FILED
8/10/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. CHHOV NOV, Respondent.	DIVISION ONE No. 79466-3-I PUBLISHED OPINION

DWYER, J. — Chhov Nov was charged with driving under the influence of intoxicants (DUI). After significant delay, he was brought to trial and convicted in district court. He appealed to the superior court, which reversed the conviction and ordered that the case be dismissed. In ordering dismissal, the superior court ruled that the State had violated CrRLJ 3.3 and, thus, denied Nov his right to a timely trial. We granted the State's motion for discretionary review.

On review, the State avers that no CrRLJ 3.3 violation occurred because the circumstances surrounding the timing of Nov's trial neither violated any provision of CrRLJ 3.3 nor constituted a violation of Nov's constitutional right to a speedy trial. Because the superior court erroneously relied on a local custom outside the provisions of CrRLJ 3.3 in its analysis of whether the rule was violated, and because nothing in the record evidences a violation of Nov's constitutional right to a speedy trial, we reverse the superior court's order and reinstate Nov's district court conviction.

I

The underlying facts are not in dispute. On October 15, 2012, Chhov Nov was driving his vehicle when he rear-ended another vehicle that was stopped at a red light. A King County Sheriff's deputy responded to the scene and noticed that Nov displayed signs of intoxication. Subsequently, the deputy arrested Nov on suspicion of DUI. The deputy transported Nov to the police precinct and administered a breath test, the results of which showed Nov's breath alcohol content to be above the legal limit. Afterward, rather than booking Nov into jail, the deputy drove Nov to the address listed on his driver's license. The address was confirmed as Nov's residence when Nov stated, "Oh, this is my house," and thanked the deputy.

On January 8, 2013, Nov was charged with DUI. His arraignment was set for January 25. The notice of arraignment was sent to the same home address as that which appeared on Nov's driver's license and which he had confirmed to be his residence address. However, the notice was returned as undeliverable. Nov failed to appear at his arraignment. Prior to requesting a bench warrant, the prosecutor conducted a database search for an updated address pursuant to CrRLJ 2.2(a)(3)(i).[1] However, the address on the notice of arraignment remained

[1] CrRLJ 2.2(a)(3)(i) reads:
Search for Address. The court shall not issue a warrant unless it determines that the complainant has attempted to ascertain the defendant's current address by searching the following: (A) the District Court Information system database (DISCIS), (B) the driver's license and identicard database maintained by the Department of Licenses; and (C) the database maintained by the Department of Corrections listing persons incarcerated and under supervision. The court in its discretion may require that other databases be searched.

the most recent address listed in the databases. Accordingly, the district court issued a $15,000 bench warrant for Nov's arrest.

More than four years later, on May 7, 2017, Nov was arrested for another DUI and was served with the 2013 warrant. The following day, at the King County District Court in Burien, Nov was arraigned on both the 2013 charge and on the new DUI charge. Bail on the 2013 DUI charge was maintained at $15,000.

Later, at Nov's first in-custody pretrial hearing, the district court granted Nov's request for release on electronic home monitoring, and gave Nov oral and written notice that he was to appear on June 1 for an out-of-custody pretrial hearing. Nov failed to appear on June 1. The district court issued a $10,000 bench warrant on the 2013 charge (2017 warrant).

On August 11, Nov, out of custody, appeared at the King County District Court in Burien for a review hearing in a case initiated by the city of Burien.[2] Because the case on the calendar was brought by the city of Burien and not the State of Washington, a Burien city attorney was present. The county prosecutor was not. The judge noted Nov's outstanding warrants (the 2017 warrant and a second bench warrant issued in a separate pending charge) and ordered that he be taken into custody.

[2] The city of Burien has an interlocal agreement with the King County District Court pursuant to which the court hears cases prosecuted by the city. Interlocal Agreement for Provision of District Court Services Between King County and the City of Burien § 2.2.5 (Aug. 22, 2006).

When Nov was booked into the King County Correctional Facility, an irregular entry was made on the jail booking sheet, resulting in the district court being unaware of Nov's detention. Although the 2017 warrant was documented as returned on August 17, the district court remained uninformed of Nov's in-custody status until October 27, when a record search was conducted. The district court promptly set a hearing date for November 2, 83 days after Nov's August 11 detention.

At the November 2 hearing, Nov moved to dismiss the case due to an alleged violation of CrRLJ 3.3, the rule governing timing for an accused's trial. The district court set a hearing on November 9 to address Nov's motion. It also set a trial date of November 13.

At the motion hearing, the district court found that under a plain language reading of CrRLJ 3.3, Nov's first appearance in court for the purposes of the rule was on November 2. With a trial date of November 13, Nov would be brought to trial within the requisite 60 day period for in-custody defendants set forth in CrRLJ 3.3. Thus, the district court reasoned that the rule had not been violated. Additionally, the district court did not find any violation of Nov's constitutional right to a speedy trial.

On November 9, the district court granted Nov's request for a trial continuance and reset trial for December 4. Prior to trial commencing, the district court granted Nov's motion to suppress evidence of the October 2012 breath test result. Despite this successful motion, Nov's subsequent December 5 bench

trial, held on stipulated evidence, resulted in his conviction for driving under the influence of intoxicants.[3] Subsequently, Nov appealed to the superior court.

The superior court reversed Nov's conviction on the basis of a purported district court custom, pursuant to which Nov should have been brought before the court within 48 hours of his incarceration on the warrant or, alternatively, within 48 hours of the documented warrant return on August 17. On this basis, the superior court found that a violation of CrRLJ 3.3 had occurred. The superior court did not rule as to whether Nov's constitutional right to a speedy trial had been violated.

The State moved for discretionary review in this court. We granted the motion.

II

The State contends that dismissal for a violation of CrRLJ 3.3 was improper because: (1) the superior court erroneously included factors outside the scope of CrRLJ 3.3 in its analysis of whether the rule had been violated, (2) based on a commencement date of November 2, a trial date of November 13 falls within the 60 day period set forth in CrRLJ 3.3, and (3) Nov's constitutional right to a speedy trial was not violated. The State's contentions have merit.

A

The State first avers that the superior court erroneously relied on the proposition that, pursuant to a local custom, a defendant should be brought

[3] On December 4, the trial court entertained pretrial motions. The bench trial on stipulated evidence took place on December 5, after the trial court had ruled on the various motions.

before the trial court within 48 hours of detention on a warrant, in determining whether a violation of CrRLJ 3.3 occurred. This is so, the State asserts, because CrRLJ 3.3(a)(4) expressly prohibits dismissal for delays arising from circumstances that are not explicitly addressed in CrRLJ 4.1[4] or CrRLJ 3.3. We agree. Because the proposition on which the superior court relied is not a factor in any of the enumerated circumstances set forth in CrRLJ 3.3, relying on that proposition to dismiss Nov's case for a violation of CrRLJ 3.3 was improper.

When the superior court acts in an appellate capacity, we review its decision with reference to the standards set forth in RALJ 9.1.[5] State v. Thomas, 146 Wn. App. 568, 571, 191 P.3d 913 (2008). The application of a court rule to a particular set of facts is a question of law and is therefore reviewed de novo. Thomas, 146 Wn. App. at 571. Court rules are interpreted similarly to statutes drafted by the legislature. State v. George, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). As such, we look "to the plain language of the rule and construe the rule in accord with the drafting body's intent." Thomas, 146 Wn. App. at 572.

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[4] Neither party contends that CrRLJ 4.1, which dictates the time within which an accused must be arraigned, applies to the issues raised herein. Thus, we will not discuss it further.

[5] RALJ 9.1 reads, in pertinent part:

> **(a) Errors of Law.** The superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law.
>
> **(b) Factual Determinations.** The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.
>
> . . . .
>
> **(e) Disposition on Appeal Generally.** The superior court may reverse, affirm, or modify the decision of the court of limited jurisdiction or remand the case back to that court for further proceedings.
>
> . . . .
>
> **(h) Discretionary Review.** The decision of the superior court on appeal is subject to discretionary review pursuant to RAP 2.3(d).

In courts of limited jurisdiction, the time within which a criminal case must be brought to trial is calculated pursuant to CrRLJ 3.3. CrRLJ 3.3 generally requires that a defendant be brought to trial within 60 days of arraignment if the defendant is in custody on the pending charge, and within 90 days if the defendant is out of custody. CrRLJ 3.3(b). The initial commencement date[6] from which the time for trial is measured can be reset if any of eight specified events set forth in the rule occur.[7] CrRLJ 3.3(c)(2). If, "taking into account any applicable resets or exclusions," the State fails to bring a defendant to trial within the requisite time specified in the rule "the charge must be dismissed with prejudice." George, 160 Wn.2d at 733-34; CrRLJ 3.3(h). However, if a trial is delayed by a circumstance that is not a factor provided for in the rule, the charge may not be dismissed unless the court finds that the defendant's constitutional right to a speedy trial was violated. CrRLJ 3.3(a)(4). As CrRLJ 3.3(h) specifies: "No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution." CrRLJ 3.3(h).

The superior court did not adhere to the letter of CrRLJ 3.3(h). Instead, its CrRLJ 3.3 analysis relied on a purported local custom, one not set forth in any court rule or statute, pursuant to which a defendant should be brought before the trial court within 48 hours of his or her incarceration on a bench warrant. Upon reviewing Nov's appeal from the district court's judgment, the superior court

[6] CrRLJ 3.3(c)(1) defines the initial commencement date as "the date of arraignment as determined under CrRLJ 4.1."

[7] These eight events are: (1) waiver, (2) failure to appear, (3) new trial, (4) appellate review or stay, (5) collateral proceeding, (6) change of venue, (7) disqualification of counsel, and (8) deferred prosecution.

reasoned that a local practice in the district court required that Nov should have been brought before that court within 48 hours of the warrant's return on August 11 or, alternatively, within 48 hours of the time at which the warrant's return was documented on August 17. The superior court applied this purported standard to find that the district court failed to meet its obligations under CrRLJ 3.3(a)(1), because it failed to bring Nov before a court within the customary 48 hour period. However, such an analysis of CrRLJ 3.3 is not an appropriate application of the rule.

CrRLJ 3.3(a)(4) explicitly prohibits the inclusion of any external circumstances not enumerated within CrRLJ 3.3 or CrRLJ 4.1 in an analysis of whether a charge should be dismissed. See also CrRLJ 3.3(h). The rule is clear.

> *Construction.* The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule but was delayed by circumstances not addressed in this rule or CrRLJ 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

CrRLJ 3.3(a)(4).

In 2003, the Supreme Court amended CrRLJ 3.3 based on the recommendations of the Time-for-Trial Task Force Final Report, which specifically addressed prior, broader judicial interpretations of the previous versions of CrRLJ 3.3 and its superior court counterpart CrR 3.3.

> Task force members are concerned that appellate court interpretation of the time-for-trial rules has at times expanded the rules by reading in new provisions. The task force believes that the rule, with the proposed revisions, covers the necessary range of time-for-trial issues, so that additional provisions do not need to be

> read in. Criminal cases should be dismissed under the time-for-trial rules only if one of the rules' express provisions have been violated; other time-for-trial issues should be analyzed under the speedy trial provisions of the state and federal constitutions.

WASH. COURTS TIME-FOR-TRIAL TASK FORCE, FINAL REPORT § II(B) (Oct. 2002) (proposed subsection (a)(4) (Construction of Rule)) (on file with Admin. Office of Courts), http://www.courts.wa.gov/programs_orgs/pos_tft/index.cfm?fa=pos_tft.reportDisplay&fileName=Index (last visited Aug. 4, 2020). CrRLJ 3.3(a)(4) was a product of this amendment process.

A plain language reading of CrRLJ 3.3 indicates that dismissal under CrRLJ 3.3 is only appropriate when a defendant's trial was delayed due to any of the circumstances enumerated in the rule. CrRLJ 3.3(a)(4); CrRLJ 3.3(h). This interpretation is supported by the stated intent of the Time-for-Trial Task Force to limit expansive judicial interpretation of the rule. The superior court's reliance on an unsubstantiated district court custom in its application of CrRLJ 3.3 to Nov's case was improper.

B

The State next contends that the district court correctly calculated the time for trial based on Nov's November 2 court appearance. A plain language reading of CrRLJ 3.3 supports this view. The new commencement date from which the time for Nov's trial should have been calculated was indeed November 2.

CrRLJ 3.3(c)(2)(ii) sets forth the means by which the time for trial is computed when a defendant fails to appear at any court proceeding at which the defendant's presence is mandatory. When a defendant fails to appear at such a

mandated court proceeding, "the elapsed time shall be reset to zero," and "[t]he new commencement date shall be the date of the defendant's next appearance." CrRLJ 3.3(c)(2), (c)(2)(ii). CrRLJ 3.3(a)(3)(iii) defines that which constitutes an "appearance":

> "Appearance" means the defendant's physical presence in the trial court. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously placed on the record under the cause number of the pending charge.

The district court found that Nov's "next" appearance for the purposes of CrRLJ 3.3, after his failure to appear on June 1, occurred on November 2. The superior court did not address this issue in its analysis.

Throughout the pretrial process, Nov failed to appear at several court mandated proceedings. Each absence necessarily reset the initial commencement date from which the time for trial was measured. CrRLJ 3.3(c)(2)(ii).

On November 2, Nov appeared before the district court with a King County prosecuting attorney present. The hearing on that date was entered on the court's record under the cause number of the 2013 DUI charge. These facts are sufficient to satisfy the requirements for an "appearance" set forth in CrRLJ 3.3(a)(3)(iii). Thus, for purposes of the rule, Nov's "next" appearance occurred on November 2 and, consistent with the district court's analysis, the time for trial was properly measured from this date.

Nov contends to the contrary, arguing that his August 11 appearance on an unrelated charge was the proper commencement date from which the time for

trial should have been calculated on this charge. On August 11, Nov appeared at the district court for a review hearing on an unrelated charge brought by the city of Burien. This was a date on which the district court was hearing cases brought by the city. Interlocal Agreement § 2.2.6. Given that the calendared case was brought by the city and not the State, a Burien city attorney was present. However, at all times, the prosecuting authority for Nov's 2013 DUI case was the King County Prosecuting Attorney's Office, not the Burien City Attorney's Office.

An interlocal agreement between the city of Burien and the King County District Court provides for the city to employ the district court's administrative services, facilities, and judges, resulting in the district court hearing and adjudicating cases brought by the city. Interlocal Agreement § 2.1. However, the two entities do not share prosecutors. Interlocal Agreement § 2.2.6.1. The Burien city attorney retains the authority to prosecute city cases heard in the district court on the city's calendar. Interlocal Agreement § 2.2.6.1. As such, the August 11 presence of a Burien city attorney did not satisfy the requirements of CrRLJ 3.3(a)(3)(iii). This is so because the city attorney did not have the authority to prosecute the 2013 charge or resolve any warrants issued by the court on that charge. A charge filed by the county prosecutor in the name of the State can only be prosecuted by a county prosecuting attorney or an appointed

deputy prosecuting attorney. RCW 36.27.020[8], RCW 36.27.040.[9] Likewise, a charge filed by the city of Burien can only be prosecuted by a Burien city attorney. Interlocal Agreement § 2.2.6.1.

Additionally, documentation of the August 11 hearing was omitted from the case file for the 2013 charge. Rather, only an August 17 entry, indicating that the warrant was returned, served to notify the State of the August 11 hearing. Mere indication that a warrant was returned is not sufficient to satisfy the second requirement of CrRLJ 3.3(a)(3)(iii).

Thus, the August 11 hearing did not constitute an "appearance" for the purposes of CrRLJ 3.3. No King County prosecuting attorney was notified of Nov's appearance and Nov's presence at the August 11 hearing was not contemporaneously placed on the record under the cause number of the 2013 DUI charge.

The district court correctly determined that November 2, and not August 11 or August 17, was the new commencement date for time-for-trial calculations under CrRLJ 3.3. The trial date of November 13 fell well within 60 days of November 2, satisfying the requirement set forth in the time for trial rule. See CrRLJ 3.3(b)(1). Hence, the district court correctly determined that CrRLJ 3.3 was not violated. Denial of the motion to dismiss was the proper ruling.

[8] RCW 36.27.020 states, in pertinent part: "The prosecuting attorney shall: . . . (4) Prosecute all criminal and civil actions in which the state or the county may be a party."

[9] RCW 36.27.040 states: "The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal. . . . Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney."

C

Finally, we must address whether Nov's constitutional right to a speedy trial was violated. The State avers that no such violation occurred, notwithstanding the lapse of 4 years, 10 months, and 27 days from the date the 2013 DUI charge was filed until the date Nov was brought to trial on that charge. We agree. Applying the four-factor test set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), to determine whether a violation of a defendant's constitutional speedy trial right has occurred, it is apparent that Nov's constitutional right to a speedy trial was not violated.

We review constitutional claims de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). Both article 1, section 22 of the Washington Constitution[10] and the Sixth Amendment[11] to the United States Constitution provide for speedy trials in criminal prosecutions. Owing to the congruence of the state and federal constitutional provisions, an analysis of a speedy trial claim under article 1, section 22 is substantively the same as an analysis of a speedy trial claim under the Sixth Amendment. State v. Ollivier, 178 Wn.2d 813, 826, 312 P.3d 1 (2013). Accordingly, we employ the United States Supreme Court's Barker balancing test to determine whether a violation of the right to a speedy trial has occurred. Ollivier, 178 Wn.2d at 826.

[10] Article 1, section 22 of the Washington Constitution reads, in pertinent part: "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." CONST. art. I, § 22.

[11] The Sixth Amendment of the United States Constitution reads, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI.

The Barker analysis is "fact-specific and 'necessarily dependent upon the peculiar circumstances of the case.'" Ollivier, 178 Wn.2d at 827 (internal quotation marks omitted) (quoting Iniquez, 167 Wn.2d at 288, 292). The four, nonexclusive factors to be considered are the "'[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" Ollivier, 178 Wn.2d at 827 (alteration in original) (quoting Barker, 407 U.S. at 530). However, a defendant must first demonstrate that the delay crosses the threshold "'dividing ordinary from "presumptively prejudicial[,]" delay'" before the alleged violation warrants a Barker analysis. Ollivier, 178 Wn.2d at 827 (internal quotation marks omitted) (quoting Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)).

For the purposes of a speedy trial analysis, the length of delay is properly calculated from the date that charges are filed against the defendant. State v. Ross, 8 Wn. App. 2d 928, 942, 441 P.3d 1254, review denied, 194 Wn.2d 1008 (2019). Here, the State concedes that the delay of over four years is presumptively prejudicial.[12] However, the State avers that the presumption of prejudice is rebutted.

The first Barker factor, the length of the delay, necessarily entails a reexamination, given its nature as a threshold question preceding a Barker analysis. Ollivier, 178 Wn.2d at 827-28. The State concedes that the delay was over four years from the date charges were filed and, thus, that this factor weighs in Nov's favor. The State's concession is contrary to the findings of the district

[12] "Courts generally have presumed prejudice in cases where the delay has lasted at least five years." Ross, 8 Wn. App. 2d at 956. The delay herein is somewhat shorter than that.

court, which used Nov's June 1 arraignment as the starting point from which to compute the length of delay. We accept the State's concession.

To be sure, without more, a delay of greater than four years is an unusually long time for a DUI charge to be brought to trial. Nov was arrested on a seemingly straightforward DUI charge in October 2012, charged in January 2013, and eventually brought to trial in December 2017. In contrast, the average DUI defendant is brought to trial in the King County District Court within 184 days. Accordingly, this factor weighs against the State.

The second Barker factor is the reason for the delay. Barker, 407 U.S. at 530. "'[P]retrial delay is often both inevitable and wholly justifiable.'" Ollivier, 178 Wn.2d at 831 (quoting Doggett, 505 U.S. at 656). As such, an analysis of the second Barker factor requires "careful assessment of the reasons for the delay" in order "to sort the legitimate or neutral reasons for delay from improper reasons." Ollivier, 178 Wn.2d at 831. This "factor focuses on 'whether the government or the criminal defendant is more to blame' for the delay." Ross, 8 Wn. App. 2d at 944 (quoting Doggett, 505 U.S. at 651). Each party's role in, and level of responsibility for, the delay is assessed. Ollivier, 178 Wn.2d at 831. Different weights are, then, ascribed to each particular reason. Ollivier, 178 Wn.2d at 831. Determination of the weight is "primarily related to blameworthiness and the impact of the delay on [the] defendant's right to a fair trial." Ollivier, 178 Wn.2d at 831. Notably, the State has some obligation to pursue and bring to trial a defendant. Doggett, 505 U.S. at 656. However, the

focal question is whether the State's actions were diligent. United States v. Aguirre, 994 F.2d 1454, 1457 (9th Cir.1993).

The first, and longest, portion of the delay in this case occurred when Nov failed to appear at his arraignment in January 2013, resulting in his not being served with the 2013 warrant until May 2017. On October 15, 2012, a sheriff's deputy arrested Nov for a suspected DUI and took him to the police precinct in order to conduct a breath test. Afterward, rather than book Nov into jail, the deputy drove Nov to the address listed on Nov's driver's license. Nov confirmed that this was his home address when he stated, "Oh, this is my house," and thanked the deputy for the ride home. Later, the State mailed a notice of arraignment to the address that Nov had confirmed was his residence. However, the notice was returned as undeliverable and Nov failed to appear at his scheduled arraignment.

Subsequently, the State ran a database search with the Department of Corrections, the District and Municipal Court Information System, and the Department of Licensing searching for an updated address. The address on the notice of arraignment was the most recent address listed in the databases. By summoning Nov via the mail and by conducting these database searches, the deputy prosecutor followed the procedure set forth in CrRLJ 2.2(d)(2)[13] and CrRLJ 2.2(a)(3)(i).[14] Only after these searches were conducted did the

[13] CrRLJ 2.2(d)(2) reads:
Delivery of Summons. The summons may be served any place within the state. It may be served by a peace officer, who shall deliver a copy of the same to the defendant personally, or it may be delivered by the court mailing the same, postage prepaid, to the defendant at his or her last known address.

[14] See supra note 1

prosecutor request the issuance of a bench warrant. Accordingly, the State's attempts to locate and prosecute Nov were diligent and properly made. The attempts were apparently hindered either by the defendant's refusal to receive the mail at his home address or, if he had moved, to update his address with the Department of Licensing, as is required by RCW 46.20.205.[15]

In a statement of additional authorities, Nov relies on United States v. Mendoza, 530 F.3d 758 (9th Cir. 2008), to assert that the State's efforts were not diligent. In Mendoza, the defendant provided his wife's and relatives' contact information to federal agents as a means by which the agents could notify him of his indictment. Mendoza, 530 F.3d at 763. On two separate occasions prior to the defendant's indictment, federal agents had left messages with the defendant's relatives and the defendant had promptly returned the calls. Mendoza, 530 F.3d at 763. Thus, the Ninth Circuit reasoned that "[b]ased on [the State's] previous success in contacting Mendoza, the government was negligent when it failed to attempt to inform Mendoza of the indictment by calling either the wife or the relative's telephone number." Mendoza, 530 F.3d at 763.

Here, however, the State was at no such advantage. The only contact information that the State possessed was an address confirmed by Nov to be his residence. Later, the address was confirmed as Nov's most recent address when the State conducted the database searches pursuant to CrRLJ 2.2(a)(3)(i).

[15] RCW 46.20.205 reads:
Whenever any person, after applying for or receiving a driver's license or identicard, moves from the address named in the application or in the license or identicard issued to him or her, or changes his or her name of record, the person shall, within ten days thereafter, notify the department of the name or address change as provided in RCW 46.08.195.

Given the State's diligent efforts to contact Nov via the only contact information available to it, it cannot be said that the portion of the delay generated by Nov's failure to appear at his arraignment weighs against the State.

However, the court and the State do share responsibility for that portion of the delay during which Nov was held in custody from August 11 to October 27.[16] An irregularity on Nov's booking sheet resulted in the State's unawareness of Nov's in-custody status. As a result, a hearing was not set until November 2, 83 days after Nov's detention on the warrant. No evidence in the record indicates that this delay resulted from intentional interference by the State. However, error attributable to negligence on behalf of the State is still a consideration in our Barker analysis—albeit, weighed less heavily than would be intentional conduct. Barker, 407 U.S. at 531.

In sum, from January 8, 2013, the date on which the charge was filed, to December 5, 2017, the date Nov was brought to trial, over 4 years and 6 months of delay resulted from Nov's unexcused absences.[17] During this time, the State following appropriate protocol under CrRLJ 2.2 and was diligent in its efforts to locate and prosecute Nov. The State remains partially responsible for 83 days of the delay caused by the paperwork irregularity after he was incarcerated on the bench warrant. Although "responsibility for such [negligence] must rest with the government rather than with the defendant[,]" the fact remains that the vast

[16] Conversely, Nov is entirely responsible for the delay between November 9, 2017 and December 5, 2017. It was Nov who moved to continue the trial date from November 13 to December. That the trial court granted his request does not relieve him of responsibility for this portion of the delay.

[17] In addition to the absence from January 25, 2013 through May 7, 2017, Nov's whereabouts were also unaccounted for from June 1, 2017 to August 11, 2017, after he was released on electronic home monitoring and failed to appear at the June 1 hearing.

majority of the delay was a result of Nov's unexcused absences. Barker, 407 U.S. at 531. That the State bore some responsibility for the 83 days of delay while Nov was in custody does not outweigh Nov's significantly more extensive absences. An additional 26 days of delay was solely caused by Nov's request for a continuance of the trial date. Accordingly, the second Barker factor weighs in favor of the State.

The third Barker factor, the defendant's assertion of his right, "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker, 407 U.S. at 531-32. The primary focus of this factor is to determine "whether and to what extent a defendant demands a speedy trial." Iniguez, 167 Wn.2d at 294. We consider "the frequency and force of a defendant's objections" and "the reasons why the defendant demands or does not demand a speedy trial." Iniguez, 167 Wn.2d at 295.

Indeed, "'failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.'" Ross, 8 Wn. App. 2d at 952 (quoting Barker, 407 U.S. at 532). "'[A]lthough a defendant has no obligation to bring himself to trial, he does bear some responsibility in asserting his right.'" Ross, 8 Wn. App. 2d at 952 (quoting State v. Sterling, 23 Wn. App. 171, 177, 596 P.2d 1082 (1979)). Critically, an assertion of the constitutional right to a speedy trial is

different from an assertion of the right to a remedy for a violation of that right.[18] Here, the district court found the third Barker factor to be "a wash." We disagree.

During the November 2 hearing, Nov moved to dismiss pursuant to CrRLJ 3.3(h). The district court set a motion hearing for November 9, and, ultimately, found that no violation of CrRLJ 3.3 or Nov's constitutional right to a speedy trial had occurred. Here, Nov only asserted a right to the remedy of dismissal pursuant to CrRLJ 3.3. He made no effort, before seeking dismissal, to assert his constitutional right to a speedy trial.

Moving to dismiss a charge on speedy trial grounds, alone, "does not establish that [the defendant] appropriately asserted [his] rights." United States v. Loud Hawk, 474 U.S. 302, 314, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986). Analogously to Barker, wherein the court ruled that the record indicated that the defendant "did not want a speedy trial[,]" Barker, 407 U.S. at 536, the record in this case indicates that Nov did not want to go to trial at all. Accordingly, this factor weighs in favor of the State.

The fourth Barker factor, prejudice to the defendant, is generally analyzed by assessing any effects on the interests protected by the right to a speedy trial: (1) prevention of a harsh pretrial detention, (2) minimization of the defendant's anxiety or worry, and (3) limitation or impairment of the defense. Iniguez, 167

[18] An appropriate assertion of the constitutional right to a speedy trial encompasses more than a desire for dismissal on speedy trial grounds. Defendants can, and have: orally demanded a speedy trial the day they were arrested, demanded a speedy trial multiple times while in custody, written *pro se* motions for a speedy trial, objected to a motion to obtain DNA samples under speedy trial grounds, and objected to the State's motion for continuance on speedy trial grounds. See e.g., Amos v. Thornton, 646 F.3d 199 (5th Cir. 2011); Smith v. Commonwealth of Kentucky, 361 S.W.3d 908 (Ky. 2012). The aforementioned methods of asserting the constitutional right to a speedy trial are all missing in the present case. Rather, Nov only asserted a right to the remedy of dismissal, not a right to a speedy trial.

Wn.2d at 295. "In general, a defendant must show actual prejudice to establish a speedy trial right violation." Ross, 8 Wn. App. 2d at 956 (citing Ollivier, 178 Wn.2d at 840). Impairment of the defense is considered the most serious form of prejudice and is presumed to intensify over time. Iniguez, 167 Wn.2d at 295. Although particularized showings of prejudice are not necessary when a delay is of a sufficient length that it causes a presumption of prejudice to arise, see Ollivier, 178 Wn.2d at 840, this presumption may be rebutted by the State establishing that the delay left the defense unimpaired. See Doggett, 505 U.S. at 658 n.4.

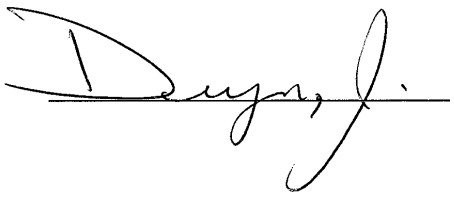
The State concedes that the length of the delay was sufficient to establish a presumption of prejudice. However, the State contends that the presumption of prejudice is overcome by the fact that the witnesses at trial were primarily the State's witnesses. Thus, any fading of eyewitnesses' memory of the incident giving rise to this charge would serve to impair the State's case and not Nov's.

Likewise, the success of Nov's motion to suppress evidence shows that his defense was unimpaired by the delay. Prior to trial, Nov moved to suppress evidence of the October 2012 breath test result. The motion was granted by the district court and the trial proceeded without the test result in evidence. A breath test result showing a breath alcohol content above the legal limit is often a critical component of the State's case against a DUI defendant. See State v. Sandholm, 184 Wn.2d 726, 730, 736, 364 P.3d 87 (2015); see also RCW 46.61.502(1)(a), RCW 46.61.506. Here, counsel for Nov successfully eliminated a significant

hurdle in his case, indicating that counsel was left unimpaired in defending Nov.[19] Accordingly, the presumption of prejudice created by the long delay before trial is rebutted. Thus, the last Barker factor weighs in favor of the State. See Barker, 407 U.S. at 530.

Upon considering all four Barker factors, we conclude that a violation of Nov's constitutional right to a speedy trial did not occur. See Barker, 407 U.S. at 530. The delay of over four years between the date the charges were filed and the date Nov was brought to trial was primarily the result of Nov's unexcused absences. Additionally, Nov never actually sought a speedy trial, demanding instead only the remedy of dismissal after the delay had already elapsed. Importantly, the record indicates that the defense remained unimpaired by the delay, rebutting any presumption of prejudice to Nov. Accordingly, Nov's right to a speedy trial under article 1, section 22 of the Washington Constitution and the Sixth Amendment of the United States Constitution was not violated.

We reverse the superior court order and reinstate Nov's district court conviction.



[19] Gaining exclusion of a breath test result may help a DUI defendant in two ways. First, it may help gain acquittal. Second, if convicted, the defendant avoids the harsher mandatory penalties attached to a conviction wherein the blood alcohol or breath alcohol content is proved to be greater than 0.15 (referencing 0.15 grams of alcohol per two hundred ten liters of breath pursuant to RCW 46.61.506 and RCW 46.61.5055).

WE CONCUR:

Andrus, A.C.J. Mann, C.J.