

NO. 63559-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRANDON OLLIVIER,

Appellant.

FILED  
COURT OF APPEALS DIVISION I  
2010 OCT -4 PM 5:00

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

The Honorable Palmer Robinson  
The Honorable Brian Gain  
The Honorable James Cayce  
The Honorable Deborah Fleck

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE 23-MONTH PRE-TRIAL DELAY, WITH 19 CONTINUANCES GRANTED OVER MR. OLLIVIER'S OBJECTION, VIOLATED CrR 3.3.

a. Mr. Ollivier objected to 19 of 22 continuances. Mr.

Ollivier agreed to the first two continuances as well as a third on February 15, 2008. However the State is incorrect in arguing he agreed to the continuances of March 7, 2008 and November 7, 2008. SRB at 15, 19.

In Mr. Ollivier's letter, given to the court on October 19, 2007, he stated:

I have prepared this statement in order to make clear my thoughts and feelings concerning any proposed continuance of my case. I will especially address the consideration of anything which would prolong my incarceration prior to my trial... To make my position clear, I object to any continuance in this matter whatsoever.

CP 271 (emphasis added). He concluded:

I expect this court will act accordingly based on that information from this point forward, and will take action to preserve and repair my already damaged rights, as I have asked.

CP 276 (emphasis added).

Through this letter, Mr. Ollivier clearly intended to make a standing objection to "any" further continuance "from this point forward" and to make a written record of that objection. It appears that the parties

interpreted the letter as such. See e.g. 1RP 34 (December 28, 2007, prosecutor assuming Mr. Ollivier's objection). Mr. Ollivier's objection to "any" further continuance was firm, clear, and ongoing; having put it on the record in that manner Mr. Ollivier had no obligation to repeat his objection at each hearing.

Nor did Mr. Ollivier did agree to a continuance on November 7, 2008. After the court granted Ms. Thomas's request for a continuance and the parties discussed scheduling, the following exchange took place:

JUDGE GAIN: What I will probably do if I can find a judge is to assign (inaudible) judge and the (inaudible) Mr. Ollivier's sentence (inaudible).

MR. OLLIVIER: Your Honor, if I may speak for a moment.

JUDGE GAIN: Sure.

MR. OLLIVIER: My primary concern is if we can get this continued too far out (inaudible) January we'll have a new presiding judge.

JUDGE GAIN: No, I'm going to be here.

MS. THOMAS: Judge Gain will be your judge.

MR. OLLIVIER: He's going to be here? Okay.... That was my concern....

JUDGE GAIN: I – I'm aware of your situation and I'll be here.

MR. OLLIVIER: Great. I was (inaudible).

1RP 58. Mr. Ollivier knew his objection to the continuance was already on the record and the continuance had been granted. The conversation had moved on to scheduling, so Mr. Ollivier spoke up with a concern on that topic. Since the continuance had already been granted over his objection,

he simply wished to make sure Judge Gain would still be presiding over his case. Nothing in this exchange supports the State's interpretation that "Ollivier did not object to the continuance so long as Judge Gain remained the presiding judge." SRB at 19.

b. The court violated CrR 3.3 by failing to consider whether Mr. Ollivier would be prejudiced by each continuance. When the court grants a continuance under CrR 3.3(f)(2) it "must state on the record or in writing the reasons for the continuance" and find "the defendant will not be prejudiced in the presentation of his or her defense." The court made that finding in only three rulings: September 12, 2007 and November 2 and 30, 2007. 1RP 14, 25, 32.

The State argues the court was not required to make that finding in the other 16 cases because "the prejudice is subsumed within the reason for the continuance itself" – i.e. defense counsel's need to prepare. SRB at 24. The State argues this necessarily implies that denying the continuance would prejudice the defendant, by bringing him to trial with counsel who was inadequately prepared. But the rule requires the court to examine the prejudicial effect of the delay. The court failed to do so in 16 of these continuances. The rule is clearly stated, and the court simply failed to comply with it.

c. The court abused its discretion by granting 19

continuances “in the administration of justice.” The State contends that the continuances may not be considered cumulatively under CrR 3.3(a). But these rulings do not occur in a vacuum. The trial court can and should consider the context of each continuance request. For example, the other cases awaiting trial in the same court may be a valid factor in considering the request:

[T]he “administration of justice” is not limited to the administration of justice in a single case seen in isolation from others awaiting trial. It is the trial court's responsibility to assure a speedy trial for all criminal defendants. See CrR 3.3(a). The court can therefore properly consider the factors affecting all defendants whose cases are scheduled to go out for trial in deciding whether a continuance should be granted under CrR 3.3(h)(2). Within reasonable limits, it is proper for the trial court to balance factors like those presented here in determining how to prioritize cases expiring at or near the same time.

State v. Angulo, 69 Wn.App. 337, 343, 848 P.2d 1276, rev. denied, 122 Wn.2d 1008 (1993) (continuance which surpassed defendant's speedy trial expiration by one day was properly granted “in the administration of justice” to prioritize trial of another defendant who had been in jail three weeks longer and whose trial was expected to be shorter).

Here, as the case wore on, the court was well aware of the egregious delay. The court's failure to give due consideration to that fact

was an abuse of discretion. Each request should be determined in context – whether that context is the number and nature of other cases awaiting trial, or the unreasonable length of delay in a particular case.

d. Defense counsel’s requests did not automatically override Mr. Ollivier’s objections. Pre-trial delay may violate CR 3.3. even though the continuances were requested by defense counsel, if the defendant’s objection is on the record. State v. Saunders, 153 Wn.App. 209, 220 P.3d 1238 (2009) because two of the continuances in that case were requested for a different reason, to continue plea negotiations. But the holding of Saunders is not so narrow. The Court did not find a violation of CrR 3.3 simply because the attorney chose to negotiate against the defendant’s wishes; instead, it found the trial court abused its discretion by granting the continuance “without acknowledging counsel’s duty under RPC 1.2(a) and its own duty to see that Saunders received a timely trial.” Id. at 217-18 (emphasis added). The issue was not only whether to go to trial, but just as importantly, the timeliness of trial.

Here, unlike in Saunders, counsel followed Mr. Ollivier’s direction to proceed to trial. However, the more fundamental issue is that counsel overrode Mr. Ollivier’s decision “concerning the objectives of representation and... the means by which they are to be pursued.” Id. at

218 n 9 (quoting RPC 1.2(a)). Just as Saunders weighed his options and decided he would rather take his chances at trial then spend more time negotiating a plea bargain, Mr. Ollivier weighed his options and decided he would rather take his chances with a timely trial rather than wait many months for a trial with counsel who might be better prepared. “[R]espect for a defendant’s freedom as a person mandates that he or she be permitted to make fundamental decisions about the course of the proceedings.” Frendak v. United States, 408 A.2d 364, 376 (D.C. 1979). Mr. Ollivier’s knowing and intelligent choice to proceed to trial with less preparation was precisely such a fundamental decision.

The State misstates Mr. Ollivier’s argument. Mr. Ollivier does not argue “any time a defense attorney requests a continuance in order to be adequately prepared for trial, and the defendant objects, there is a CrR 3.3 violation.” SRB at 27. To the contrary, Mr. Ollivier argues that when a defense attorney requests a continuance and the defendant objects, the court must not simply take counsel at her word. Instead, the court must carefully scrutinize the circumstances and context to ensure that the speedy trial right is respected.

2. PRETRIAL DELAY VIOLATED MR. OLLIVIER'S  
RIGHT TO A SPEEDY TRIAL UNDER THE  
WASHINGTON AND UNITED STATES  
CONSTITUTIONS.

As noted above, Mr. Ollivier did not agree to continuances on March 7, 2008 and November 7, 2008. The State is therefore incorrect in its calculation of the delay that should be considered. The only period which should be excluded is February 15, 2008 to March 7, 2008.

However, even if the State is correct on that point, the delay should not be considered as three separate periods of five, six, and four months. SRB at 32, 33. Instead, this Court should consider the cumulative delay – that is the number that actually represents the impact of the delay on Mr. Ollivier's constitutional right to a speedy trial.

Mr. Olliver argues the relevant period of time is 23 months – the time elapsed from arraignment to trial. In the alternative, the cumulative period could be 17 months (the total delay excluding the continuances agreed to by Mr. Ollivier). At a minimum, the cumulative period would be 15 months (if this Court finds Mr. Ollivier agreed to the continuances of May and November 2008). In any event, the time should be viewed as a single period of time. Dividing it into multiple periods is merely technical; the continuances added up to delay the single trial of a single defendant, with a cumulative burden on his constitutional rights.

While advancing various policy arguments, the State fails to answer the policy questions at the heart of this case. What options does an indigent defendant have, when his pretrial delay has gone far past the point of reasonableness and his public defender continues to request continuances over his objection? How strong is the speedy trial right, if it can be vindicated in such cases only by sacrificing the right to counsel? Who bears the responsibility when the heavy caseloads of public defenders chronically prevent them from bringing their clients to trial in a timely manner? If defense counsel's need to prepare for trial can always trump the defendant's objection, no matter how egregious the delay, what will motivate a reduction in public defenders' caseloads?

Mr. Ollivier's predicament illustrates that where a pretrial delay has become unreasonable, through no fault of the defendant himself, the court has a responsibility to ensure that the defendant's speedy trial right is protected. Whether that right is threatened by the State or defense counsel, the right belongs to the defendant and the ultimate responsibility for it lies with the court.

3. THE TRIAL COURT ERRED IN DENYING MR. OLLIVIER'S MOTION TO SUPPRESS THE EVIDENCE BASED ON THE OFFICERS' FAILURE TO SERVE HIM WITH THE SEARCH WARRANT.

It is clear that in executing the search warrant on Mr. Ollivier's apartment, the police officers failed to provide him with a copy of the warrant as required by CrR 2.3. The question is whether suppression is required because the violation was deliberate,<sup>1</sup> as the Ninth Circuit held in Gantt,<sup>2</sup> or whether Mr. Ollivier was required to show prejudice, as the trial court ruled.

The State again misstates Mr. Ollivier argument on this point. SRB at 68. Mr. Ollivier has not argued that Washington's constitution must be interpreted to provide greater protection than the Fourth Amendment in this context. That is not necessary. The point is that it cannot be less protective.

Under the Washington Constitution, it is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. Accordingly, a Gunwall analysis is unnecessary to establish that this court should

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<sup>1</sup> The trial court in this case found the violation deliberate. CP 230 (CL 4.d). The State splits hairs, arguing that the deliberateness in this case was not the "sort" of deliberateness contemplated by the Gantt Court; this contention is not supported by the plain language of Gantt. If the Ninth Circuit meant to require suppression based on a malicious or bad-faith violation of the rule, it would have said so.

<sup>2</sup> United States v. Gantt, 194 F.3d 987, 994 (9<sup>th</sup> Cir. 1999), overruled on other grounds by United States v. Grace, 526 F.3d 499 (9<sup>th</sup> Cir. 2008).

undertake an independent state constitutional analysis. The only relevant question is whether article I, section 7 affords enhanced protection in the particular context.

State v. Surge, 160 Wn.2d 65, 71, 156 P.3d 208 (2007). Whether or not article I, section 7 provides greater protection in this context than the Fourth Amendment does, it is beyond question that it cannot provide less. Under Gantt, suppression is required if the violation was deliberate, as it was here. Prejudice is not required. Under the trial court's and the State's interpretation of Aase,<sup>3</sup> both deliberateness and prejudice are required. CP 230 (FF 4 (a), (c)); SRB at 67-70.<sup>4</sup> But under that interpretation, the Fourth Amendment offers more protection to privacy rights than does article I, section 7. No Washington Court has ever made that ruling.

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<sup>3</sup> State v. Aase, 121 Wn.App. 558, 89 P.3d 721 (2004).

<sup>4</sup> As noted in the Opening Brief, that is not what Aase says. That opinion addressed only a situation where the violation was neither prejudicial nor deliberate; it did not answer whether, in another case, both would be required for suppression.

[Gantt], the Fourth Amendment, and Article I, section 7 do not compel suppression of evidence where a copy of the warrant and the items seized are not given to the defendant resident before commencing an otherwise lawful search. Even assuming [the police] "deliberately" violated CrR 2.3(d), Aase does not argue that he was prejudiced by the several-minute delay or that the search would have somehow been less intrusive had he been able to immediately see the warrant. Suppression is not required.

Aase, 121 Wn.App. at 567.

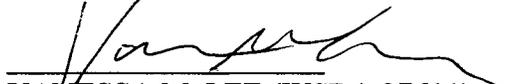
Because the trial court's ruling was illogical and clearly at odds with article I, section 7, it erred in denying the motion to suppress.

B. CONCLUSION.

As to all other assignments of error, Mr. Ollivier rests on the arguments submitted in his Opening Brief. For the reasons stated therein and above, Mr. Ollivier respectfully requests this Court dismiss his conviction with prejudice for the violation of his speedy trial rights. In the alternative, because of the multiple errors in the preparation, service, and execution of the search warrant, this Court should reverse the conviction and remand for further proceedings.

DATED this 4<sup>th</sup> day of October, 2010.

Respectfully submitted,



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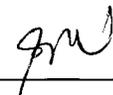
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STATE OF WASHINGTON  
2010 OCT -4 PH 5:00

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF OCTOBER, 2010.

X \_\_\_\_\_ 

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