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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

85789-0

No. 28259-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE NUNEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR DOUGLAS COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF APPEAL:

Enrique Nunez's right to a speedy trial pursuant to CrR 3.3 was violated and therefore his convictions for delivery of cocaine and possession with intent to deliver must be reversed and the charges against him dismissed with prejudice.

The CrR 3.3 speedy trial period ended on Monday, June 29, 2009. On that day, the court held a hearing and ordered time excluded until July 1 based on CrR 3.3(g). The court failed to make a finding on the record that the defendant would not be prejudiced in the presentation of his defense. Mr. Nunez raised the speedy trial objection both on June 29, 2009, and at the beginning of trial on July 1.

Under these facts, CrR 3.3(h) requires reversal of the lower court and dismissal of all charges against Mr. Nunez.

B. ASSIGNMENT OF ERROR

The defendant was not afforded his right to a speedy trial under CrR 3.3 .

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

CrR 3.3 provides that a defendant detained in jail shall be brought to trial within 60 days plus any excluded time. Where the time for speedy trial under CrR 3.3 expired on June 29, 2009,

where the court ordered a continuance based on CrR 3.3(g) on June 29, 2009, where the court failed to find that defendant would not be prejudiced by the delay, and where defendant raised the speedy trial objection to the court on June 29, 2009 and objected to proceeding with trial on July 1 on the same grounds, must the conviction be reversed and the case remanded to the superior court with instruction to dismiss both charges?

D. STATEMENT OF THE CASE

Defendant Enrique Nunez was arraigned in Douglas County Superior Court on March 23, 2009 on one count of delivery of a controlled substance (cocaine) and one count of possession of a controlled substance (cocaine). CP 56 (Defendant's Acknowledgment of Advice of Rights). The court noted that Mr. Nunez's speedy trial period was set to expire sixty days later on May 22, 2009. CP 60 (Mar. 23, 2009 Order Setting Trial Date). Mr. Nunez was detained at arraignment and remained detained. See id. (setting speedy trial date at 60 days from date of arraignment).

On April 22, 2009, the superior court issued an order setting the trial date for May 28, 2009, based on a motion for continuance from the defense. CP 65 (Order Setting Trial and Hearing Dates). The court recalculated the speedy trial expiration date and found it

to be Monday, June 29, 2009. Id.; see also 4/22/09RP at 28-29 (defendant agrees on record that his speedy trial date pushed back thirty days from end of continuance); see also CrR 3.3(b)(5) (allowable time shall not expire less than 30 days after a continuance). The continuance the court ordered on April 22, 2009 was the first and only continuance before June 29. See 4/22/09RP at 27 (State and defense counsel agreeing with court that there had been no prior continuances).

On May 18, 2009, the State filed an amended information charging Nunez with one count of delivery of a controlled substance (cocaine) and one count of possession of a controlled substance (cocaine) with intent to deliver. CP 8-11. On May 26, the parties informed the court that they were ready to begin the trial on May 28. CP 72 (Minutes). The trial did not begin on May 28. On June 1, the court entered an order resetting the trial date to June 11, 2009. CP 74. On June 8, the parties informed the court that they were ready to proceed to trial on June 11, 2009. CP 75 (Minutes). The trial did not begin on June 11. On June 18, the court entered an order resetting the trial for June 25, 2009. CP 77; see also CP 76 (June 15, 2009 Minutes) (noting that “[t]rial was bumped by a quicker speedy trial”).

In its June 1 and June 18 orders, the court did not exclude any time for purposes of Rule 3.3. CP 74, 77. The speedy trial expiration date remained June 29, 2009. Id.

The trial did not start on June 25, 2009, nor was there a hearing on that date. The court heard the prosecutor's motion for a delay beyond June 29, 2009 on June 29. RP6/29/09. The entire hearing lasted two minutes. Id. Douglas County Prosecuting Attorney Eric Biggar stated as the State's reason for seeking a delay beyond the speedy trial expiration date that

[t]he State was involved in a trial last week, which I indicated ultimately settled, but it didn't settle until the jury was here. It was a case that had been pending for nearly a year-and-a-half, was a sex abuse case. I've been handling the prosecution throughout in that case, and so this matter had to have been bumped as a result of my schedule conflict. The State is asking that we put this on for trial July 1.

RP6/29/09 at 3 (emphasis added). Mr. Biggar did not inform the court that he was unavailable to try the case on Friday, June 26, after his other trial had ended, or June 29. Id. Nor did Mr. Biggar inform the court that he needed more time to prepare his case. Id. The State had been ready to try the case for over a month. CP 72 (May 26, 2009 Minutes) (State informing court of readiness to proceed on May 28). The only reason Mr. Biggar gave for the need to push the trial beyond the statutorily-required time period was his

involvement in case that ended four days earlier. RP6/29/2009 at 3.

Mr. Nunez reminded the court of the speedy trial date and objected to delay beyond that date. Id. The court, responding to Mr. Nunez, provided its reasoning for ordering a delay beyond the speedy trial date:

Okay. Well, the Court believes that as the prosecution was involved in a trial last Thursday when Mr. Nunez was scheduled to go to trial, that case had been pending for about a year. That case did have a child victim. The child victim was eight or 10 years old, in that neighborhood, and it was the type of case that, by statute, the Court can't continue as a result of the child victim, and Mr. Biggar, who's the Prosecutor in both cases, was involved. So, under the circumstances, the Court believes that there is good cause to continue a minimal time, which is day after tomorrow, his speedy trial into Wednesday.

RP6/29/2009 at 3-4.

The defendant then asked when the new speedy trial expiration date would be. The court replied

Well, I'm not sure. As I understand the statute, as he's incarcerated, the Court has another 14 days under 3.3(g). And, candidly, I haven't even really looked at his file to see if there's other reasons to continue under 3.3(e), but under 3.3(g), the Court has 14 days.

RP6/29/090 at 4. There was no written order issued June 29.

On July 1, 2009, the court entered a written order setting the trial date for that same day, July 1. CP 79. The concise order only stated: "The Court hereby ORDERS the following trial and hearing dates . . . [x] Trial. July 1, 2009. The estimated length of trial is 2 days." Id. As in its oral findings, the superior court failed to find in its July 1 written order that Mr. Nunez would not be prejudiced by the delay. Id.

At the start of trial, defense counsel again objected to trial going forward because the speedy trial period had expired. 7/01/09RP at 47. The court noted the objection but provided no further explanation of the reasons for delay beyond the speedy trial expiration date of June 29. Id. The trial was completed in less than one day. The jury found defendant guilty of both counts.

E. ARGUMENT

MR. NUNEZ'S RIGHT TO A SPEEDY TRIAL PURSUANT TO CrR 3.3 WAS VIOLATED, REQUIRING REVERSAL OF THE CONVICTION AND DISMISSAL OF THE ACTION

1. CrR requires a speedy trial within 60 days unless time is excluded or extended. Unless time is excluded by rule, the trial of a defendant charged in superior court who is in custody on the charge must begin no more than 60 days after arraignment. CrR 3.3(b)(1). The application of the speedy trial rule to a particular set

of facts is a question of law subject to de novo review. State v. Raschka, 124 Wn. App. 103, 108, 100 P.3d 339 (2004).

Here, the court, the State, and Mr. Nunez agreed that the speedy trial expiration date was June 29, 2009. RP6/29/09 at 3; CP 77 (June 18, 2009 Order). The parties and the court were correct in their calculation, since June 29 was the first weekday 30 or more days after May 28, the date of the end of the last continuance. CP 65 (Apr. 22, 2009 Order Setting Trial Date); see CrR 3.3(b)(5) (allowable time shall not expire less than 30 days after a continuance).

The sole issue in this case is whether the court, without examining whether defendant would be prejudiced, may exclude time under CrR 3.3(g). If the court's exclusion of time was not permitted by the rule, the remedy is reversal and dismissal of the charges with prejudice. CrR 3.3(h); State v. Saunders, 153 Wn.App. 209, 221, 220 P.3d 1238 (2009)

2. The court's order failed to meet the requirements of CrR 3.3(g) to exclude time. CrR 3.3(g) reads:

(g) Cure Period. 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 only be granted 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. The period of delay shall be for no more than 14 days for a defendant detained in jail The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(emphasis added). CrR 3.3(g) requires the court to make a finding that the defendant will not be substantially prejudiced. The court in this case failed to make such a finding. RP6/29/09. In fact, the court made no effort to discover whether Mr. Nunez would suffer prejudice. The court did not ask Mr. Nunez's attorney at the June 29, 2009 hearing whether Mr. Nunez would suffer prejudice from a delay beyond the speedy trial expiration date. Id. The court candidly stated on the record that it had not read Mr. Nunez's file in preparation for the hearing. Id. at 4. Because the court made no finding regarding prejudice to Mr. Nunez, the court extended the speedy trial expiration date without authority under CrR 3.3(g). The requirement that the court find no prejudice to the defendant on the record or in writing is unequivocal. CrR 3.3(g).¹

Further, the superior court erroneously applied CrR 3.3(g) to extend the speedy trial date on June 29, when the speedy trial period had not yet expired. CrR 3.3(g) allows the court to extend the speedy trial date "within five days after the time for trial has

¹ CrR 3.3(g) has been in effect only since September 1, 2003, and there are few reported cases interpreting the new provision.

expired.” Since the time for Mr. Nunez’s speedy trial had not expired, the court should have looked to CrR 3.3(e) instead to determine whether the court could exclude time. See CrR 3.3(e) (giving nine categories of excluded periods).

3. The court did not extend time based on CrR 3.3(e) and none of the CrR 3.3(e) provisions apply to the period after June 29, 2009. The court explicitly noted that it was applying CrR 3.3(g) and not CrR 3.3(e) to exclude time:

As I understand the statute, as he’s incarcerated, the Court has another 14 days under 3.3(g). And, candidly, I haven’t even really looked at his file to see if there’s other reasons to continue under 3.3(e), but under 3.3(g) the Court has 14 days.

RP6/29/09 at 4. Regardless, the delay here fits into none of the categories of excluded periods in CrR 3.3(e). The only periods of categories that could conceivably apply are CrR 3.3(e)(3) and (8).

CrR 3.3(e)(3) permits the court to exclude time for a continuance pursuant to CrR 3.3(f). CrR 3.3(f)(2) provides that:

[o]n motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. . . . The court must state on the record or in writing the reasons for the continuance.

(emphasis added). Here, the court made no statement on the record or in writing either that (i) the continuance was required in the administration of justice or that (ii) defendant would not be prejudiced. RP6/29/09; CP 79 (July 1, 2009 Order). Therefore, there was no valid CrR 3.3(f) continuance and CrR 3.3(e)(3) does not apply to exclude the time between June 29 and July 1.

CrR 3.3(e)(8) permits the court to exclude time for “[u]navoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties.” Here, there is nothing on the record indicating that the parties could not have proceeded with trial on June 26, 2009 or June 29, 2009.

RP6/29/2009. Prosecutor Eric Biggar explained at the June 29 hearing that he had had a trial that settled after the jury was called on June 25. Id. at 3. The State did not claim that it needed more time to prepare the case against Mr. Nunez. Id. The State had been ready to try Mr. Nunez for over a month. CP 72 (May 26, 2009 Minutes). The court did not indicate that it was unavailable to try the case on either June 26 or June 29. RP6/29/09. Rather, the record suggests that the court and the prosecutor preferred to have more days between cases for unidentified reasons. This Court should find that the unsupported whims of the trial court or

prosecutor do not constitute “[u]navoidable or unforeseen circumstances.” See CrR 3.3(e)(8); see also State v. Kenyon, 167 Wn. 2d 130, 136-37, 216 P.3d 1024 (2009) (en banc) (holding that court congestion was not an “unavoidable or unforeseen” circumstance).

3. Mr. Nunez need not prove actual prejudice for reversal to be required. The trial court bears the ultimate responsibility to ensure that trial is held within the speedy trial period. CrR 3.3(a)(1); Raschka, 124 Wn. App. at 110. On appeal, “[f]ailure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice.” Raschka, 124 Wn. App. at 112. Mr. Nunez need not show prejudice to be entitled to a reversal of his conviction and a dismissal of all charges.

4. This Court must reverse and order dismissal of the charges against Mr. Nunez with prejudice. Where the trial court violates a defendant’s speedy trial rights and the defendant is convicted, the appellate court must reverse the conviction and order dismissal. Kenyon, 167 Wn.2d at 139; Saunders, 153 Wn. App. at 211. There is no de minimis exception to the speedy trial rule. See CrR 3.3(g) (although court may “cure” late trial within five

days of expiration of speedy trial period, it may only do so “upon a finding on the record or in writing that the defendant will not be substantially prejudiced”); State v. Warren, 96 Wn.App. 306, 979 P.2d 915 (1999) (reversing trial court and dismissing convictions where court, in ordering two-day continuance, did not make detailed explanation on the record as to why each superior court department was unavailable).

This Court should not reverse the conviction with an order to the superior court to determine prejudice retrospectively. See Raschka, 124 Wn. App. at 112 (“[f]ailure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice”). In Kenyon, a case in which the trial court ordered a continuance based on court congestion, the Supreme Court found that “the record here contains no information regarding the number or availability of unoccupied courtrooms nor the availability of visiting judges or pro tempores to hear criminal cases in the unoccupied courtrooms.” 167 Wn. 2d at 138. But Kenyon did not remand the case to the trial court to correct the omission in the record and make retrospective findings regarding the availability of courtrooms and other judges as of the date the continuance was granted. Id. at 139. Rather, the Supreme Court,

by unanimous decision, reversed the convictions and dismissed all charges. Id.; see also State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (“In the absence of a finding on a factual issue, we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue”).

The argument here against the remedy of remanding to the trial court for further fact finding is even stronger than that in Kenyon. The requirement in Kenyon that a trial court citing congestion as a reason for excluding time must make findings regarding the unavailability of other judges and courtrooms is found nowhere within CrR 3.3 but was created by the courts. See CrR 3.3; Kenyon, 167 Wn.2d at 137. Here, the requirement that the court make a finding of no prejudice contemporaneously with an order excluding time under Rule 3.3(g) is found within the rule itself and is unambiguous.

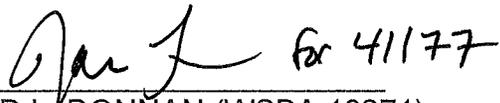
This Court should not give the trial court a second bite at the apple by permitting it to make findings it was required to make over six months ago. Such a remedy would render the procedural protections of CrR 3.3 illusory, since a busy court could disregard its statutory duty to enter certain findings on the record or in writing

before time is excluded, knowing that it could correct any omission at a later time.

F. CONCLUSION

For the foregoing reasons, Mr. Nunez respectfully requests this Court reverse his convictions and remand the matter to the superior court for dismissal of the charges with prejudice.

Respectfully submitted this 25th day of February 2010.

A handwritten signature in black ink, appearing to read "Donnan" followed by "for 41177".

DAVID L. DONNAN (WSBA 19271)
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28259-7-III
v.)	
)	
ENRIQUE NUNEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ERIC BIGGAR, DPA	(X)	U.S. MAIL
DOUGLAS COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
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DIVISION III
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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28259-7-III
v.)	
)	
ENRIQUE NUNEZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF MARCH, 2010, I CAUSED THE TRUE COPY OF THE **AMENDED OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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