

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NORMAN JACKSON, aka ALVIN MOORE,

Appellant.

No. 39321-2-II

UNPUBLISHED OPINION

Johanson, J. — A jury found Norman Jackson guilty of unlawful possession of a controlled substance (methamphetamine) with intent to deliver, and first degree unlawful possession of a firearm. We hold that Jackson’s CrR 3.3 time-for-trial right was violated when the State failed to exercise due diligence to secure either the presence or the testimony of a key witness before requesting a continuance based on that witness’s unavailability. We reverse the trial court’s granting of a continuance, vacate the convictions, and remand with instructions to dismiss the charges with prejudice. Accordingly, we do not reach the remainder of Jackson’s arguments.

FACTS

On January 27, 1998, the State filed multiple drug and first degree unlawful possession of a firearm charges against Jackson.¹ After his arraignment, Jackson was released on bond but

¹ Ultimately, in March 2009 after Jackson’s jury trial, the State amended the charges to unlawful possession of a controlled substance (methamphetamine), with intent to deliver and first degree unlawful possession of a firearm.

failed to appear for his trial date on October 13, 1998. Jackson remained on warrant status until police arrested him in California on April 12, 2008. Jackson was transferred to the Pierce County jail and appeared in court again for the first time on May 1, 2008. Trial was set for June 26, and his CrR 3.3 time-for-trial expiration date was June 30 (60 days past Jackson's May 1 court appearance).

On June 17, the trial court continued the trial to July 10 on agreement of all parties to allow Jackson a chance to find a different attorney. Jackson's appointed defense attorney indicated he would be ready to go to trial on July 10 if Jackson did not obtain new counsel. Jackson's new trial expiration date was August 9, 30 days after the July 10th trial date.

On July 1, the State moved for a continuance based on the unavailability of a key witness, Shawn Kelstrup, a former police officer who had been involved in serving the search warrant 10 years earlier. At the time the State requested the continuance, Kelstrup was working as a civilian consultant in the Middle East; he had returned to the country on June 18, was still in the state, routinely went to the Middle East for about 90 days, and was "going to be leaving shortly." Verbatim Report of Proceedings (VRP) (July 1, 2008) at 3. The State asked for this continuance based on information from Kelstrup's wife that he was leaving for the Middle East by the middle of July and that he would not return until roughly September 11. The State asked for a September 15 trial date.

Jackson objected, noting that a number of other officers had been involved in the search and could likely testify instead. The trial court granted the continuance, noting that a "key witness is out of the country, apparently, in Iraq, until mid-September." VRP (July 1, 2008) at 5.

The trial court set a new trial date of September 15. Thereafter, the trial court granted several other continuances that are not pertinent to our resolution of this case.

On March 17, 2009, before trial finally began, Jackson moved to dismiss his case for violation of his CrR 3.3 time-for-trial rights. Jackson argued that the State had failed to exercise due diligence when it did not subpoena Kelstrup before requesting continuances. The State explained that Kelstrup had in fact been available until July 15, 2008.² The State also explained that it had never subpoenaed Kelstrup and had instead relied on Kelstrup to report his own availability. The State suggested that Jackson had the responsibility to preserve Kelstrup's testimony in an alternative fashion. The trial court denied the motion to dismiss, finding no substantial prejudice to Jackson when "his ten year absconding led to the death of a key witness, it led to someone, whoever put up the collateral for his bailbond [sic], losing that, the \$50,000 collateral." I VRP at 110.

Jackson was finally brought to trial more than 10 months after he reappeared in Washington. A jury found him guilty on both counts. Jackson appeals.

ANALYSIS

Jackson argues that his CrR 3.3 time-for-trial rights were violated when the trial court granted the State multiple continuances beyond the time-for-trial expiration date to ensure the presence of a witness that the State did not subpoena. The State contends, without citing any authority, that it did not subpoena the witness because the State could not do so legally while the witness was out of the country. The State argues that it exercised due diligence by maintaining

² The prosecutor stated that Kelstrup had returned to the country on June 18, but then said he left again on "June 15." I VRP at 108. The State apparently misstated the month and meant July 15.

contact with the witness and by subpoenaing him once it could legally do so. We hold that because the State failed to show that it exercised due diligence to ensure Kelstrup's presence or preserve his testimony before requesting a continuance on July 1, the State was not entitled to a continuance under the time-for-trial rules.

We generally review a trial court's decision to grant a continuance under CrR 3.3(f)(2) for abuse of discretion.³ *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). But we review a violation of the time-for-trial rule de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

The trial court is responsible for ensuring compliance with the time-to-trial rules. CrR 3.3(a)(1). On motion of the trial court or a party, the trial court may continue the trial 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. CrR 3.3(f)(2).⁴ The trial court may grant a continuance because a material State's witness is unavailable when there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant. *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936, *review denied*, 122 Wn.2d 1008 (1993). For the purposes of CrR 3.3, an "unavailable" witness is one whose testimony cannot be contrived by any means. *State v. Torres*, 111 Wn. App. 323, 330,

³ We will not disturb a trial court's continuance decision unless the appellant makes a clear showing that the trial court's discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

⁴ The trial court may also grant a continuance based upon the written agreement of the parties, which the defendant must sign. CrR 3.3(f)(1). Jackson did not sign any of the continuance orders here.

44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005 (2003). The word “unavailable” is not used in the social sense of having a previous engagement. *Torres*, 111 Wn. App. at 331. “[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.” *Kenyon*, 167 Wn.2d at 136 (quoting *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976)). The State agrees that it must exercise due diligence before requesting a continuance based on that witness’s unavailability. *State v. Iniguez*, 143 Wn. App. 845, 853-54, 180 P.3d 855 (2008) (citing *Nguyen*, 68 Wn. App. at 915-16), *rev’d on other grounds*, 167 Wn.2d 273, 217 P.3d 768 (2009). The record shows that the State failed to exercise that due diligence here.

Even though Kelstrup was not in the country on June 17, the State agreed to Jackson’s request to continue the June 26 trial date to July 10. Although Kelstrup returned June 18, the day after the State agreed to this continuance, the State did not give the trial court any indication that securing Kelstrup’s presence for the new July 10 trial date might be difficult. In addition, Kelstrup had not left for Iraq at the time the State requested a continuance on July 1, 2008, because he was “going to be leaving shortly.” VRP (July 1, 2008) at 3. Even though Kelstrup had been in the country since June 18, would have been available for trial while in the country, had not yet left the country at the time of the State’s July 1 motion for a continuance, and would routinely be out of the country for more than 90 days at a time, the record does not show that the State took any steps to subpoena him, or to preserve his testimony, or that it offered to do so. The State, as the moving party, had the burden of exercising due diligence when its witness was supposedly unavailable. *Iniguez*, 143 Wn. App. at 853-54 (citing *Nguyen*, 68 Wn. App. at 915-

16). But the State gave no reason why it could not have had Kelstrup testify out of order, if necessary, if the trial had begun as scheduled on July 10. The State gave no reason why a continuance was the only option.⁵

In *Wake*,⁶ Division Three of this court held that the trial court abused its discretion when it granted a continuance in a drug case based on a witness's supposed unavailability when the State failed to exercise due diligence before requesting the continuance. Division Three noted three failures: (1) the crime laboratory had failed to keep pace with its caseload and had inadequate staff available for court testimony; (2) the prosecutor knew of a scheduling conflict two weeks before trial was scheduled, had an opportunity to make alternative arrangements, and failed to do so.; and (3) the prosecutor never subpoenaed the witness before requesting a continuance. *Wake*, 56 Wn. App. at 475-76. One alternative to the continuance could have included acceleration of the trial date. *Wake*, 56 Wn. App. at 476 n.3. The *Wake* court noted that requiring a subpoena ensured that a record would be made for the reasons for a witness's absence. 56 Wn. App. at 476.

Similarly, the State knew in advance that Kelstrup might not be available for the July 10 trial date. The State did not attempt to avail itself of any alternative, such as accelerating the trial date, taking Kelstrup's testimony out of order, or preserving his testimony. The State was aware that Kelstrup's availability would be an ongoing problem, yet it did not take any action other than

⁵ We realize that because Jackson absconded for 10 years, this case was more difficult to retry, especially because this witness, originally the investigating officer, was no longer with the police force and was now working in the Middle East. But despite the unique circumstances here, the State simply did not make the requisite showing of due diligence.

⁶ *State v. Wake*, 56 Wn. App. 472, 474-76, 783 P.2d 1131 (1989).

to request a continuance. The State did not subpoena Kelstrup ahead of time, and as such, the record is underdeveloped on issues such as when Kelstrup would be available and what steps the State could have taken to ensure his presence. Notably, the State did not tell the trial court or defense that it had not subpoenaed Kelstrup before requesting the continuance. The State failed to exercise due diligence before seeking a continuance based on Kelstrup's unavailability. The State failed to show that Kelstrup was unavailable and that a continuance was required for the administration of justice.

Jackson argues that because his CrR 3.3 time-for-trial rights were violated, we should reverse and remand for dismissal with prejudice. We agree.

When a defendant fails to appear, the commencement date of his or her time for trial is reset to the date of the defendant's next court appearance. CrR 3.3(c)(2)(ii). When the defendant is detained in jail, the trial court must set a trial date within 60 days of the defendant's arraignment. CrR 3.3(b)(1)(i). Under CrR 3.3(e) certain periods are excluded when computing the time-for-trial period. Continuances granted by the court are excluded from the time-for-trial period. CrR 3.3(e)(3). The defendant's time-for-trial expiration date is reset to at least 30 days after the end of the excluded period. CrR 3.3(b)(5). When a defendant is not brought to trial within the limits of CrR 3.3, the trial court must dismiss the charges with prejudice if the defendant objects within 10 days after notice of trial date setting is mailed. CrR 3.3(d)(3), (h); *Kenyon*, 167 Wn.2d at 136. In such situations, the defendant need not show prejudice, and the trial court has no discretion in deciding whether to dismiss the charges. *State v. Swenson*, 150 Wn.2d 181, 186-87, 75 P.3d 513 (2003).

On June 17, the trial court granted a valid continuance and set a new trial date for July 10. This established a new trial expiration date 30 days later, or August 9. CrR 3.3(b)(5). On July 1, the trial court granted a continuance over Jackson's objection because Kelstrup was supposedly unavailable. This continuance should not have been granted because the State did not exercise due diligence to obtain or preserve Kelstrup's testimony before requesting the continuance. Without a valid continuance, there was no excluded period from Jackson's time-for-trial date. CrR 3.3(e) (listing valid reasons for excluded periods, none of which are met here). Jackson had to be brought to trial by August 9. He was not brought to trial by August 9; nor were any other valid continuances granted that properly extended the time-to-trial expiration date beyond August 9. Under CrR 3.3, once the time-for-trial date expires without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case. *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009) (citing CrR 3.3(b), (f)(2), (g), and (h)).

Jackson was not brought to trial within the time limits of CrR 3.3 and he timely objected. Accordingly, we reverse the trial court's decision granting a continuance on July 1, 2008, vacate Jackson's convictions, and remand with instructions to dismiss the charges with prejudice.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Johanson, J.

We concur:

No. 39321-2-II

Hunt, J.

Penoyar, C.J.