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NO. 25218-3-III Consolidated with
25223-0-III

STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

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Washington Court of Appeals, Division Three

STATE OF WASHINGTON,

By _____

Respondent,

v.

RICARDO INIGUEZ,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR NO. 1

The Court erred in failing to provide defendant a speedy trial.

ISSUE NO. 1

Did the Court's continuances violate the defendant's constitutional right to a speedy trial?

ISSUE NO. 2

Did the length of and reason for the delay create a presumption of prejudice?

ASSIGNMENT OF ERROR NO. 2

The Court violated rule CrR 3.3 by granting a continuance on January 3, 2006.

ISSUE NO. 1

Was the witness under subpoena and therefore required to appear?

ISSUE NO. 2

If the witness was not subpoenaed, was there insufficient due diligence to allow for a continuance?

STATEMENT OF FACTS

Defendant was charged by information with one count of robbery in the first degree. (CP 222). The information alleged that this was a first degree robbery because the defendant, during the commission of the robbery “was armed with a deadly weapon.” (CP 223). The information also “specially alleged” that the defendant, “was armed with a firearm” for an enhanced penalty. When the defendant did not plead guilty, the State added three more identical counts for 3 other victims raising the standard range. 108-144 months is the standard range, but 4 firearm enhancements take the range to 348-384 months. (CP 19). The defendant was convicted of all four counts and received a sentence of 384 months or 32 years. (CP 19). This was 240 months for 4 firearm enhancements and 4 concurrent convictions of armed robbery at 144 months each to run concurrently. (CP 19). Defendant was arraigned on June 7, 2005 (CP 220) and trial was set for July 27, 2005. (CP 220).

At a pretrial hearing on July 26, 2006, the defendant objected to a continuance of the October 27, 2006 trial date to accommodate

his attorney's planned vacation. (RP 7/27/05; 2:18). Defendant's attorney said on July 5, 2005, he was unavailable on July 27, 2005. (CP 210). On July 26, 2006, counsel for defendant told the Court his client was not willing to waive his right to a speedy trial. (RP 7/26/05; 5:15). The State told the Court that this defendant's trial could be continued because this trial was joined with a co-defendant who was out of custody and who had waived his right to a speedy trial. (RP 7/26/05; 7:3). Over this defendant's objection, the trial was continued to October 5, 2005. (CP 194). This was a 70 day continuance.

On August 9, 2005, the defendant made a pro se motion to dismiss the information for violation of his constitutional right to a speedy trial. (RP 8/9/05; 14:20). Counsel for defendant also objected to any continuance beyond 60 days. (RP 8/09/05; 15:13).

The defendant, on August 9, 2005, again objecting that his court date was continued to October 5, 2005, asked the Court to reduce his bail as he had already been in jail more than 90 days. (RP 8/9/05; 17:10). The Court denied this motion. (RP 8/9/05; 18:12).

On September 27, 2005, the pretrial date for both defendants, the co-defendant McIntosh again moved for a continuance to November 11, 2005 and waived his speedy trial. (RP 9/27/05; 2:23). Defendant Iniguez objected on speedy trial grounds. (RP 6/27/05; 4:4). The trial was continued another 40 days to November 11, 2005. (CP 188).

On November 8, 2005, counsel for co-defendant McIntosh asked to continue the trial because he had other cases set for trial in Spokane County. (RP 11/8/05; 13:21). Both co-defendant McIntosh and defendant Iniguez objected. (RP 11/8/05; 14:25). Counsel for co-defendant McIntosh said he would not be available for this trial until January. (RP 11/8/05; 14:6). Defendant Iniguez had been in jail since late May, approximately 5.5 months. (RP 11/8/05; 15:2 - 5). Defendant Iniguez moved to sever the two trials. (RP 11/8/05; 15:7). The Court continued this matter one week and said that if the trial could not go in one week, the court would grant a good cause continuance. (RP 11/8/05; 10:14).

On November 15, 2005, defendant filed a written motion for severance. (RP 11/15/05; 8:15). In defendant's memorandum in support of severance (CP 184-5) he states that under CrR 4.4(2):

The Court . . . shall grant the severance . . . if, before trial, it is deemed necessary to protect a defendant's right to a speedy trial. (CP 184:22).

The correct quote of CrR 4.4(c)(2) should contain the word "should" "not" "shall" and correctly reads:

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:
(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant.

The Court denied the motion for severance and continued defendant Iniguez's case another 7 days from November 15, 2005 to November 23, 2005. (RP 11/15/05; 10:9). On November 23, 2005, the Court denied defendant Iniguez's motion for severance and set

the trial for January 4, 2006. (RP 11/23/05; 12:12). The defendant argued that case law allowed joined defendants to be tried beyond the speedy trial rule, but only for short periods of time beyond the speedy trial date. (RP 11/23/05; 11:13). The defendant claimed that lengthy pretrial detention was prejudicial. (RP 11/23/05; 11:17). The continuance on November 23, 2005 was until January 4, 2006, another 42 days. (CP 177).

On December 27, 2005, the defendant objected that his trial was beyond the speedy trial rule. (RP 12/27/05; 14:14).

On January 3, 2006, the State again moved for a continuance until February 8, 2006, claiming good cause due to the unavailability of a witness. (RP 1/3/06; 4:24). This continuance was for 36 days. The State said that this was the first time that the State requested a continuance (RP 1/3/06; 5:6) which might be true for defendant McIntosh, but the State had previously requested that defendant Iniguez's case be continued 4 times. The state's witness who was allegedly unavailable had, allegedly, previously been subpoenaed (RP 1/3/06; 6:7), but was told that he would receive a new

subpoena. (RP 1/3/06; 6:8). It is undisputed that this witness had not received a new subpoena for the January 4, 2006 trial date. This unavailable witness did not receive a new subpoena or any information that the trial was now scheduled for January 4, 2006. (RP 1/3/06; 9:6). The unavailability was first told to by defendant Iniguez on January 3, 2006. (RP 1/3/06; 4:25). For two months starting November 8, 2005, the prosecutor knew the new trial date would be January 4, 2006. (RP 11/8/06; 14:6). The prosecutor did not re-subpoena this witness (RP 1/3/06; 9:3) or try to tell him of the new date until December 27, 2005. (RP 1/3/06; 5:2). The Court file does not reflect any return of service for a subpoena for this witness. (CP1-238). (Index of Clerk's Papers). This unavailable witness in Mexico was talked to directly on the phone by the prosecutor (RP 1/3/06; 9:20) and could have been told to return to Franklin County to testify. He instead was told that he could come back on either the 1st or 2nd of February, 2006. (RP 1/3/06; 6:2).

The Court made a finding that the witness was under subpoena (RP 1/3/06; 10:24) although the Court's file contained no

subpoena and no affidavit of service. The Court found that the State took reasonable steps to notify the “subpoenaed” witness. (RP 1/3/06; 11:3). The Court directly asked the State if there was a subpoena and if it had been served. (RP 1/3/06; 12:5). The Court assumed the record would support the issuance of and service of a subpoena, but there is no record to support that.

The Court found that the witness did not have to return from Mexico because, “it’s really not very feasible to come all the way from Mexico.” (RP 1/3/06; 12:20).

A jury in this case was picked on February 8, 2006 (RP 2/8/06; 4:17) and trial commenced on February 14, 2006. (RP 2/14/06; 5:1). A mistrial was declared on February 16, 2006. (RP 2/16/06; 109:3). The mistrial was due to a Court interpreter that was provided by the State or the Court that could not adequately translate Spanish to English. (RP 2/16/06; 105:14).

This case was retried on April 12, 2006. (RP 4/12/06; 2:8). The jury found both defendant’s guilty of 4 counts of armed robbery

in the first degree, each with a special verdict of armed with a firearm. (RP 5/23/06; 16:8).

The Court sentenced defendant Iniguez to 384 months or 32 years. (CP 24:6). This was 60 months for each firearm allegation (CP 24:11, 12, 13, 14) for a total of 240 months plus 144 as the high end of the standard range. (RP 24:11, 12, 13, 14).

ARGUMENT

ASSIGNMENT OF ERROR NO. 1

The Court erred in failing to provide defendant a speedy trial.

ISSUE NO. 1

Did the Court's continuances violate the defendant's constitutional right to a speedy trial?

ISSUE NO. 2

Did the length of and reason for the delay create a presumption of prejudice?

ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR NO. 1

Defendant contends that under the United States Constitution's Sixth Amendment and under Article 1 § 22 of the

Washington State Constitution, the Court in the instant case violated defendant Iniguez's constitutional right to a speedy trial. In *Doggett v. U.S.*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed2d 520 (1992), the U.S. Supreme Court citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 101 (1972), stated:

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial. . . ." On its face, the Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government to delay the trial of an "accused" for any reason at all. Our cases, however, have qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries: whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial and whether he suffered prejudice as the delay's result. See *Barker, supra*, 407 U.S., at 530, 92 S.Ct., at 2192.

The *Doggett* Court also stated in footnote number 1:

FN1. Depending on the nature of the charges, the lower courts have

generally found postaccusation delay “presumptively prejudicial” at least at it approaches one year. See 2 W. LaFave & J. Israel, *Criminal Procedure* § 18.2, p.405 (1984); Joseph, *Speedy Trial Rights in Application*, 48 *Ford.L.Rev.* 611, 623, n. 71 (1980) (citing cases). We note that, as the term is used in this threshold context, “presumptive prejudice” does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry. Cf. Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 *Colum.L.Rev.* 1376, 1384-1385 (1972).

The second *Barker/Doggett* factor has to do with the reason for the delay. It would be difficult to blame defendant Iniguez for any delay as his initial court date was set at July 27, 2005, and he complained about any continuance of that date and insisted on going to trial on that date. The State moved for a continuance of the Iniguez trial because counsel for co-defendant McIntosh had asked for a continuance and had waived speedy trial. The State cited two cases stating that when defendant’s are joined, a waiver of a speedy trial or a continuance granted to one defendant allows the court to

ignore the speedy trial requests of all other joined defendants. (CP 179). The State cited *State v. Guloy*, 104 Wn.2d 412 (1985) in support of continuing a joined co-defendants trial if the other defendant requests a continuance. The *Guloy* continuance brought both defendants to trial on the 61st day rather than the 60th day.

In *State v. O'Neal*, 126 Wn. App. 395, 417 (2005), also cited by the State, the arraignment was on December 19 and the trial on July 8, a total of 200 days, but the *O'Neal* court found that, unlike the instant case, no defendant requested severance and no defendant claimed prejudice.

In *State v. Eaves*, 39 Wn. App. 16 (1984), the appellate court upheld the trial courts refusal to sever defendants and the granting of a 3 day continuance beyond the speedy trial time. *Eaves* stated:

While the trial court *should* sever to protect a defendant's right to a speedy trial, severance is mandatory only under Cr.R 4.4(c)(1), which protects a defendant from incriminating out-of-court statements by a codefendant. *See Grisby*, at 507, 647 P.2d 6.

The federal courts have been presented with facts similar to the case at

bench. *20 *United States v. Jones*, 712 F.2d 1316 (9th Cir. 1983), *cert. denied*, 464 U.S. 986, 104 S.Ct. 434, 78 L.Ed.2d 366 (1983). In *Jones* a codefendant's counsel was unavailable for trial and a continuance was necessary to preserve continuity of counsel. The district court granted a continuance and refused to sever the trial of the co-defendants even though that would extend the trial beyond the speedy trial period of one of the defendants. *Jones*, at 1322-23. The Ninth Circuit Court of Appeals affirmed the lower court's decision to grant a continuance rather than a severance.

In *State v. McKinzy*, 72 Wn. App. 85 (1993), the Appellate Court upheld a denial of severance and a one week continuance passed the speedy trial rule. *McKinzy* stated:

We hold that under these facts the trial court was within its discretion to deny the motion for severance. A brief delay of the trial date beyond a defendant's speedy trial period is permissible where the administration of justice requires it and the defendant will not be substantially prejudiced in the presentation of his or her defense.

In *State v. Dent*, 123 Wn. App. 467 (1994), the Court stated:

As to the speedy trial argument, the parties agreed that Balcinde's speedy trial period ends on May 21, 1990. Verbatim Report of Proceedings (May 11, 1990), at 10. Trial did not begin until July 30, 1990. In this case the continuance was granted to allow adequate preparation time for new counsel who took over Dent's case after his original counsel was allowed to withdraw due to a conflict of interest. In a case involving similar circumstances, the Court of Appeals stated: "Severance is not mandatory even where a defendant's speedy trial rights are at issue." *State v. Melton*, 63 Wn. App. 63, 67, 817 P.2d 413 (1991) (upholding a continuance extending 7 days beyond one codefendant's speedy trial period), *review denied*, 118 Wn.2d 1016 (1992). In *Melton*, no abuse of discretion was found where the trial court relied on "the State's policy favoring joint trials" and where no prejudice in presenting a defense was alleged. *Melton*, at 66-67.

Although the delay of slightly over 2 months here was longer than the delay in *Melton*, Balcinde has not alleged that the delay caused him any prejudice in presenting his defense.

In the instant case, the 5 continuances that the State asked for covered 260 days to February 8th, 266 days to the actual start of trial on February 14th, and 323 days to April 12th, when retrial started with the State providing a competent interpreter. Defendant Iniguez moved for severance on several occasions. The Court and the State were told on November 22, 2005, that the codefendant McIntosh's counsel could not try this case until after January 1, 2006. No one inquired on the record if counsel for McIntosh could have another attorney cover this trial or other trials for him.

ASSIGNMENT OF ERROR NO. 2

The Court violated rule CrR 3.3 by granting a continuance on January 3, 2006.

ISSUE NO. 1

Was the witness under subpoena and therefore required to appear?

ISSUE NO. 2

If the witness was not subpoenaed, was there insufficient due diligence to allow for a continuance?

**ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR
NO. 2**

DUE DILIGENCE

The continuance from January 4, 2006 to February 8, 2006, was due to the State's negligence in failing to subpoena a witness and in failing to tell the witness to return from Mexico for the trial, if in fact, he had been subpoenaed. Defendant contends that this continuance was not authorized by CrR 3.3, but in fact, violated this speedy trial rule and requires that this case be dismissed for violation of the rule. The record does not disclose that a subpoena was issued or that it was personally served on the missing witness. If no subpoena was issued, or no subpoena was personally served, there is no due diligence. If the subpoena was personally served, the defendant argues that the State's statement that they were going to issue a new subpoena relieved the witness of his duty to appear and there is no due diligence. If the States refusal or failure to request this witness to return from Mexico is in fact a withdrawal or negation of the subpoena, then there is no due diligence.

Without due diligence, there is no basis for a continuance.

State v. Gowens, 27 Wn. App. 921 (1980). In *State v. Hairychin*, 136 Wn.2d 862 (1998), the Court stated:

Hairychin asserts that the prosecution failed to exercise due diligence when it failed to issue a subpoena to compel Hanson's appearance at the fact-finding hearing scheduled for March 3, 1997. Her argument finds clear support in our prior holding "that due diligence requires the proper issuance of subpoenas to essential witnesses." *State v. Adamski*, 111 Wash.2d 574, 578, 761 P.2d 621 (1988). In *Adamski*, we held that the State could not claim due diligence when it failed to serve a subpoena by one of the methods provided in CR 45(c). In *State v. Duggins*, 121 Wash.2d 524, 525, 852 P.2d 294 (1993), we reiterated our holding in *Adamski* that "the State cannot show due diligence, for purposes of JuCR 7.8, unless the subpoena was served by one of the methods described in CR 45(c)." In the present case, the defect is not the State's failure to serve the witness by proper means, but rather its failure to make any effort to serve her at all. Plainly, the State did not exercise the due diligence required for a continuance under JuCR 7.8(e)(2)(ii).

In *State v. Wake*, 56 Wn. App. 472 (1989), an unsubpoenaed crime lab expert was out of town. No reason was given for his unavailability. The State knew of the problem two weeks in advance of trial. Granting a continuance was an abuse of discretion. See also *State v. Woods*, 143 Wn.2d 582-85, 561 (2001).

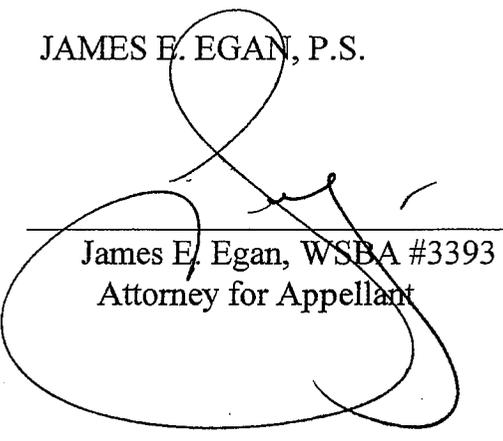
State v. Tortum, 74 Wn. App. 81 (1994), states that once subpoenaed, the witnesses obligation to attend remains even if the trial is continued. In the instant case, the missing witness in Mexico should have been told to return for the trial, if, in fact, he was served. Excusing this witness' attendance for over a month was an abuse of discretion.

CONCLUSION

This information should be dismissed based upon the State's failure and the Court's failure to provide a speedy trial under both the U.S. and State Constitutions and under CrR 3.3.

Respectfully Submitted this 9th day of January, 2007.

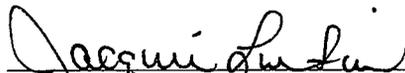
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CERTIFICATE OF MAILING

I hereby certify under penalty of perjury under the laws of the State of Washington, that a copy of the foregoing was mailed, via 1st Class Mail, to Andrew Miller, Benton County Prosecutor, 7122 W. Okanogan Place, Kennewick, WA 99336 and Ricardo Iniguez, DOC #895746, c/o Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362 by depositing in the mail of the United States of America on the 9th day of January, 2007.



Jacquie Linton