

FILED
JAN 13, 2016
Court of Appeals
Division III
State of Washington

No. 32839-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Respondent

v.

Joshua James Clark, Appellant

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

- A. Did the trial court comply with CrR 3.3 when it continued Clark's trial to the next available trial date due to Clark and his attorney's unavailability for trial (due to their required presence at trial in another case)?
- B. Did Clark fail to preserve the issue regarding his ability to pay legal financial obligations when he did not raise the issue at the trial court?

II. STATEMENT OF THE CASE

Joshua Clark was charged with Attempting to Elude a Police Vehicle and Possession of Methamphetamine. CP 66-69. In a separate case, Clark was charged with Possession of a Stolen Motor Vehicle (County Cause No. 14-1-00111-1 and C.O.A. No. 329283). Clark's trial was eventually set for July 24, 2014, with a CrR 3.3 trial deadline of August 15, 2014. RP (pretrial hearings) 33. The trials in both Clark's cases (the present case and the stolen vehicle case) were continued from July 24, 2014, to August 14, 2014; Clark did not object to these new trial dates. RP (pretrial hearings) 37.

At the readiness hearing on August 11, 2014, the State elected to proceed to trial on Clark's other case (the stolen vehicle case); the court continued the eluding trial to the next available trial date of August 28,

2014, reasoning that “there’s only one courtroom, one Judge and we’ll only be calling one jury, so ... that’s why we continued the [eluding trial].” RP (pretrial hearings) 40-41. Furthermore, the same judge, same deputy prosecutor, same defense attorney, and same defendant were involved in both of Clark’s cases. RP (pretrial hearings) 39-42; CP 4.

The trial in the present case began on August 28, 2014, CP 4, and Clark was convicted of both charges. CP 25-27, 46. The court imposed legal financial obligations totaling \$2,145.41 and did not inquire of Clark’s ability to pay these LFOs; however, both parties discussed the LFOs at sentencing, and Clark did not object to their imposition. CP 48; RP (sentencing hearing) 271-76. This appeal followed.

III. ARGUMENT

A. The trial court did not violate Clark’s time for trial right under CrR 3.3.

1. The trial court’s continuance was an excluded period of time because it was necessary in the administration of justice.

Although CrR 3.3(b) generally states that an out-of-custody defendant must be brought to trial within 90 days of his arraignment, this time period may be extended due to certain excluded periods of time. CrR 3.3(b), (e). One such excluded period of time is any delay of the trial due to a request for a continuance. CrR 3.3(e)(3). The request for the continuance may be

made by the court or either party and may be granted as long when it is required in the administration of justice and as long as the defendant will not be prejudiced in presenting his defense. CrR 3.3(f)(2). Both a continuance of the trial as well as unavoidable or unforeseen circumstances are excluded periods of time, and the time for trial shall not expire earlier than 30 days after the newly set trial date. CrR 3.3(b), (e)(3), (e)(8), (f). A trial court's decision to continue a trial will not be disturbed on appeal absent a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929, 938 (1984) (citing *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970)).

The unavailability of a party or attorney may constitute an unavoidable circumstance for time-for-trial purposes. CrR 3.3(e)(8). For example, where both of the trial counsel and trial judge involved in the case were actually unavailable as they were all participating in another case, that unavailability constituted an "unavoidable circumstance" under the rule that allowed for an extension of time for speedy trial. *State v. Carson*, 128 Wn.2d 805, 814-15, 912 P.2d 1016 (1996). In another case, the appellate court held that a continuance granted to accommodate a deputy prosecutor's unavailability (due to prescheduled vacation) was a valid basis for granting a continuance. *State v. Heredia-Juarez*, 119 Wn. App.

150, 151, 79 P.3d 987 (2003); *see also State v. Torres*, 111 Wn. App. 323, 331, 44 P.3d 903 (2002).

In the present case, the continuance constituted an excluded period of time for two separate reasons: (1) the continuance was required in the administration of justice (with no prejudice against the defendant in his presentation of a defense), and (2) there was an unavoidable or unforeseen circumstance affecting the time for trial. CrR 3.3(e)(3), (e)(8), (f). Both of Clark's cases involved the same judge, same deputy prosecutor, same defense attorney, and obviously the same defendant. RP (pretrial hearings) 39-42, CP 4. As in *Carson*, both the trial attorneys and judge were unavailable to handle the present case because they were in trial on another one of Clark's cases. But most importantly, Clark himself was unavailable for trial in the present case due to his necessary appearance in his other case (both set for trial the same day). Due to this, a continuance of the trial in the present case was not only an unforeseen circumstance under CrR 3.3(e)(8), it was also necessary in the administration of justice under CrR 3.3(e)(3) and (f) so that Clark could be present at both trials.

Clark attempts to frame the issue as one of mere court congestion. Yet as mentioned above, the hurdles to proceeding with Clark's trial within his initial speedy trial time were much more than mere court congestion. Even if the court found a second judge, found a second

courtroom, called a second venire, and assigned a second prosecutor, the case would have nevertheless been unable to proceed due to both Clark and his attorney being unavailable. It was impossible for both Clark and his attorney to appear in two trials held simultaneously.

In the present case, the continuance of Clark's trial was necessary in the administration of justice so that Clark and his attorney could be present for both trials. And because this court is required to give deference to the trial court's decision (absent a manifest abuse of discretion), it should be affirmed.

2. The continuance of the trial at defense counsel's request automatically moved the time for trial deadline to September 27, 2014.

Because the trial court did not abuse its discretion in continuing the trial from August 14, to August 28, CrR 3.3(b) automatically extended the time for trial period 30 days past the new trial date. In this case, the continuance extended the time for trial expiration to September 27. Therefore, because the trial on August 28 occurred well within the new time for trial, no violation of CrR 3.3 occurred.

- B. The issue of whether Clark had the ability to pay his legal financial obligations was not preserved for appeal.

A defendant is not entitled to challenge the imposition of legal financial obligations for the first time on appeal where he did not object at the trial court. *State v. Blazina*, 174 Wn. App. 906, 912, 301 P.3d 492, 494 (2013). In *Blazina*, the court held that “because [Blazina] did not object in the trial court to [the] finding [that he had the ability to pay LFOs], we decline to allow him to raise it for the first time on appeal.” *Id.*

Because Clark did not preserve the “ability to pay” issue at the trial court level, this court should decline to address it now for the first time on appeal. If the court chooses to address this issue and holds that the court failed to determine Clark’s ability to pay legal financial obligations, the State requests that the case be remanded for the limited purpose of making proper findings regarding Clark’s ability to pay.

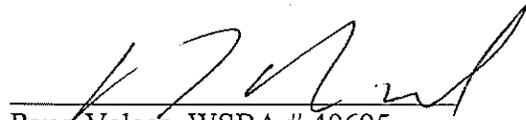
IV. CONCLUSION

Based on the foregoing analysis, both issues in front of the Court should be resolved in favor of the State. As to the first issue, there was no violation of Clark’s rights under CrR 3.3 because the continuance was necessary in the administration of justice (and thus an excluded period of time under the rule), Clark’s time for trial was automatically extended 30 days past the new trial date. The second issue regarding Clark’s ability to

pay his legal financial obligations was not preserved for appeal and should not be considered.

DATED: January 13, 2016

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'R. Valaas', written over a horizontal line.

Ryan Valaas, WSBA # 40695
Deputy Prosecuting Attorney

