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NO. 86633-3

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON OLLIVIER,

Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

ORIGINAL

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A. ISSUES

1. Is Ollivier barred from objecting to a time-for-trial continuance under CrR 3.3(f)(2) and under speedy trial principles where his lawyer asked for each continuance on his behalf?¹

2. Has Ollivier failed to establish a CrR 3.3 violation where he concedes that each continuance granted by the trial court was within the court's discretion?

3. Has Ollivier failed to establish a constitutional speedy trial claim where his lawyer repeatedly requested and was granted additional time to prepare for trial, and where Ollivier has never shown that counsel's requests were improper or that counsel was ineffective.

4. Has Ollivier failed to show that the trial court abused its discretion in denying a motion to suppress evidence where probable cause supported the search warrant even after misinformation was excised?

5. Did the trial court properly deny a motion to suppress evidence of child pornography found on Ollivier's computer pursuant to a search by police where officers posted a copy of the search warrant in

¹ The phrase "time for trial" will be used in this brief to refer to the requirements of CrR 3.3, whereas the term "speedy trial" will be used to refer to the constitutional requirement. Use of this terminology helps to distinguish between the related but distinct timeliness challenges. WASHINGTON COURTS TIME-FOR-TRIAL TASK FORCE, FINAL REPORT I.B at 3 n.1 (Oct.2002) (on file with Admin. Office of Courts), available at http://www.courts.wa.gov/programs_orgs/pos_tft/index.cfm?fa=pos_tft.report-Display&fileName=Index (last visited April 10, 2012).

Ollivier's apartment after the search, and he was not prejudiced by the fact that he was not shown the warrant before the search?

B. FACTS²

Ollivier was a registered sex offender living with two other sex offenders. One of his roommates, Anderson, was arrested for a community custody violation and told his probation officer that Ollivier was viewing child pornography on Ollivier's home computer. Detectives obtained a search warrant and found hundreds of images of child pornography on the computer.

There were lengthy delays in bringing Ollivier to trial. However, each postponement of trial was at the request of Ollivier's counsel in order to accomplish one of three things: a) obtain a forensic expert to analyze the computer on which child pornography was found; b) obtain records from the Department of Corrections relevant to Ollivier's roommates, in order to establish that the roommates were other suspects, or to impeach them; c) obtain employment records relevant to the sheriff's detective who was the affiant of the search warrant for Ollivier's computer, in order to support a claim that the detective lied in her affidavit. Ollivier personally

² The facts of Ollivier's crime and the facts related to his timeliness claims were fully described in the State's Court of Appeals brief. *See* Br. of Respondent at 2-8 (crime), 10-21 (claim of pretrial delay). Additional facts regarding execution of the search warrant are set forth, *infra*, at 17.

objected to most, but not all, of these continuances. The trial courts granted defense counsel's requests. Ultimately, Ollivier was tried and convicted.

On appeal, Ollivier challenged the delay in bringing him to trial and the search of his apartment. The Court of Appeals held, *inter alia*, that 1) there was no CrR 3.3 violation because Ollivier agreed that each continuance was within the court's discretion and "the risk of going to trial without the requested information, for which defense counsel was waiting, far outweighed any delay in going to trial"; 2) constitutional speedy trial rights were not violated because Ollivier had not shown prejudice to his defense and "the continuances were all requested by defense counsel who asserted that she was not prepared to go to trial without the necessary information"; 3) the warrant was supported by probable cause; and 4) Ollivier had not shown prejudice from failure to give him a copy of the warrant before the search was executed. State v. Ollivier, 161 Wn. App. 307, 254 P.3d 883 (2011).

This Court granted Ollivier's petition for review. State v. Ollivier, 173 Wn.2d 1014 (2012).

C. ARGUMENT

Ollivier's first two arguments focus on the delay in bringing him to trial. These arguments should be rejected. Under both CrR 3.3 and a

constitutional analysis, the decision whether to seek a continuance is for counsel — not the defendant. By allowing the defendant to "object" to a continuance sought by counsel, the two can "double team" the court, creating a situation in which any ruling the court makes can be challenged. The trial court justifiably relied on counsel's assertions that continuances were essential to an effective defense. The propriety of those rulings cannot be undermined unless it is shown that trial counsel was ineffective.

Ollivier also petitioned this Court to review two aspects of the Court of Appeals' search and seizure holdings. He challenges the holding that probable cause existed even if material misstatements in the affidavit are excised from the warrant, and the holding that evidence need not be suppressed based simply on the fact that the warrant was not shown to him before officers searched. The State relies primarily on its briefing in the Court of Appeals as to the probable cause argument. Br. of Resp. at 41-51.

As to the method of delivering the warrant to Ollivier, the State argues that posting the warrant in a conspicuous place in his apartment satisfies CrR 2.3, that the rule does not require that officers place the warrant in Ollivier's hands before the search is conducted, and that, in any event, suppression is required under CrR 2.3 only if Ollivier can show prejudice or a deliberate intent to violate the rule. He can show neither.

1. OLLIVIER'S LAWYER NEEDED MORE TIME TO PREPARE FOR TRIAL; THE TRIAL COURT'S DECISION TO GRANT SUCH TIME SHOULD NOT BE OVERTURNED ABSENT A SHOWING THAT COUNSEL WAS INEFFECTIVE.

Ollivier argues that his conviction should be reversed and the case dismissed because it took too long to bring him to trial. He argues that because he personally objected, "his attorney's requests for more time cannot be attributed to him." Pet. for Review at 8. These arguments must be rejected. Delay requested by Ollivier's lawyer is attributed to Ollivier under either CrR 3.3 or a constitutional analysis. If a defendant is dissatisfied with counsel's requests for a continuance, he can move to substitute counsel on the basis that counsel is ineffective, but he cannot prevail on appeal based simply on the fact that he disagreed with his lawyer's tactics.

- a. The Time-For-Trial Rule Was Not Violated.³

CrR 3.3(f)(2) provides that "the bringing of . . . [a motion to continue the trial date] by or *on behalf* of any party waives that party's objection to the requested delay." (Italics added.) Thus, when the

³ This claim was addressed at length by the State below and each of those arguments will not be repeated here. Br. of Resp. at 10-28.

defendant's lawyer seeks a continuance of trial, his motion forecloses a rule-based challenge to the granting of the continuance.

The waiver provision of CrR 3.3(f)(2) was adopted as part of the 2003 amendments to the time-for-trial rules. Prior to that amendment, courts did sometimes consider defendants' objections to continuances that were requested by their attorneys. *See, e.g., State v. Campbell*, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). Under this procedure, defendants and their attorneys could "double team" the court by taking opposing positions. Regardless of which way the court ruled, its decision could be challenged on appeal. The 2003 amendment eliminated the ability of the defense to set up trial courts in this manner.

This amendment reflects the ordinary rules governing the attorney-client relationship. "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued." RPC 1.2(a). "[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." *Faretta v. California*, 422 U.S. 806, 820, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). "A person who chooses to be represented by counsel has no constitutional

right to personally conduct his defense.” State v. Blanchley, 75 Wn.2d 926, 938, 454 P.2d 841 (1969), *cert. denied*, 396 U.S. 1045 (1970).

CrR 3.3(f)(2) embodies these principles. The timing of trial does not implicate the objectives of representation, but only the means of achieving those objectives. The choice of means is properly a matter for counsel to decide. The rule allocates to counsel the authority to make a binding decision to seek a continuance. Since the defendant chose to be represented by counsel, he has no constitutional right to object to that decision.

Ollivier nevertheless claims that the trial court erred in failing to weigh "the sheer number of continuances" against the "superficially permissible" reasons offered by his attorney. Pet. for Rev. at 12. CrR 3.3 does not require any such weighing of the client's wishes against the lawyer's tactics. Nor does the rule establish a ceiling on the time counsel might need to prepare for trial. The rule does provide, however, that "no case shall be dismissed for time-to-trial reasons except as expressly required by [CrR 3.3], a statute, or the state or federal constitution." CrR 3.3(h). Ollivier's arguments are foreclosed by the rule.

Neither State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009), nor State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009), requires a different result. Saunders involved numerous continuances

requested by the State and acquiesced in by Saunders' counsel. The court did not discuss CrR 3.3(f)(2). Moreover, the continuances were granted to permit plea negotiations, even though Saunders had instructed his lawyer that he would not plead guilty. Whether to plead guilty is an objective of representation, not simply a means. In seeking to achieve an objective that Saunders had rejected, his lawyer violated RPC 1.2(a). Saunders, 153 Wn. App. at 218 n.9. In this case, there is no indication that trial counsel ignored Ollivier's objectives; Ollivier simply disagreed with counsel as to the means to achieve those objectives.

Ollivier argues that continuances may not be granted "without documenting, on the record or in writing, the reason for the continuance and the prejudice caused by delay." Pet. for Review at 11 (citing Saunders and Kenyon). Kenyon dealt with continuances granted in the administration of justice where the court did not sufficiently explain why judges were unavailable.⁴ Here, each continuance was requested by defense counsel, carefully weighed by the trial judges, and each judge explained his or her ruling.

In short, because Ollivier concedes that "any of the continuances, standing alone, would not be an abuse of discretion," Br. of App. at 20,

⁴ The State discusses these cases more fully in its Court of Appeals briefing. Br. of Resp. at 25-27.

because CrR 3.3(f) does not permit a challenge to a motion brought by defense counsel, and because CrR 3.3 does not cap the preparation time that counsel may request to ensure competent representation, Ollivier's rule-based arguments must be rejected.

b. Speedy Trial Rights Were Not Violated.

Article I, section 22 of the Washington Constitution provides that “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial.” The Sixth Amendment similarly provides that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. “[A]rticle I, section 22 requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights.” State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). The Sixth Amendment analysis requires consideration of four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). These factors become relevant if there is a period of unusual delay that gives rise to a presumption of prejudice. Iniguez, 167 Wn.2d at 290. The State agreed below that the 23 months required to bring this case to trial was presumptively prejudicial, and that the Barker factors should be addressed.

Ollivier argues that defense counsel's requests for continuances do not override the defendant's personal requests to be tried without delay. He fails to cite any authority for this proposition, however, because the rule is just the opposite.

A defendant's attorney is his agent and the defendant is bound by his agent's choices. Coleman v. Thompson, 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); Rivers v. Wash. State Conf. of Mason Contrs., 145 Wn.2d 674, 679, 41 P.3d 1175 (2002) (“Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity.”); RCW 2.44.010 (a client is bound by his attorney’s actions that are taken in open court). The lawyer decides strategic matters, whereas the client may choose how to plead, whether to testify, and the overall aims of the litigation. State v. Cross, 156 Wn.2d 580, 606-08, 132 P.3d 80 (2006).

Consistent with these principles, a lawyer may waive speedy trial rights of her client when waiver is necessary to adequately prepare. Vermont v. Brillon, ___ U.S. ___, 129 S. Ct. 1283, 1290-91, 173 L. Ed. 2d 231 (2009) (delay caused by defense counsel request counts against the defendant in the Barker analysis); State v. Campbell, 103 Wn.2d 1, 691

P.2d 929 (1984); State v. Franulovich, 18 Wn. App. 290, 567 P.2d 264 (1977); State v. Thomas, 95 Wn. App. 730, 738, 976 P.2d 1264 (1999).⁵

Thus, a challenge to defense counsel's waiver is essentially an allegation of ineffective assistance of counsel. Such a claim cannot ordinarily be established in a direct appeal because there is a strong presumption that counsel is competent, and numerous relevant facts – including communication between counsel and client – are missing from the record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).⁶

Here, counsel's investigation began with an expert forensic analysis of the computer, although this analysis ultimately was not used at trial. Her later efforts produced "a stack about a foot high of documents" that she used in an effort to suppress the key computer evidence. CP 32-

⁵ Many other states agree. See State v. McHenry, 268 Neb. 219, 231-32, 682 N.W.2d 212, 224 (2004); Townsend v. Superior Court, 15 Cal.3d 774, 543 P.2d 619, 126 Cal.Rptr. 251 (1975) (defendant was bound by counsel's requested continuances because heavy caseload impeded trial preparation); State v. LeFlore, 308 N.W.2d 39 (Iowa 1981) (statutory right to speedy trial is not personal; counsel may request continuance over defendant's objection when counsel is unprepared for trial); State v. Ward, 227 Kan. 663, 608 P.2d 1351 (1980) (trial preparation is strategic decision; defense counsel's continuances extended statutory period for trial despite defendant's objections); State v. McBreen, 54 Ohio St.2d 315, 376 N.E.2d 593 (1978) (defense counsel had authority to waive statutory time for trial to prepare even without defendant's consent).

⁶ Trial counsel has been admitted to the Washington bar for 26 years. It is wholly reasonable for the trial court to presume that she was competent. http://www.mywsba.org/default.aspx?tabid=178&Redirect-TabId=177&Usr_ID=16449 (last accessed Apr. 9, 2012).

36; 2RP 6; 3RP 9-19.⁷ She persuaded the trial court that omissions from the warrant were deliberate. CP 234. And, she developed evidence of computer training for Anderson, the State's key witness, that suggested he could have downloaded the child pornography to Ollivier's computer. 7RP 24-27.

Three separate judges found at various points that counsel's requests were reasonable and necessary. *See, e.g.*, 1RP 25 (Judge Robinson -- "This [expert review of the computer] is important work that needs to be done in terms of preparation of your defense."); 1RP 53 (Judge Gain -- "I'm satisfied that there is good cause and this matter is not ready."); 2RP 10 (Judge Fleck -- noting the "complexity of the issues that still are not fully ready to be heard, that a continuance is required in the administration of justice" and that "Ms. Thomas [is] finalizing her investigation.").⁸

The effort to uncover records of the search warrant affiant's dishonesty was central to counsel's Franks motion and he continues to

⁷ Forensic computer analysis is a complex and tedious process akin to finding needles in haystacks, especially when multiple users are alleged. *See generally* U.S. Department of Justice, Office of Justice Programs. National Institute of Justice, Special Report: "Forensic Examination of Digital Evidence: A Guide for Law Enforcement," April 2004 NCJ # 199408, available at <https://www.ncjrs.gov/pdffiles1/nij/199408.pdf> (last accessed Apr. 11, 2012).

⁸ Ollivier has not assigned error to any of these findings; they are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

argue that issue to this Court. There is nothing in the record to suggest that the detective's termination from employment should have been discovered earlier, or that the records could have been obtained faster.⁹ Thus, there is nothing in this record to overcome the strong presumption of counsel's competence. See State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Based on this record, it cannot be said that counsel was deficient or that any deficiency resulted in prejudice to Ollivier's ability to defend.

c. The Existing Rule Is Based On Sound Principles.

The rule that delay requested by competent counsel must be attributed to the defendant is based on sound principles. First, trial judges cannot choose ad hoc whether to grant the defendant's request over the lawyer's. Defendants are often understandably frustrated with pretrial delay, but that frustration could cause them to inflict blind yet fatal wounds on their own defense. Counsel is appointed to prevent such self-inflicted harm. Second, even if the court wanted to second-guess defense counsel, the court would be in an exceedingly poor position to do so, since it is not privy to defense counsel's information. Third, even if the court

⁹ It appears that counsel discovered this issue in early September, 2008. 1RP 48-50. "A large stack" of records was received in early November, 2008. 1RP 55-60. Vacations, the holidays, other trials, and inclement weather delayed the start of trial until early March. Br. of Resp. at 19-21.

could know everything that defense counsel knew, a detailed inquiry into pretrial strategy could unfairly expose that strategy to the defendant's detriment. Fourth, a trial court forced to choose between the defendant's wishes and the lawyer's request runs the risk of interfering with the attorney-client relationship. Fifth, even if the trial court believed that counsel should have moved faster in identifying an issue or investigating the case, forcing the case to trial when counsel was not prepared would simply exacerbate the problem; the defendant, if convicted, would surely claim ineffective assistance of counsel on appeal, and might well prevail. Finally, a rule that gave the defendant veto power over his lawyer's continuance requests might encourage delay tactics, which would cause judges to be unfairly skeptical of trial counsel's requests. *See Vermont v. Brillon*, 129 S. Ct. at 1291.

For all these reasons, it makes sense to preserve the rule that defense counsel can ask for additional time to prepare for trial, even over the defendant's objections. If a defendant can establish that his lawyer's performance falls below professional norms, he can seek to have the lawyer removed, or he can obtain relief after trial by personal restraint petition.

Finally, if this court considers Ollivier's speedy trial arguments, it should carefully scrutinize his claim that his trial was unjustifiably

"delayed" 23 months. Br. of Resp. at 31-32. The length of delay and reasons for delay are not as Ollivier claims. He personally agreed to a number of continuances, and the time spent to obtain King County records about the detective's dishonest activities surely cannot be termed an unjustified delay, especially when Ollivier continues to pursue the search argument in this Court. He should not be allowed to complain that his lawyer developed a factual basis for the claim over his objection, while simultaneously relying on the facts adduced by the investigation in order to advance his arguments. The delays he agreed to or that are attributable to legitimate investigation into the search claim amount to approximately 15 months. Appendix A.

2. PROBABLE CAUSE EXISTED TO BELIEVE THAT CHILD PORNOGRAPHY WOULD BE FOUND ON OLLIVIER'S COMPUTER.

Ollivier argues that, if material misstatements are excised from the search warrant, probable cause is lacking because the informant lacked veracity. Pet. for Rev. at 13-14. This argument was fully addressed in the Court of Appeals briefing. Br. of Resp. at 48-54. *See also* State's Response to Appellant Olivier's Motion to Reconsider, at 6-12. Due to space limits, the State will not repeat those arguments in this brief.

Ollivier renews his arguments, however, claiming that the Court of Appeals made factual and legal errors. His arguments should be rejected.

Ollivier correctly notes that the Court of Appeals decision contains two factual inaccuracies, but the errors are immaterial. The Court of Appeals said that Anderson provided a written statement to his community corrections officer (CCO). In fact, Anderson gave an oral statement to the CCO who then reduced it to a written report. CP 75. Second, Detective Saario did not interview Ollivier after learning of Anderson's allegations, as the Court of Appeals said. Instead, as the warrant application makes clear, she took a tape-recorded statement from Anderson himself. CP 23. However, neither of these errors affects the probable cause determination; the point is that Det. Saario was fully aware of Anderson's allegations when she presented the warrant.

As for the probable cause showing, Ollivier primarily argues that the trial court should have excised Anderson's statements because he was not credible. As argued in the Court of Appeals, Ollivier's argument ignores relevant search and seizure law. Br. of Resp. at 48-54.

Also, Ollivier confuses probable cause to search with proof that he was guilty of this crime. Possession of child pornography is illegal. To obtain a warrant to search Ollivier's computer, the State needed only to establish probable cause to believe that child pornography was on the computer. Whether Ollivier was guilty of *putting* that information on the computer was a separate issue. Ollivier's attacks on Anderson's veracity

are directed to the claim that Ollivier was responsible for putting the pornography on the computer, not to the claim that child pornography was on the computer.

Still, Anderson's conduct strongly supported his veracity as to the existence of the pornography and as to its origins. Anderson told detectives that he had first-hand information that child pornography was on Ollivier's computer and that Ollivier had viewed that material. If Anderson was lying to detectives, his lie would have been quickly and readily discovered, and any attempt to curry favor with the CCO would likely have failed. Additionally, providing information about child pornography on a computer he had access to placed Anderson in jeopardy. Anderson would be unlikely to falsely put detectives on a path that could hurt him. A reasonable magistrate could conclude that these facts were sufficient to satisfy the veracity requirement under search warrant law.

3. FAILURE TO PRESENT OLLIVIER WITH A COPY OF THE SEARCH WARRANT IS NOT A BASIS TO INVALIDATE THE SEARCH.

Ollivier claims child pornography found on his computer should be suppressed because officers did not present him with a copy of the warrant before they arrested him. His argument should be rejected. Neither the court rule nor the constitution requires presentation of a warrant *before* the warrant is served.

The relevant facts are these. Detectives obtained a warrant to search for child pornography on Ollivier's computers. CP 20-28 (warrant and return); CP 287-88 (Findings 1a-1c). Upon serving the warrant, detectives knocked, and after a slight delay, Ollivier responded and opened the door. He was immediately handcuffed, taken into custody, and read his Miranda warnings. CP 228 (Findings 1g-1h). Ollivier sat outside the apartment in a chair for the first hour and a half, then he was moved to the backseat of a patrol car for a second hour and a half. CP 228 (Finding 1i). Toward the end of the search, Ollivier was brought upstairs again and seated just outside the door to the apartment; he was not handcuffed. CP 228 (Finding 1j). He could not watch as the search was conducted. CP 229 (Finding 1k).

As to whether Ollivier was given a copy of the warrant, the court made the following findings. Although the detectives "did not hand the defendant a copy of the warrant," he was not arrested, and "[a] copy of the warrant and inventory were taped on a bookcase and within plain view when the officers left." CP 229 (Findings 1k-1n). Ollivier "probably expressed an interest in being shown a copy of the search warrant" and "[he] probably was shown a copy of the warrant." CP 229 (Finding 3a). The trial court found both the detectives and Ollivier to be credible witnesses. CP 230 (3a-3b). The court also found that "not giving the

defendant a copy of the warrant was deliberate, not in a malicious sense, but because the officers did not understand the court rule and the procedural requirements." CP 230 (Conclusion 4d).¹⁰ Hundreds or thousands of child pornography images were found on the computer. CP 228 (Finding 1d).

a. CrR 2.3 Does Not Require That A Warrant Be Shown Before The Search.

Ollivier argues that CrR 2.3(d) requires officers to present a search warrant before it is executed. That argument should be rejected, as no such requirement exists under Washington law.

Court rules are to be interpreted like statutes; the plain language of the rule should control. State v. Chhom, 162 Wn.2d 451, 472, 173 P.3d 234 (2007). The plain language of CrR 2.3 does not demand that a warrant be shown to the suspect before the warrant is executed. Subsection (d) is entitled "Execution and Return With Inventory," and it provides in pertinent part:

The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt.

¹⁰ Although listed as a conclusion of law, this is more properly characterized as a finding of fact as to the detectives' state of mind.

CrR 2.3(d).¹¹ The plain language of this rule does not require that a copy of the warrant be shown to a suspect before the warrant is executed. At most, this rule provides that a copy shall be "give[n] to the person from whose premises the property is taken" if an officer is "taking property." Officers will not know whether they are taking property until the premises have been searched and targeted property has been identified and seized. Thus, the plain language of the rule does not give officers notice that a warrant must be shown to the suspect before a search is commenced.¹²

Nor does the Constitution require that a warrant be shown to a suspect before the warrant is executed. Groh v. Ramirez, 540 U.S. 551, 562 n.5, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) ("neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search."). Moreover, "the prevailing view in state and federal cases is that such exhibiting or delivering need be done only prior to post-search departure by the police, so that police advised that a search

¹¹ A comparable federal rule provides that "[t]he officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the warrant and receipt at the place where the officer took the property." Fed.R.Crim.P. 41(f)(3).

¹² The face of the search warrant says the warrant must be given to the suspect or posted at the premises searched, but it does not require that it be shown before the premises are searched. CP 63.

warrant has issued need not have it with them at the outset." 2 W. LaFave, Search & Seizure § 4.12 (4th ed.).

This Court has never directly addressed this issue. In State v. Aase, 121 Wn. App. 558, 89 P.3d 721 (2004), however, the Court of Appeals appears to have assumed that a warrant must be delivered before it is executed. It held, however, that the failure to adhere to the requirement was not significant, and that giving a copy to the defendant within minutes of the start of the search was substantial compliance. Aase, 121 Wn. App. at 566.¹³

b. Suppression Of Evidence Is Required Only If Officers Knowingly And Deliberately Violated The Rule.

Even if this Court were to find a rule-based requirement that warrants be shown to a defendant before being executed, suppression of the child pornography is not required unless Ollivier can show prejudice. Most courts consider the requirement to deliver a copy of the warrant to be ministerial, and suppression is deemed appropriate only if the defendant

¹³ The cases upon which Ollivier relies are not controlling. In State v. Ettenhofer, 119 Wn. App. 300, 79 P.3d 478 (2003), police obtained telephonic permission to search but wholly failed to reduce the affidavit or the warrant to written form. In this case, of course, the police obtained and produced a written warrant for Ollivier's inspection. Ollivier also relies on United States v. Gantt, 194 F.3d 987 (9th Cir. 1999), *overruled on other grounds by United States v. Grace*, 526 F.3d 499 (9th Cir 2008) (en banc). But even the Ninth Circuit has recognized the minimal precedential value of Gantt. United States v. Mann, 389 F.3d 869, 875 n.1 (9th Cir. 2004) ("dicta in ... Groh ... casts serious doubt both on our interpretation of Rule 41 and our reasoning in Gantt").

can show prejudice. "Prejudice" in this context means that "the search would not have occurred or would not have been so abrasive if law enforcement had followed the Rule." United States v. Williamson, 439 F.3d 1125, 1133 (9th Cir. 2006); State v. Kern, 81 Wn. App. 308, 311, 914 P.2d 114 (1996); State v. Wible, 113 Wn. App. 18, 25, 51 P.3d 830 (2002) ("[A] ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown."); City of Tacoma v. Mundell, 6 Wn. App. 673, 677-78, 495 P.2d 682, 686 (1972) ("Although it would have been better if defendant had been served personally with a copy of the search warrant pursuant to RCW 69.33.430, it was not reversible error to place the warrant in defendant's property box, as he received the warrant the next day, upon his release from jail on bail."). In the Ninth Circuit, suppression may also be appropriate if officers acted in "intentional and deliberate disregard" of the rule. United States v. Martinez-Garcia, 397 F.3d 1205, 1213 (9th Cir.), *cert. denied*, 546 U.S. 901 (2005).

Ollivier has not established prejudice, and nothing in this record shows that the detectives who executed the warrant intentionally or deliberately disregarded the relevant rule. The trial court explicitly found that the officers were not aware of any requirement that the warrant be delivered before the search was conducted. CP 230 (Conclusion 4d).

Moreover, Ollivier has failed to show any prejudice. This argument should be rejected.

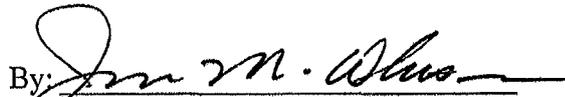
D. CONCLUSION

For the foregoing reasons, this Court should affirm Ollivier's conviction for Possession of Depictions of Minors.

DATED this 12th day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Periods of agreed continuance and
time related to investigating factual basis for search challenge

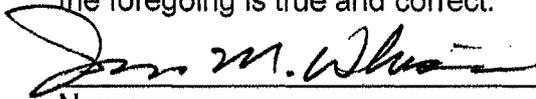
Dates	Approximate length of Time	Reason for excluding	Cites
April 18, 2007 - September 20, 2007	5 months	Ollivier never objected during this period and he expressly agreed his lawyer needed to seek forensic computer expert to prepare for trial	1RP 7-9; CP 267
February 15, 2008 - March 19, 2008	1 month	No objection to attempts to obtain records from DOC regarding "other suspect" evidence	1RP 39; CP 281
March 7, 2008 - May 6, 2008	2 months	No objection to attempts to obtain records from DOC	1RP 41-42; CP 282
September 5, 2008 - March 9, 2009	7 months	Obtaining and deciphering records regarding affiant for search warrant	1RP 50-end 2RP 2-19

APPENDIX A

Certificate of Service by Electronic Mail

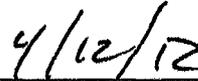
Today I directed electronic mail addressed to the attorneys for the petitioner, Nancy Collins @ nancy@washapp.org, containing a copy of the Respondents Supplemental Brief, in STATE V. BRANDON OLLIVIER, Cause No. 86633-3, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington



Date 4/12/12

OFFICE RECEPTIONIST, CLERK

To: Whisman, Jim
Subject: RE: State v. Ollivier, No. 86633-3

Rec. 4-12-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Whisman, Jim [<mailto:Jim.Whisman@kingcounty.gov>]
Sent: Thursday, April 12, 2012 4:42 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: State v. Ollivier, No. 86633-3

Dear Supreme Court Clerk,

Attached for filing is a supplemental brief in the above case.

Please let me know if there is any difficulty with this filing.

Sincerely,

James M. Whisman, WSBA 19109
Senior Deputy Prosecuting Attorney
Appellate Unit
King County Prosecuting Attorney's Office
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
206-296-9660

OFFICE RECEPTIONIST, CLERK

From: Whisman, Jim [Jim.Whisman@kingcounty.gov]
Sent: Thursday, April 12, 2012 4:44 PM
To: Nancy Collins (nancy@washapp.org); OFFICE RECEPTIONIST, CLERK
Subject: FW: State v. Ollivier, No. 86633-3
Attachments: Ollivier Supp Brief.pdf

Resent with cc to defense counsel.

From: Whisman, Jim
Sent: Thursday, April 12, 2012 4:42 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: State v. Ollivier, No. 86633-3

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