# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

# DIVISION II

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| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>JAMES ROSHON HUGHES,<br>Appellant. | No. 37857-4-II<br><br><br>UNPUBLISHED OPINION |

Bridgewater, J. — James Roshon Hughes appeals his conviction for one count of first degree robbery under RCW 9A.56.200(1)(a)(ii). We affirm.

Facts

On November 27, 2007, a loss prevention officer at the Tacoma Mall Old Navy store observed Hughes grab five to six pairs of pants and place them in an empty plastic bag. He later observed Hughes place a few pairs of socks and two shirts into the same bag. The officer followed Hughes out of the store and confronted him. According to the officer, Hughes lifted up his jacket and revealed a black handle that appeared to be a gun or possibly a knife sticking out of his waistband. Afraid that the Hughes would use the weapon in the mall, the officer did not chase Hughes. Instead, he called 911 to report the incident. Shortly thereafter, Tacoma police officers arrived. With the help of a patrol dog, the officers apprehended Hughes in a wooded area near the mall. The officers searched Hughes and the surrounding area, but they were unable to recover any items stolen from Old Navy or a weapon. On November 28, 2007, the State charged Hughes

with one count of first degree robbery. *See* RCW 9A.56.190, 9A.56.200(1)(a)(i), (ii).

On January 9, 2008, Hughes's defense counsel moved for a continuance so that he could investigate an alleged mall surveillance video in hopes that it would help Hughes's defense. Hughes objected to the continuance. The trial court granted defense counsel's motion and set the trial date for February 26.

On February 26, the trial court continued the trial for the next day, February 27, because no courtrooms were available. Hughes was not present at the hearing.

Then on February 27, defense counsel asked for another continuance because he was in trial on another case. Hughes objected to a continuance, because he had "been in custody for, at least, about 92 days." RP (Feb. 27, 2008) at 7. The trial court granted defense counsel's motion and continued Hughes's trial for March 12.

On March 12, the State filed a motion for continuance because the prosecutor was in trial on another case. Hughes objected. The trial court nonetheless granted the continuance and set trial for March 19.

On March 19, the State again brought a motion for continuance because the prosecutor was still representing the state in another trial. Hughes again objected. The trial court again granted the continuance, setting trial for April 2.

On April 2, no courtrooms were available; consequently, the trial court set the matter over until April 3. Hughes was not present at the hearing.

On April 3, no courtrooms were available. The parties agreed to continue the trial until April 7, the next available day on the courtroom scheduling calendar. Hughes was not present for

this hearing.

Once again, on April 7, no courtrooms were available for Hughes's trial. The trial court continued the matter until April 8. Once again, Hughes was not present at the hearing.

On April 8, the State moved for a continuance because its eyewitness was unavailable. The trial court granted the State's motion over Hughes's objection. It set the trial date for April 21.

On April 21, the trial court continued the trial to May 1 because defense counsel had a scheduling conflict and the State's eyewitness was unavailable. Hughes was not present during the hearing.

On May 1, the State filed an affidavit of prejudice against the trial court judge scheduled to preside over the case that day. The case was reassigned and under Criminal Rule (CrR) 3.3(e)(9),[1] added five days to the time-for-trial clock. The trial court scheduled Hughes's trial for May 5. This was the first time that Hughes's time for trial was impacted or tolled under CrR 3.3.[2]

On May 5, the case proceeded to trial. At the beginning of the proceedings, the State informed the trial court of Hughes's past convictions. Among others, Hughes had a 2001 third

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[1] Under CrR 3.3(e), certain periods are excluded when computing the time for a speedy trial under Washington court rules. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). CrR 3.3(e)(9) excludes a five-day period for the purposes of computed time for speedy trial, commencing with the disqualification of a judge to whom the case is assigned.

[2] CrR 3.3 was enacted for the purpose of enforcing a defendant's constitutional right to a speedy trial. *Kenyon*, 167 Wn.2d at 136. It is a court rule, however, and therefore compliance with CrR 3.3 does not necessarily guarantee that there has been no constitutional violation. *See State v. Iniguez*, 167 Wn.2d 273, 287, 217 P.3d 768 (2009). We note that there is no evidence in the record indicating that Hughes's speedy trial rights were violated under CrR 3.3 at any time during the proceedings.

degree theft conviction, two 2005 shoplift convictions, a 2006 shoplift conviction, a 2007 second degree theft conviction, and a 2007 attempted third degree theft conviction. The State sought to introduce these convictions as evidence against Hughes. Under ER 609, the trial court ruled that the State may introduce the 2007 second degree theft conviction for impeachment purposes, should Hughes testify. The trial court further ruled that the State may not introduce the 2001 third degree theft, 2005 shoplift, or 2006 shoplift convictions for impeachment purposes unless it obtained "sufficient documentation to establish proof of the conviction itself and the defendant's identity as the person who committed it, and has provided such information to defense counsel, prior to the defendant taking the stand to testify, and has raised the issue again to the court outside the presence of the jury." CP at 67.

Hughes testified in his defense. During his testimony, defense counsel questioned Hughes about his 2005 and 2006 shoplifting convictions, in addition to his 2007 second degree theft conviction. Hughes admitted to those convictions. He also admitted to shoplifting from Old Navy on July 15, 2007, but he denied that he was armed with a weapon. On cross-examination, the State questioned Hughes about his past convictions.

On May 8, 2008, the jury found Hughes guilty of first degree robbery. The trial court sentenced him to 70 months' confinement, to be followed by 18 to 36 months of community custody.

## Discussion

### Constitutional Rights to Speedy Trial

Hughes first contends that the more than six-month delay between his arrest and his trial

was presumptively prejudicial and violated his speedy trial rights under article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution.[3] We disagree.

We review a claim of denial of constitutional rights de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). In *Iniguez*, our Supreme Court recently held that article I, section 22 does not afford a defendant greater speedy trial rights than does the federal Sixth Amendment. *Iniguez,* 167 Wn.2d at 289. Our state constitution requires a method of analysis substantially the same as the federal Sixth Amendment analysis in the speedy trial context. *Iniguez*, 167 Wn.2d at 290.

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right to a speedy trial "'is as fundamental as any of the rights secured by the Sixth Amendment.'" *Barker v. Wingo*, 407 U.S. 514, 516 n.2, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (quoting *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)). When a defendant's constitutional speedy trial rights are violated, the remedy is to dismiss the charges with prejudice. *Barker*, 407 U.S. at 522.

In determining whether a defendant's constitutional speedy trial rights have been violated, courts balance four interrelated factors. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at

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[3] Hughes does not contend on appeal that his rights were violated under CrR 3.3. Thus, we decline to address the issue of Hughes's speedy trial rights in the context of CrR 3.3. *See State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009) (noting that a constitutional speedy trial challenge warrants a different analysis than does a CrR 3.3 violation) (citing *Kenyon*, 167 Wn.2d at 135-39 and *Iniguez*, 167 Wn.2d 290-95).

530). As a threshold matter, a defendant must show that the length of delay "crossed a line from ordinary to presumptively prejudicial." *Iniguez*, 167 Wn.2d at 283 (citing *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)); *Barker*, 407 U.S. at 530). This is necessarily a fact-specific inquiry dependent on the circumstances of each case. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 530-31). Thus, the constitutional speedy trial right cannot be quantified into a specific time period. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 523).

If a defendant demonstrates that the delay was presumptively prejudicial, the remainder of the inquiry is triggered. *Iniguez*, 167 Wn.2d at 283 (citing *Doggett*, 505 U.S. at 651). The remaining factors that are relevant to the determination of whether a constitutional violation occurred include the length and reason for the delay, whether the defendant asserted his right, and the ways in which the delay may have caused prejudice to the defendant. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 530). Our Supreme Court has noted that these are not exclusive factors because other circumstances may be relevant to the inquiry. *Iniguez*, 167 Wn.2d at 283 (citing *Baker*, 407 U.S. at 533). And significantly, none of the factors alone is necessary or sufficient. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 533).

We begin our inquiry by determining whether Hughes has demonstrated that the length of delay "crossed a line from ordinary to presumptively prejudicial." *See Iniguez*, 167 Wn.2d at 283, Hughes argues that the six-month delay between the date he was charged and the commencement of his trial was presumptively prejudicial in light of the straightforward nature of the charges.

The passage of time is an important factor in the presumptively prejudicial analysis;

however, there is no formulaic presumption of prejudice upon the passing of a specific period of time. *Iniguez*, 167 Wn.2d at 292. Again, the constitutional speedy trial rights analysis is a fact specific inquiry that is "'necessarily dependent upon the peculiar circumstances of the case.'" *Iniguez*, 167 Wn.2d at 292 (quoting *Barker*, 407 U.S. 530-31). In addition to the length of delay, we consider other factors such as the complexity of the charges and reliance on eyewitness testimony. *Iniguez*, 167 Wn.2d at 292 (citing *Barker*, 407 U.S. at 531 n.31).

Here, the length of delay was substantial in light of the case. Hughes remained in custody, awaiting trial, for approximately six months. *See* RP (June 6, 2008) at 313-14 (noting that at sentencing Hughes had credit for 192 days served). The length of delay is particularly striking in light of the State's charges against Hughes. He was awaiting trial on one count of first degree robbery. Moreover, the State's case rested in part on eyewitness testimony from multiple people, requiring the importance of avoiding delays that may result in witness unavailability or inability to accurately remember underlying incidents. *See Iniguez*, 167 Wn.2d at 292. Based on the circumstances of Hughes's case, the approximately six-month delay in proceedings was presumptively prejudicial. *See Iniguez*, 167 Wn.2d at 292.

Because we hold that the length of delay was presumptively prejudicial in this case, the remainder of the *Barker* inquiry is triggered. Accordingly, we must now determine whether a constitutional violation occurred based on the length of delay, reason for the delay, whether Hughes asserted his constitutional right to speedy trial, and the ways in which the delay cause prejudice to Hughes. *See Iniguez*, 167 Wn.2d at 292.

Under the *Barker* inquiry, we consider the extent to which the length of delay stretches

beyond the bare minimum required to trigger the inquiry. *Iniguez*, 167 Wn.2d at 293 (citing *Doggett*, 505 U.S. at 652). Stated another way, the longer the delay, the more scrutiny we must apply to the circumstances surrounding the delay. *Iniguez*, 167 Wn.2d at 293. Here, the circumstances surrounding the length of delay require little scrutiny. Although Hughes remained in custody for approximately six months, long enough to meet the presumptively prejudicial threshold in light of the facts presented, this was not necessarily an undue delay. Accordingly, the length of delay does not weigh against the State.

In considering the next factor, the reason for delay, we look to each party's responsibilities for the delay and assign weights to those reasons. *Iniguez*, 167 Wn.2d at 294 (citing *Barker*, 407 U.S. at 531). Here, Hughes concedes that "most of the delay was due to scheduling conflicts and unavailability of courtrooms." Br. of Appellant at 12. Indeed, Hughes's trial was continued six times due to courtroom unavailability, once because the prosecutor had a conflicting trial, and once because Hughes's counsel had a conflicting trial. In addition, Hughes's defense attorney requested one continuance to investigate an alleged mall surveillance video. The State requested the remaining two continuances, one because its primary eyewitness was unavailable and one because the prosecutor filed an affidavit of prejudice against the judge.[4] On the whole, none of the continuances can be described as unreasonable, particularly given that trial courts must frequently accommodate the schedules of multiple lawyers and multiple witnesses amidst an assiduous legal system. Under the circumstances presented here, the reasons for delay do not

[4] During the final continuance hearing, the prosecutor clarified that he filed the affidavit against the trial court judge partly to invoke a five-day excluded period under CrR 3.3(e)(9) because he had a prepaid, preplanned out of state vacation conflict. Hughes makes no argument that the affidavit of prejudice was improper.

weigh against the state. *See Iniguez*,167 Wn.2d at 294.

The third factor we consider under the *Barker* inquiry is the extent to which a defendant asserts his speedy trial right. *Iniguez*, 167 Wn.2d at 294-95. We look to the frequency with which the defendant asserts this right, in addition to the reasons for his assertions. *Iniguez*, 167 Wn.2d at 295 (citing *Barker*, 407 U.S. at 529). Here, the trial court granted eleven continuances, six of which Hughes objected to and asserted his right to speedy trial. Presumably, he did not object to the remaining five continuances because he was not present for the hearings. In light of the facts presented, Hughes consistently asserted his speedy trial right; therefore, this factor weighs in favor of Hughes and against the State. *See Iniguez*, 167 Wn.2d at 295.

The final factor under the *Barker* inquiry is the prejudice resulting from the delay. *Iniguez*, 167 Wn.2d at 295. We assess prejudice in light of the interests protected by the right to speedy trial. Those interests include (1) preventing oppressive pretrial incarceration, (2) minimizing the defendant's anxiety and worry, and (3) limiting impairment to the defense. *Iniguez*, 167 Wn.2d at 295 (citing *Barker*, 407 U.S. at 532). As to impairment to the defense, because it is difficult to demonstrate, we presume that such prejudice intensifies with time. *Iniguez*, 167 Wn.2d at 295 (citing Barker, 407 U.S. at 532). Nevertheless, defendant makes a stronger case for a speedy trial violation if he can demonstrate prejudice. *Iniguez*, 167 Wn.2d at 295.

Here, Hughes argues that his defense was impaired by the delay because he was unable to recall the incidents leading to his arrest and charges with precise clarity of details. While we are sensitive to the importance of a defendant's testimony, we cannot find that Hughes's "dimmed"

memory substantially prejudiced his defense as a result of the delayed proceedings. Br. of Appellant at 14.

To begin, courts have allowed longer delays. In *Barker*, the United States Supreme Court did not find a 10-month pretrial incarceration prejudicial. *Barker*, 407 U.S. at 534 (noting that the defendant did not claim, for example, that any of his witnesses died or otherwise became unavailable as a result of the delay). Likewise, the *Iniguez* court held that the defendant failed to demonstrate prejudice resulting from his eight-month pretrial delay, during which he remained incarcerated. *Iniguez*, 167 Wn.2d at 295. We note that, unlike Hughes, the defendant in *Iniguez* did not attempt to demonstrate prejudice and instead relied on the presumption. *Iniguez*, 167 Wn.2d at 295. But Hughes's attempted demonstration of prejudice is tenuous at best. He does not allege that any of his witnesses became unavailable or any other definite, quantifiable impairment to his defense. And while we seek to limit a defendant's anxiety and oppressive pretrial incarceration, as noted, other courts have allowed longer delays than the approximate six-month delay in this case. *See Barker*, 407 U.S. at 534; *Iniguez*, 167 Wn.2d at 295. Hughes has not convinced us that he was substantially prejudiced by an unreasonable delay.

Considering the totality of circumstances, we cannot find that a speedy trial violation of constitutional magnitude to justify a dismissal of the charges with prejudice. *See Iniguez*, 167 Wn.2d at 295. The trial court had legitimate reasons for granting each continuance. It balanced the competing interests of accommodating trial preparation, scheduling concerns, and securing Hughes's constitutional rights. We hold that Hughes suffered no violation of his constitutional rights to a speedy trial.

Ineffective Assistance of Counsel

Hughes next contends that his defense counsel was ineffective because he questioned Hughes about two prior shoplifting convictions, thereby violating his constitutional rights to effective assistance of counsel rights under article I, section 22 of the Washington Constitution and the Sixth Amendment of the United States Constitution. Again, we disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove ineffective assistance of counsel, Hughes must show that (1) counsel's performance was deficient, and (2) this deficient performance prejudiced him. *Strickland* 466 U.S. at 687. We engage in a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics and strategy form no basis for an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Here, defense counsel's decision to raise Hughes's 2005 and 2006 theft convictions falls within the category of legitimate trial tactics and strategy. Throughout the trial, Hughes's defense theory was that he committed a theft, but not a robbery. Defense counsel rigorously questioned the State's witnesses about whether they saw or found a deadly weapon or firearm in or near Hughes's control during the incidents. Moreover, Hughes admitted that he shoplifted from Old Navy. He maintained, however, that he did not have a firearm during the incident. And in closing, defense counsel argued that because there was no evidence that Hughes was armed with

a deadly weapon or what appeared to be a firearm or other deadly weapon, the State failed to prove the first degree robbery charge.

Clearly, when Hughes's defense attorney raised his past theft and shoplifting convictions, he was seeking to establish a pattern of thefts but no pattern of robberies. Hughes has failed to demonstrate his defense counsel's performance was deficient. *See Hendrickson*, 129 Wn.2d at 77-78. Accordingly, he has failed to meet the first prong of the two-prong *Strickland* test. *See Strickland*, 466 U.S. at 687; *McFarland*, 127 Wn.2d at 335. We hold that Hughes suffered no violation of his constitutional rights to effective assistance of counsel.

Affirmed.

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

Bridgewater, J.

We concur:

Armstrong, J.

Penoyar, A.C.J.