

04969-8

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NO. 64969-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SCOTT INGRAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN
THE HONORABLE CHERYL B. CAREY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DOUGLAS K. YOUNG
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

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A. ISSUE PRESENTED

When substantial evidence supports the lower court's findings that support the conclusion that CrR 3.3 was not violated, should the conviction be affirmed?

B. STATEMENT OF THE CASE

PROCEDURAL AND SUBSTANTIVE FACTS

Based on an incident which occurred on September 5, 2009, Robert Scott Ingram was charged by Information on September 10, 2009, with the crime of Theft of Motor Vehicle (RCW 9A.56.065). CP 1-4.

On October 7, 2009, the defendant submitted a signed "Order on Case Scheduling or Status Conference and Waiver of Speedy Trial" that continued the case scheduling hearing to October 27, 2009. Portions of this order, but not the speedy trial waiver section, were stricken. With a new commencement date of October 27, 2009, the speedy trial expiration date was recalculated to be December 25, 2009, for this in-custody defendant. CP 133 - 135.

On October 28, 2009, the originally appointed counsel, Amy Parker of the Associated Counsel for the Accused (ACA), was

discharged. 10/28/2009 RP; CP 136. On November 4, 2009, Scott Schmidt of the Society of Counsel Representing Accused Persons (SCRAP) was confirmed as new counsel but was discharged the following day. CP 137 - 38. Mr. Schmidt's Notice of Withdrawal indicated that the withdrawal was necessary due to a "conflict of interest or other reason mandating withdrawal." CP 139. On November 20, 2009, the court denied several of the defendant's motions, including one to discharge his third appointed attorney, Mark Bradley of The Defender Association (TDA). CP 6; 11/20/2009 RP. At this hearing, the defendant reminded the court of his reasons for previously demanding new counsel. 11/20/2009 RP 10-12.

On November 24, 2009, a trial date of December 23, 2009, was taken. CP 140 - 42. On December 16, 2009, Judge Brian Gain denied the defendant's motion to dismiss for violation of CrR 3.3 and entered an "Order Denying Defendant's Motion to Dismiss and Resetting the Commencement Date." Orally and in the order, the court gave three reasons for denying the defendant's motion. CP 130- 131; 12/16/2009 RP.

A jury trial commencing on January 4, 2010, was conducted before Judge Cheryl B. Carey, and the defendant was convicted as

charged on January 7, 2010. CP 30; 01/04/2010 RP. At the commencement of the trial, the court held a hearing pursuant to CrR 3.5 at which the defendant testified, and the court reached the explicit and somewhat unusual conclusion that the defendant was not credible, noting that he had given conflicting testimony during the hearing and had previously been convicted of crimes of dishonesty. CP 129.

The defendant appealed his convictions. CP 132.

Additional pertinent facts are included in the argument sections to which they pertain.

C. **ARGUMENT**

THERE WAS NO VIOLATION OF CrR 3.3.

The defendant argues that CrR 3.3 was violated because the time for trial expired before the defendant was brought to trial. The defendant argues that the findings made by Judge Brian Gain on December 16, 2009, are not supported by substantial evidence and therefore the judge's legal conclusion that CrR 3.3 was not violated is erroneous. But the record below is clear. First, on October 7, 2009, the defendant provided the court with a signed order waiving

his speedy trial rights, resetting the commencement date pursuant to CrR 3.3(c)(2)(i). CP 133 - 135. Second, on October 28, 2009, and again on November 5, 2009, the court granted the defendant's request for new counsel, resetting the commencement date pursuant to CrR 3.3(c)(2)(vii). CP 136 - 139. Each of these events served to reset the commencement date so that CrR 3.3 was not violated. Ingram's arguments to the contrary have no merit.

An in-custody defendant shall be brought to trial within 60 days after the commencement date. CrR 3.3(b)(1). Failure to bring a defendant to trial within the time limits prescribed by CrR 3.3 will result in a dismissal with prejudice. CrR 3.3(h); State v. Saunders, 153 Wash.App 209, 217, 220 P.3d 1238 (2009). The commencement date can be reset by a number of events, one of which is a waiver (CrR 3.3(c)(2)(i)) and one of which is disqualification of counsel (CrR 3.3(c)(2)(vii)). CrR 3.3; Saunders, 153 Wash.App. at 217.

When a trial court has weighed the evidence, the review of the trial court's findings and conclusions is limited to whether substantial evidence supports the findings and to whether the conclusions are supported by those findings. Ridgeview Properties v. Starbuck, 96 Wash.2d 716, 719, 638 P.2d 1231 (1982).

Mislabeled findings and conclusions are reviewed in accordance with what they truly are. Willener v. Sweeting, 107 Wash.2d 388, 394, 730 P.2d 45 (1986).

The defendant initially argues that he did not sign the waiver dated October 7, 2009 (CP 133 - 135) as required by CrR 3.3(c)(2)(i), but this is not accurate. On the first page (CP 133) of this three-page order, listed are a new commencement date, a new status conference date, and the calculated 60- and 90-day speedy trial expiration dates. The waiver section on that page is not stricken but instead contains the new commencement and speedy trial expiration dates; the defendant's attorney has signed directly under this section but the defendant's signature line is blank. Page two (CP 134) of this order has almost every section crossed out. Page three (CP 135) of the order has two sections checked but most sections left blank, and the defendant's signature is found at the bottom of the order, along with his attorney's signature, the deputy prosecutor's signature, and the judge's signature.

CrR 3.3(c)(2)(i) does not provide any sort of guidance as to the format of the waiver; required only is the defendant's signature. The required location of this signature is not defined by the rule. The form used in this case was a combination of waiver and

scheduling order. Some sections were checked, some sections were crossed out, but the new commencement date and speedy trial dates were noted in both the scheduling section and the waiver section on the first page. The defendant signed this waiver and order document on the third page. CP 133 - 135.

In sharp contrast to the document filed on October 7, 2009 (CP 133 - 135) is the same three-page order submitted on November 24, 2009 (CP 140 - 142). As before, some sections are checked and some stricken, but of note is the specific striking of the waiver language on the first page. The defendant has signed on the first page (CP 140) but not on the third page (CP 142). His attorney has signed on both pages.

The defendant cites State v. Carson, 128 Wash.2d 805, 812, 912 P.2d 1016 (1996), for the proposition that a court rule's language is given its plain meaning under principles of construction. CrR 3.3(c)(2)(i) plainly requires a defendant's signature, but is silent as to where that signature is found. The defendant now asserts that because he did not sign the October 7th document in two places, the waiver is invalid. This argument was advanced by the defendant on December 16, 2009 (12/16/2009 RP at 7), and was rejected by Judge Gain who found that the defendant intended that

document to act as a waiver of his speedy trial rights. 12/16/2009
RP at 8; CP 130- 131.

The defendant next argues that the discharge of his attorneys was in error and not based on a disqualification. The defendant cites State v. Stenson, 132 Wash.2d 668, 940 P.2d 1239 (1997) (Stenson I), for the proposition that the defendant must show good cause, such as a conflict of interest, an irreconcilable conflict, or a complete communications breakdown, to warrant substitution. The decision whether a defendant's claim has merit and whether a new appointment is justified lies within the discretion of the trial court. Id. at 733 - 34. This reflects the general standard articulated by CrR 3.1(e). In In Re Personal Restraint of Stenson, 142 Wash.2d 710, 723-24, 16 P.3d 1 (2001) (Stenson II), the court articulated a new three-part test for this inquiry: (1) extent of the conflict, (2) adequacy of the inquiry, and (3) timeliness of the motion. Id.

At the hearing on October 28, 2009, the defendant told Judge Gain (1) that there had been a "communication breakdown" between him and Ms. Parker, and (2) that he did not "feel secure going to trial with this person." 10-28-2009 RP at 2. As a result of these arguments, Ms. Parker was discharged as the defendant's

attorney. CP 136. The defendant has misread the record of this hearing when he now argues that his sole reason to replace Ms. Parker was a loss of trust. Brief of Appellant at 10. Two reasons were articulated by the defendant at the hearing.

Additionally, at the hearing on November 5, 2009, the defendant moved for discharge of his newly appointed second attorney Scott Schmidt, and his motion was granted by Judge Gain. CP 137, 138. In Mr. Schmidt's Notice of Withdrawal, he indicates that withdrawal was necessary because of "a conflict of interest or other reason mandating withdrawal under the RPC" CP 139.

Regarding both disqualifications, the defendant himself provided additional information, at a hearing on November 20, 2009, as to why he had wanted both counsel removed. The defendant stated, regarding Ms. Parker, that they had engaged in a heated argument, that their communication was not pleasant, and that there was a communication barrier. Regarding Mr. Schmidt, the defendant alleged that Mr. Schmidt had previously turned over information to the prosecution that was confidential in nature. 11/20/2009 RP at 10-11.

Using all of the above, the requirements of Stenson I are met: Ms. Parker was disqualified due to a communication

breakdown, and Mr. Schmidt was disqualified for a conflict of interest. Stenson II's three-part test is similarly met: the extent of the conflict is great, the court inquired as to the reasons and received adequate and sufficient answers, and the requested disqualifications occurred well before a trial date was set, allowing sufficient time for new counsel to be ready for trial. Judge Gain exercised appropriate discretion in allowing the two discharges of counsel.

At the hearing on December 16, 2009, Judge Gain found that each of these two discharges of counsel acted to reset the commencement date in accordance with CrR 3.3(c)(2)(vii). The court further held that November 5, 2009, the date of the last discharge of counsel, was the correct commencement date and calculated that the speedy trial expiration date was therefore January 4, 2010. 12/16/2009 RP at 8 - 11; CP 130- 131.

The trial court relied on substantial evidence in reaching its findings that the defendant intended to waive his speedy trial rights under CrR 3.3 in the order entered on October 7, 2009, and that the two disqualifications of counsel acted to reset the commencement date for the purposes of computing speedy trial expiration under

CrR 3.3. The court correctly concluded that the correct date for speedy trial expiration was January 4, 2010.

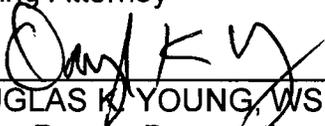
D. CONCLUSION

Mr. Ingram's right to a speedy trial was not violated in the trial court below. He initially waived his right to a speedy trial by agreeing to a new commencement date. He subsequently demanded new counsel on three occasions, two of which were granted, and the resulting disqualifications of counsel reset the commencement date as well. The trial court recognized this posture of the case and entered an order detailing these reasons. Substantial evidence supported the trial court's findings.

The defendant's argument should be rejected, and his conviction should be affirmed.

DATED this 22nd day of February, 2011.

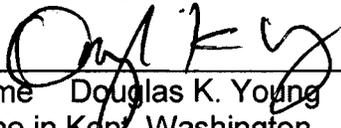
RESPECTFULLY submitted,
DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
DOUGLAS K. YOUNG, WSBA 23586
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service

Today I personally served on the offices of Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington 98101, a true and correct copy of the Brief of Respondent in STATE V. ROBERT SCOTT INGRAM, Cause No. 64969-8-I, in the Court of Appeals, Division I, 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 Douglas K. Young
Done in Kent, Washington

2/22/2011
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