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## I. STATEMENT OF FACTS

The facts relevant to the issue in this appeal concern the procedural history leading up to the defendant's trial on July 1, 2009.

The defendant was arraigned on March 23, 2009 on one count of delivery of a controlled substance and a second count of possession of a controlled substance. (CP 56-58, 60). The charges were subsequently amended to delivery of a controlled substance within 1000 feet of a school/bus zone, and possession of a controlled substance with intent to deliver within 1000 feet of a school/bus zone. (CP 8-11). An order was entered at arraignment setting the trial date for April 23, 2009. (CP 60). Speedy trial was noted on the order as expiring on May 22, 2009 (CP 60).

On April 22, 2009 the defendant orally moved to continue the trial to allow further plea negotiations. (CP 66-68). The court granted the motion and set trial for May 28, 2009 with a speedy expiration date of June 29, 2009. (CP 65). Defendant did not go to trial on May 28, 2009 because another case proceeded to trial ahead of his. (CP 73). As a result on June 1, 2009 trial was reset for June 11, 2009. (CP 73, 74). The court did not adjust

the speedy trial expiration date in the order setting trial for June 11, 2009. (CP 74). On June 15, 2009 the court reset trial for June 25, 2009 (CP 76, 77). The trial was not held on June 11, 2009 as another case with a shorter speedy trial period went to trial that date. (CP 76). On June 29, 2009 the State orally moved to continue the trial to July 1, 2009. (RP 3, 6/20/09). The basis for the State's motion was that the prosecutor that was trying the defendant's case was in trial on another matter scheduled at the same time as the defendant's trial (June 25, 2009). (RP 3, 6/20/09). The prosecutor noted that the other case involved had been pending for nearly 1 ½ years and was a child sex abuse case that the prosecutor had been working on throughout the life of that case. (RP 3, 6/20/09). Defense counsel objected to the continuance, but did not argue or allege that the short delay would result in any prejudice to defendant. (RP 3, 6/20/09). The court found good cause to continue the trial to July 1, 2009. (RP 3-4, 6/20/09).

Trial was ultimately held on July 1, 2009. Defense counsel again objected to the trial date as being outside speedy trial. (RP 47, 7/1/09). Defense counsel did not assert any prejudice to the defendant as a result of the short delay in the trial. (RP 47,

7/1/09). Defendant was convicted at trial on both charges. The defendant was sentenced on July 13, 2009 to 44 months. (CP 80).

## II. ISSUES

2.1 Did defendant's trial occur outside the time limits proscribed under CrR 3.3 such that his right to a speedy trial was violated?

## III. ARGUMENT

3.1 Defendant's trial commenced within the speedy trial time limits of CrR 3.3

A. General discussion.

CrR 3.3 sets forth two specific time for trial periods, 60 and 90 days, depending on whether the defendant is incarcerated. CrR 3.3(b). A defendant who is incarcerated must be tried within 60 days of his arraignment. CrR 3.3(b)(1)(i).

The trial court is responsible for assuring a speedy trial under CrR 3.3. State v. Ralph Vernon G., 90 Wn.App. 16, 20, 950 P.2d 971 (1998) (citing State v. Carson, 128 Wn.2d 805, 912 P.2d 1016 (1996)). Even though trial preparation and scheduling conflicts may be valid reasons for continuances beyond the time for trial period, court congestion is not. State v. Flinn 154 Wash.2d 193, 200, 110 P.3d 748, 751 (2005) (citing State v. Mack, 89 Wash.2d 788, 794, 576 P.2d 44 (1978)). A

scheduled vacation is a valid basis for granting a continuance. State v. Torres, 111 Wn. App. 323, 331, 44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005 (2003). Trial preparation is a legitimate basis for the granting of a continuance. See State v. Luvane, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

CrR 3.3(e) sets forth periods which are excluded in computing time for trial. Under CrR 3.3(e)(3) continuances of trial granted under CrR 3.3(f) are excluded periods when computing the time for speedy trial. A continuance may be granted on motion of the court or either party. CrR 3.3(f)(2). The continuances under CrR 3.3(e)(3) effectively extend the speedy trial period by the length of the delay. Pursuant to CrR 3.3(e)(8) unavoidable or unforeseen circumstances resulting in the delay or continuance of trial are also excluded periods when computing time for trial. When calculating the speedy trial period following an excluded period, CrR 3.3(b)(5) applies. This rule provides that following any period of time excluded pursuant to section (e), "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." Under the plain reading of this rule the speedy trial period is extended 30 days following the excluded period.

A party who objects to a continuance on speedy trial grounds must move for and note a hearing on the issue or lose the right to object. CrR 3.3(d)(3).

Procedurally the defendant does not allege any errors were committed by the trial court in granting continuances of the April 23, 2009, May 28, 2009, or June 11, 2009 trial dates. The sole issue presented on appeal concerns whether the trial court properly continued the June 25, 2009 trial date to July 1, 2009, and whether the continuance resulted in a violation of the defendant's speedy trial rights under CrR 3.3.

Respondent submits that the period of time between the defendant's scheduled trial date of June 25, 2009 and when trial was held on July 1, 2009 (6 days) constituted an excluded period in computing time for trial under CrR 3.3(e)(3) and (e)(8). Thus, under CrR 3.3(b)(5), defendant's speedy trial period did not expire until 30 days after the excluded period, or August 4, 2009.

B. The State's motion to continue trial from June 25, 2009 to July 1, 2009 properly excluded that period in computing time for trial under CrR 3.3(e)(3).

The State's motion to continue trial from June 25, 2009 to July 1, 2009 was based upon the prosecutor's unavailability for trial in the defendant's case. CrR 3.3(e)(3) provides:

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

...

(3) Continuances. Delay granted by the court pursuant to section (f).

CrR 3.3(f) and provides:

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. *On 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 motion must be made before the time for trial has expired.* The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

*(Emphasis added).* The State's motion falls within the parameters of CrR 3.3(f)(2). Pursuant to the rule the State's motion to continue trial was brought prior to expiration of the speedy trial date, and the State provided good cause for the continuance.

“The decision of a trial court in granting an extension under CrR 3.3(d)(8)<sup>1</sup> is reviewed only for abuse of discretion.” State v. Terrovona, 105 Wn. 2d 632, 651, 716 P. 2d 295 (1986), *cert. denied*, 499 U.S. 979 (1991); State v. Campbell, 103 Wn. 2d 1, 14, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). The granting or denying of a motion for continuance rests within the sound discretion of the trial court, and the trial court's ruling will not be disturbed unless an abuse of discretion is shown. State v. Miles, 77 Wash. 2d 599, 464 P.2d 723 (1970). Discretion is abused only where no reasonable person would take the view adopted by the trial court. If reasonable people could differ as to the propriety of the action taken by the trial court, it cannot be said the trial court abused its discretion. Rehak v. Rehak, 1 Wash.App. 963, 65 P.2d 687 (1970).

Although the issue in Terrovona dealt with whether multiple five (5) day extensions under the former time for trial rule was permissible, clearly the same abuse of discretion standard applies to the trial court's decision to extend under CrR 3.3(e)(f). This rule provides that the court may continue trial when the continuance is

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<sup>1</sup> Former rule under CrR 3.3.

required in the administration of justice and the defendant is not prejudiced. The prosecutor in this case was unavailable on June 25, 2009 to try the defendant's case as he was involved in the trial of a child sex abuse case that had been pending for nearly 1 ½ years. The State provided the court with good cause to continue the trial in the administration of justice, and the trial court only continued the trial for a period of six (6) days (June 25<sup>th</sup> to July 1). At the time of the hearing on the State's motion, although defense counsel objected to the continuance, counsel did not argue to the court that defendant would be prejudiced by the short delay. Furthermore, when defense counsel again noted his objection to the trial continuance on July 1, 2009, he did not allege or assert that any prejudice occurred to the defendant's ability to present his defense.

The trial court did not abuse its discretion in granting the State's motion to continue trial to July 1, 2009, therefore excluding the interim period of six (6) from speedy trial computation. Accordingly, applying CrR 3.3(b)(5) the defendant's proper speedy trial expiration date became August 4, 2009 (30 days after the excluded period).

C. The State's motion to continue trial from June 25, 2009 to July 1, 2009 properly excluded that period in computing time for trial under CrR 3.3(e)(8).

CrR 3.3(e)(8) excludes periods of time for computing time for trial for unavoidable or unforeseen circumstances:

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

...

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

"Washington courts of appeal have consistently held that unavailability of counsel may constitute unforeseen or unavoidable circumstances to warrant a trial extension under CrR 3.3(d)(8)." State v. Carson, 128 Wn. 2d 805, 814, 912 P. 2d 1016 (1996) citing State v. Watkins, 71 Wash.App. 164, 175, 857 P.2d 300 (1993); State v. Kelley, 64 Wash.App. 755, 767, 828 P.2d 1106 (1992); State v. Raper, 47 Wash.App. 530, 539, 736 P.2d 680, *review denied*, 108 Wash.2d 1023 (1987); State v. Stock, 44 Wash.App. 467, 472, 722 P.2d 1330 (1986); State v. Brown, 40 Wash.App. 91, 94, 697 P.2d 583, *review denied*, 103 Wash.2d 1041 (1985); State v. Eaves, 39 Wash.App. 16, 20, 691 P.2d 245 (1984); State v. Palmer, 38 Wash.App. 160, 162, 684 P.2d 787 (1984).

Courts have rejected the argument that a prosecutor's unavailability because of a scheduling conflict is akin to docket congestion and self-created hardship, which do not constitute "good

cause” to warrant setting the trial date beyond the speedy trial rule period. State v. Brown, supra; State v. Palmer, 38 Wash.App. 160, 162, 684 P.2d 787 (1984). “A counsel's unavailability for trial may be an unforeseen and unavoidable circumstance beyond the court's control which justifies a continuance.” State v. Brown, supra, at 94-95.

In State v. Carson the defendant argued that the trial court's granting of a trial continuance violated his speedy trial rights. Specifically the defendant argued that the court administrator had advised counsel and the judge of the potential speedy trial problem; other attorneys were available to try the case; the court could have obtained other judges or courtrooms; the court should have continued the conflict case and ordered defendant's case to proceed; and that the continuance was actually granted because the State had miscalculated speedy trial. The Supreme Court held that because both the prosecutor and trial judge involved in the case were unavailable due to participation in another case, their unavailability constituted an unavoidable circumstance under the court rule. The court further held that that circumstance, combined with the speedy trial calculation error and defense counsel's failure

to apprise the State or the court of the error, justified the trial extension under CrR 3.3(d)(8) (former rule).

Similarly, the record before the court reflects that the prosecutor handling defendant's case was unavailable for defendant's trial on June 25, 2009 as he was in trial on a separate matter. The trial court recognized the prosecutor's unavailability when it ruled on the State's motion:

THE COURT: 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.

The record establishes that the trial court's decision in granting the continuance of trial from June 25, 2009 to July 1, 2009 was based upon the prosecutor's unavailability on the date of defendant's scheduled trial. Although the court didn't verbalize that the trial continuance was granted under CrR 3.3 (e)(8), clearly the court found good cause for the continuance because the prosecutor could not perform two trials simultaneously. A trial court may be affirmed on

any basis supported by the record and the law. State v. Kelly, 64 Wn. App 755, 764, 828 P.2d 1106, 1111 (1992) citing LaMon v. Butler, 112 Wash.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989); Hadley v. Cowan, 60 Wash.App. 433, 444, 804 P.2d 1271 (1991).

Under CrR 3.3(e)(8) the trial court did not abuse its discretion in granting the State's motion to continue trial to July 1, 2009, therefore excluding the interim period of six (6) days from speedy trial computation. Applying CrR 3.3(b)(5), the speedy trial period was extended 30 days after the excluded period (July 5, 2009) giving a new speedy expiration date of August 4, 2009.

D. Other issues.

Defendant challenges the trial court's reference to CrR 3.3(g) as authority for the basis of the court's decision continuing trial from June 25, 2009 to July 1, 2009. The State concedes that the trial court's reliance on CrR 3.3(g) is misplaced. As correctly pointed out by the defendant, the rule governs trial continuances (cure periods) that are brought within five (5) days after speedy trial has already expired. The rule is inapplicable to the present case.

Prior to the State's motion for trial continuance herein, defendant's speedy trial period was set as June 29, 2009. The

State then moved on the last day of defendant's speedy trial period (June 29, 2009) to continue the trial. Therefore speedy trial had not yet expired on the date the motion was brought. Accordingly, CrR 3.3(g) does not apply.

However, for the reasons set forth above the trial continuance was proper under CrR 3.3(e)(3) and/or CrR 3.3(e)(8)

#### IV. CONCLUSION

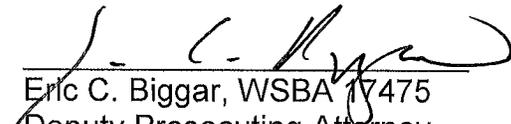
The trial continuance from June 25, 2009 to July 1, 2009 was proper pursuant to CrR 3.3(e)(3) and 3.3(e)(8). The unavailability of the prosecutor for trial in defendant's case due to being in trial on another matter was a sufficient basis for the court to continue trial. The trial court did not abuse his discretion in granting the continuance due to the unavailability of the prosecutor. The trial continuance was necessary for the proper administration of justice, and no prejudice resulted to the defendant's ability to defend against the charges. Furthermore, the prosecutor's unavailability for trial was an unavoidable circumstance warranting the trial continuance. The trial continuance resulted in six (6) days being excluded from speedy trial computation. As a result, under CrR 3.3(b)(5) speedy trial could not expire less than 30 days after the excluded period thereby giving August 4, 2009 as the speedy trial expiration date. Since trial

commenced on July 1, 2009 the defendant's speedy trial rights were not violated.

Defendant's convictions for delivery of a controlled substance, and possession of a controlled substance within 1000 feet of a school bus stop should be affirmed.

Dated: 4/29/10

Respectfully Submitted by:

  
Eric C. Biggar, WSBA 17475  
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Attorney for Respondent