Wn. App. 815, 820, 129 P.3d 821 (2006). Notably, in the quarter-century since CrR 4.4(c)(2)(i) was first construed to be non-mandatory, there has been no effort to amend that rule.

At 5, amicus cites to the dissenting opinion from Hartridge v. United States, 896 A.2d 198 (D.C. App. 2006), a case upon which the State heavily relies. However, the United States Supreme Court has denied certiorari in Hartridge. 549 U.S. 1272, 127 S. Ct. 1503, 167 L. Ed. 2d 242, 75 USLW 3473 (2007). Surely the United States Supreme Court took note of a much-discussed case originating in the very seat of the national government and would have granted certiorari had there been any indication the Hartridge majority had misapprehended the high court's precedents.

Amicus argues that the rule favoring joinder should not "trump" the right to a speedy trial, as the former is merely a public policy while the latter is a constitutional right. But in order for there to be anything for the public policy to trump, there must be a constitutional speedy trial violation in the first place. The

determination of whether such a violation exists is made by applying the Barker factors, including the reason for the delay. Different weights are assigned to different reasons for delay. Barker, 407 U.S. at 531; Vermont v. Brillon, ___ U.S. ___, 129 S. Ct. 1283, 1290, ___ L. Ed. 2d ___ (2009). Barker gives examples of various reasons for delay that are not themselves constitutionally mandated but are nonetheless considered neutral or weigh against finding a speedy trial violation, such as overcrowded courts, governmental negligence, and missing witnesses. Barker, 407 U.S. at 531. The same is true of an understaffed prosecutor's office. United States v. Grimmond, 137 F.3d 823, 828 (4th Cir. 1998). Similarly, delay resulting from the State's advocacy of a joint trial does not weigh heavily against the State. Hartridge, 896 A.2d at 210.

The adoption of a constitutional right is itself a public policy choice by the framers of the constitution. While a constitutional right would prevail over a conflicting public policy, the underlying policy considerations are relevant to understanding the intended scope of the right. Thus, recognition of the public policy against falsely yelling "fire" in a crowded theater helps in mapping the extent of the First Amendment free speech right. See Schenck v.

United States, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919). Specifically, “[t]he speedy trial right is amorphous, slippery and necessarily relative”; it is “consistent with delays and dependent upon circumstances.” Vermont v. Brillon, 129 S. Ct. at 1290 (citations and quotes omitted). The speedy trial right is thus not necessarily in conflict with delays based on public policy. Consideration of “society’s important interest in having persons charged with jointly committing grave offense tried together” (as the Hartridge court put it at 896 A.2d 212) aides in identifying the perimeters of the Sixth Amendment speedy trial right.

At 6, amicus quotes selectively from Townsend v. United States, 512 A.2d 994 (D.C. App. 1986). In Townsend, the government delayed the trial in order to enable it to build a case against a codefendant and try all defendants at once. (There was no similar allegation of tactical reasons for the delay in either Hartridge or the instant case.) The full context of the one sentence from Townsend quoted by amicus is as follows:

[W]e are of the view that the proffered reason does not excuse the delay or render it neutral. Yet we think it does not weigh heavily against the government, as it was not intended to gain a strategic advantage as such over Townsend, but rather was apparently intended to realize the generally recognized benefits that attend joint trials. See Davis v. United States,

367 A.2d 1254, 1263 (D.C. 1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977) (joinder promotes economy and efficiency and avoids multiplicity of trials).

Id. at 999. The court concluded, “[W]e hold Townsend’s right to a speedy trial was not infringed.” Id. When read in full, Townsend is completely consistent with Hartridge. Even if Townsend did conflict with Hartridge in some way, as a 1986 case it would no longer be good law in light of the same court’s 2006 decision in Hartridge.

Like the Court of Appeals, amicus quotes one sentence from Grimmond, 137 F.3d at 828 to the effect that “a defendant’s invocation of his Sixth Amendment right to a speedy trial . . . would trump” the policy of joining the trials of defendants who are charged together. First, the statement is dicta as the Grimmond court found the defendant had not made a timely demand of his right to a speedy trial. Id. at 829. Second, in the same paragraph the Grimmond court cited with approval to United States v. Annerino, 495 F.2d 1159, 1162-63 (7th Cir. 1974), which held a delay resulting from the prosecution’s desire for a single trial deserves some deference despite one defendant’s speedy trial objections. Id. Third, the codefendant in Grimmond was in the process of being prosecuted by another sovereign and was not even available to the

court, see id. at 828; in the instant case, both defendants were before the court and each continuance was to a date certain based on the then-existing circumstances. Fourth, the Grimmond court proceeded to analyze all four of the Barker factors in finding the defendant's speedy trial rights had not been violated. Id. at 829-30. Under Barker, a defendant's assertion of the right to a speedy trial is just one of the factors that go into the balance. See Barker, 407 U.S. at 530.

Notably, in support of its claim that the joinder policy is not a valid reason for delay under the Barker test, amicus does not cite a single case where a speedy trial violation was actually found to have occurred. The three cases cited – Hartridge, Townsend, and Grimmond – truly support the State's position.

(2)(b) Reason for delay: The victim's vacation. Without citation to the record, amicus claims at 7-8 that the State acted negligently in its "failure to maintain contact" with the victim and not taking appropriate steps to notify the victim of the January 4, 2006 trial date. The trial court made no such findings and the record suggests nothing of the kind.

The victim had been personally served with subpoenas listing two previous trial settings. (Iniguez CP 258, 278). This

eliminated the need for any further subpoenas. State v. Tatum, 74 Wn. App. 81, 85-86, 871 P.2d 1123 (1994). Nonetheless, the State did more than required in issuing a subpoena for the January 4, 2006 trial date on December 6, 2005. (State's Supplemental CP 34). The sheriff timely attempted service on December 18, 2005, but was advised the victim was in Mexico. (State's Supplemental CP 33). The State then contacted the victim by telephone; he explained that he had gone to Mexico to visit his family and children over the holidays. (12/30/05 RP, 5:17-20; 01/03/06 RP. 4:24). The victim did not say that he would not cooperate; rather, he said he planned to return on February 1 or 2, 2006, and asked if the trial could be moved until after his return. (Iniguez CP 174). A trial court has discretion to grant a continuance to accommodate the vacation of a prosecution witness. State v. Grilley, 67 Wn. App. 795, 799, 840 P.2d 903 (1992); State v. Vicuna, 119 Wn. App. 26, 30-35, 79 P.3d 1 (2003). Here, the conflict with the victim's vacation was only created by the previous delays requested by one of the defendants; certainly the trial would have never been set on January 4, 2006 in the first place had the court known of the victim's vacation plans. Const. Art. I, § 35 requires consideration of the rights of victims "to accord them due dignity and respect . . ."

Had the victim been forced to miss his rare opportunity to spend time with his children, he would have had reason to believe he was not being accorded the dignity and respect to which he is entitled.

(3) Whether and when the defendant asserted the right to a speedy trial. At 9, amicus quotes from the Court of Appeals at 143 Wn. App. 857 as follows: "Here, Mr. Iniguez – through counsel and pro se – objected to delaying the trial, asserted his right to a speedy trial and/or demanded severance on each occasion he was before the court, even if delay was not the topic before the court." However, Washington does not recognize a right to hybrid representation through which an accused may serve as co-counsel with his or her attorney. State v. Hegge, 53 Wn. App. 345, 348-49, 766 P.2d 1127 (1989); State v. Romero, 95 Wn. App. 323, 325-27, 975 P.2d 564 (1999). When a defendant is represented by competent counsel, the trial court is entitled to disregard the defendant's pro se remarks. State v. Bergstrom, 162 Wn.2d 87, 95-97, 169 P.3d 816 (2007). Since Iniguez was represented by competent counsel throughout the proceedings and never asked to proceed pro se, only the assertions of his attorney are relevant.

Iniguez agreed through his attorney to joinder of his trial with that of McIntosh. (07/26/05 RP, 6:2-7, 7:17-18). He agreed that

the joinder order justified continuing his trial date to October 5, 2005, to coincide with that of McIntosh. (08/09/05 RP, 13:3-24; 14:16-18). The trial court stated that “the court does believe there has been a sufficient showing by the State to continue this matter which has been voluntarily consolidated with the previous matter [McIntosh] to October 5th for trial.” (08/09/05 RP, 15:21-25). The trial court further stated:

I think at this point the State has shown that the sufficient use of resources and judicial economy warrant continuing this matter onto the date with the co-defendant of October 5th. And my reading of the case law is consistent with that of Mr. Sonderman [counsel for Iniguez] and Ms. McMillen [deputy prosecutor] that in such circumstances the court has authority to continue these matters beyond the speedy trial period.

(08/09/05 RP. 16:6-14). While Iniguez made a perfunctory objection to the later continuance from October 5 to November 16, 2005 on “speedy trial” grounds, he made no motion to sever at that point. (09/27/05 RP, 4:4-19). It was impossible for his trial to go forward without being severed. Iniguez did not move to sever until November 8, 2005 (when counsel for McIntosh said he would not be able to try the case until the early part of January, 2006). (11/08/05 RP, 3:16-25; 4:1-22). Trial began exactly three months later on February 8, 2006. (02/08/06 RP).

In Grimmond, the court found this factor weighed against finding a speedy trial violation where the defendant made a speedy trial demand four months before the start of his trial. Grimmond, 137 F.3d at 829. In the instant case, Iniguez did not assert his speedy trial right in any meaningful way until three months before his trial began. He demanded a prompt trial on November 8, 2005 and got exactly that.

(4) Prejudice to the defendant. Amicus states at 10: “The Supreme Court in Barker v. Wingo itself recognized that a comparable period of pretrial incarceration (10 months) constituted very real prejudice.” This is not true. The Barker Court discussed the possible prejudice resulting from “oppressive” pretrial incarceration not because it was relevant to the case at hand, but in the course of attempting for the first time to set out the criteria by which the speedy trial right is to be judged. See Barker, 407 U.S. at 516. The Barker Court actually found that “prejudice was minimal” despite an “extraordinary” five year delay because the defendant was only held in pretrial detention for 10 months. See Barker, 407 U.S. at 533-34. In the instant case, Iniguez was held for just over eight months prior to his first trial and received credit for all time served against his sentence upon conviction.

(5) The balancing process. Amicus argues at 10: “The Court of Appeals carefully and objectively considered and balanced the four Barker factors found in the record.” While no one would question the sincerity of the Court of Appeals in attempting to decide the case correctly, the State’s briefing has demonstrated that the Court of Appeals was operating under a number of erroneous assumptions, including (1) that once it is determined that pretrial delay is presumptively prejudicial, it is unnecessary to consider the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim; (2) that the policy favoring joint trials of codefendants is not a valid reason for delay under Barker if a defendant objects; (3) that a trial court has no discretion to grant a continuance to accommodate a crime victim’s vacation; (4) that the pro se speedy trial “demands” of a represented defendant are relevant; (5) that prejudice can be found based on a generalized claim of “anxiety and concern” without any showing of particularized harm; and (6) that pretrial incarceration of just over eight months per se rises to a constitutional level of prejudice. The Court of Appeals’ analysis was skewed by these invalid assumptions. In the event this court

finds the delay met the threshold to require application of the Barker factors, it should conduct the balancing process de novo.

(II) The speedy trial provisions of the state and federal constitutions are identical.

Perhaps realizing that he could not prevail under the four-part balancing test established by the United States Supreme Court in Barker, Iniguez argued for the first time in his supplemental brief that the speedy trial requirement in Article I, § 22 of the Washington Constitution should be interpreted more broadly than the comparable provision in the Sixth Amendment to the United States Constitution. Amicus makes further argument in support of this claim at 11-20.

First, the issue need not be considered. This court may decline to address a state constitutional claim made for the first time in a supplemental brief and/or a brief of amicus curiae. See State v. Collins, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993) (supplemental brief); Republican Party v. PDC, 141 Wn.2d 245, 255 n.2, 4 P.3d 808 (2000) (brief of amicus curiae).

Second, even if the claim is considered, it has no merit. The State has previously addressed this issue in its Response to Supplemental Brief of Respondent. Those arguments are

incorporated herein by reference. As further stated in LAFAVE & ISRAEL § 18.3(c):

Virtually all states have provisions in their own constitutions safeguarding the right to a speedy trial. Usually the language is identical to that in the Sixth Amendment, and thus the tendency of state courts is to use the balancing test of Barker v. Wingo in construing those provisions. In addition, all but a few states have adopted statutes and rules of court on the subject of speedy trial. These provisions usually provide protection beyond that of the state constitutional guarantee[.]

(footnotes omitted). Thus, the nearly identical language in the speedy trial provisions of the Sixth Amendment and Const. Art. I § 22 supports applying the Barker test to both. Contrary to what amicus implies, the adoption of CrR 3.3 and former RCW 10.46.010 did not make Washington unique; virtually every state has a similar statute or court rule. Congress has also enacted 18 U.S.C. § 3161. These statutes and court rules are designed to provide protection beyond that of the constitutional guarantee. LAFAVE & ISRAEL § 18.3(c). They do not define the constitutional right. See State v. Brewer, 73 Wn.2d 58, 62, 436 P.2d 473 (1968) (noting that “it is clear that when the legislature enacted the ‘60-day’ rule, it did not conceive nor contemplate that the limitation so established should become an inflexible yardstick by which the constitutional

guarantees to a speedy trial of felony charges should be measured”). Neither amicus nor LAFAVE & ISRAEL cite any instance where a state constitution has ever been construed to require trial within a certain number of days or months.

Immediately before listing four factors in State v. Christensen, 75 Wn.2d 678, 686, 453 P.2d 644 (1969), this court stated:

We find in the record none of the four factors heretofore adopted by this court (State v. Brewer, 73 Wn.2d 58, 436 P.2d 473 (1968)), and by the Supreme Court of the United States upon which a denial of the constitutional right to a speedy trial can be said to depend, *i.e.*, [listing four factors] . . .

First, by referring to factors adopted “by this court . . . and the Supreme Court of the United States”, this court was clearly not engaging in an independent state constitutional analysis. See Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (fact that state court decision is interwoven with federal constitutional law suggests court did not base its decision on independent state constitutional grounds). Second, by listing “the four factors heretofore adopted,” “*i.e.*,” this court was restating previously established factors rather than identifying new ones. While the Christensen court connected the factors with “or”, it cited

to Brewer, 73 Wn.2d at 62, which quoted from State v. Alter, 67 Wn.2d 111, 120, 406 P.2d 765 (1965) and United States v. Fay, 313 F.2d 620 (2d Cir. 1963) in connecting factors with “and”. Fay further stated that “[t]hese factors are to be considered together because they are interrelated.” Id. at 623. The Christensen court’s use of the connective “or” was merely a matter of paraphrasing.

Perhaps most tellingly, the Barker Court actually interpreted the speedy trial right more broadly than had this court three years earlier in Christensen. See State’s Response to Supplemental Brief of Respondent, at 5 (comparing Christensen, 75 Wn.2d at 684-85 with Barker, 407 U.S. at 523-29). There is no reason to believe the state provision is broader than its federal counterpart.

CONCLUSION

On the basis of the State’s briefing, it is respectfully requested the decision of the Court of Appeals be reversed.

Dated this 9th day of April, 2009.

Respectfully submitted,

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