

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JACOB MATTHEW YADEN, JR.,

Appellant.

No. 38133-8-II

UNPUBLISHED OPINION

Penoyar, A.C.J. — Jacob Yaden, Jr. appeals his conviction of possession of pseudoephedrine with intent to manufacture methamphetamine. The State concedes that Yaden’s speedy trial rights under Superior Court Criminal Rule (CrR) 3.3 were violated. We accept the State’s concession and remand to the trial court for an order dismissing the charges against Yaden with prejudice.

FACTS

On August 17, 2004, police seized a 20-pound bag of ammonia sulfate fertilizer, two cans of lye, a two-pound box of rock salt, a can of acetone, a can of xylene, vinyl tubing, and 329 tablets containing pseudoephedrine from the car that Yaden was driving. The State charged Yaden by amended information with possession of pseudoephedrine with intent to manufacture methamphetamine. Yaden posted a bond and was released.¹

Almost four years of delay preceded Yaden’s trial. Yaden acknowledges that his court-

¹ A non-detained defendant generally must be brought to trial within 90 days of arraignment. CrR 3.3(b)(2)(i); CrR 3.3(c). A charge not brought to trial within the CrR 3.3 time limits shall be dismissed with prejudice. CrR 3.3(h).

appointed attorneys—especially his initial public defender—caused almost all of the delay. On November 30, 2007, the trial court set January 17, 2008 as the date for Yaden’s suppression hearing, February 12, 2008 as the new trial date, and March 13, 2008 as the new outside date.²

After another reschedule, the suppression hearing began on February 7, 2008. A new public defender appeared on Yaden’s behalf. Yaden asked the trial court to continue the suppression hearing since he had not had the opportunity to meet with his new attorney. The State objected, noting that three police officers were present to testify. The trial court decided to conduct the hearing on multiple days in order to accommodate both parties’ requests. After the officers testified at the suppression hearing, the State also indicated that it needed more time to prepare. The following colloquy occurred:

COURT: [N]ow it appears that there [are] reasons from both sides for [a continuance]. Uh, how much time are we looking at? Put it together in a week or two?

STATE: Uh, unless [the witness] has a conflict (inaudible) at least (inaudible).

DEFENSE: I think we’re set for trial on [February] 12th, which is obviously not realistic.

COURT: Yeah, we, we’ve got a problem here with the trial date

STATE: Your Honor, if I may suggest that the trial date be stricken and we schedule the remainder of this hearing for next Thursday [February 14, 2008].

COURT: Will that give you enough time?

STATE: And at that time we could reset the trial date.

DEFENSE: Um, yeah.

COURT: Because I’m, I’m happy to do it next Thursday, if that’ll give you enough time.

DEFENSE: Okay, that actually sounds like a plan. We can do a trial setting, as well, next Thursday [February 14, 2008].

1 Report of Proceedings (RP) at 83-84.

² The outside date is the date by which the defendant must be brought to trial.

On February 14, the parties appeared in court and the trial court rescheduled the hearing for February 21. After testimony concluded on February 21, the trial court took the issue under advisement but failed to set a new trial date. On April 2, the trial court denied Yaden's motion to suppress.

On May 2, the parties appeared again in court, apparently after the State moved to set a trial date. Yaden's counsel requested that the trial court dismiss his case because the speedy trial period had expired on March 13 and the State had not brought Yaden to trial. The trial court set a tentative trial date of May 27.

On June 12, the trial court denied Yaden's motion to dismiss for violation of his speedy trial rights. In its oral ruling, the trial court stated:

I guess what's troubling about the matter is that the defendant allowed his case to languish for over three years by repeated, if you go through the file, by repeated requests for continuance, and, repeated promises of an attending motion under [CrR 3].6 . . . in light of the tortured history of this case, the Court cannot help but question the genuineness of the defendant's current motion.

1 RP at 101-02.

The trial court cited *State v. Carson*,³ noting that "case law place[s] some responsibility upon the defendant to assure the compliance with his right to a speedy trial." 1 RP at 103. The court observed that Yaden's "trial date of February 12th . . . passed without a whimper from the defendant," and he that had failed to object to a potential speedy trial violation when he was present in court on February 7, 14, and 21. 1 RP at 103. Thus, the trial court ruled that Yaden waived his right to assert a CrR 3.3 violation.

³ 128 Wn.2d 805, 912 P.2d 1016 (1996).

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On June 30, Yaden's trial began. The jury found Yaden guilty and the trial court sentenced him to 78 months in prison. Yaden now appeals.

ANALYSIS

Yaden contends that the trial court should have dismissed his case with prejudice under CrR 3.3(h). Yaden's argument is limited to the events of late 2007 and early 2008; he does not argue that any earlier delays violated his CrR 3.3 rights. Specifically, Yaden points to the trial court's November 30, 2007 decision to reset the trial date to February 12, 2008. He argues that the speedy trial period therefore expired on March 13, 2008, and that the trial court's failure to set a new trial date until May 2 requires us to reverse his conviction and dismiss the charges with prejudice under CrR 3.3(h).

At oral argument, the State conceded a violation of Yaden's CrR 3.3 speedy trial rights. The State observed that the trial court "appeared to lose track of time" and that the trial court's attempt to set a new trial date on May 2, well beyond the outside date of March 13, violated CrR 3.3(f)(2), which allows a party or the court to move to continue the trial date "before the time for trial has expired." Oral Argument (Nov. 30, 2009) at 8:23-9:34. The State noted that the *Carson* decision, which the trial court relied on in its oral ruling, involved a situation in which the trial court granted retroactive continuances⁴ that allowed it to commence the trial on the outside date.⁵ *See* 128 Wn.2d at 816-18.

We accept the State's concession and remand to the trial court for an order dismissing the charges against Yaden with prejudice.

⁴ The *Carson* court upheld the trial court's ruling that "unavoidable or unforeseen circumstances" justified retroactive continuances under CrR 3.3(a)(8). 128 Wn.2d at 810, 816.

⁵ Yaden notes that the trial court could not have granted retroactive continuances to cure the violation in his case, presumably because neither the court nor any party made a motion for such continuances within five days after Yaden's time for trial expired as CrR 3.3(g) requires.

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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.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.