

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	DIVISION ONE
)	
Respondent,)	No. 66931-1-I
)	
v.)	
)	UNPUBLISHED OPINION
NATHAN OWEN PIERCE,)	
)	
Appellant.)	FILED: July 25, 2011
_____)	

Dwyer, C.J. — Nathan Owen Pierce appeals from the judgment entered on a jury’s verdict finding him guilty of possession of a controlled substance (methamphetamine). He contends that his court rule right to a timely trial was violated as a result of the trial court’s decision to grant the State’s motion for a continuance over Pierce’s objection and beyond the expiration of the established time for trial period. Because the trial court appropriately exercised its discretion in granting the trial continuance, Pierce’s claim is unavailing. Accordingly, we affirm.

I

On July 6, 2009, Nathan Owen Pierce and his girlfriend, Stephanie Mode, were sitting in the bedroom of Mode’s apartment when police entered the residence to execute on a search warrant. Subsequently, an officer arrested

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Pierce and found a spoon in Pierce's pocket covered with a white crystal residue. As a result, Pierce was charged with one count of possession of a controlled substance (methamphetamine).¹ The State initially charged Pierce singularly but, on July 24, 2009, the State added Mode as a co-defendant.

After posting bail, Pierce remained out of custody on supervised release. However, on October 20, 2009, Pierce was arraigned on unrelated charges and subsequently jailed. On November 19, 2009, Pierce appeared for a readiness hearing on this case, with trial scheduled to commence on November 23. Pierce's time for trial period for the possession of a controlled substance charge was set to expire on November 25, 2009; the scheduled date for trial was the 88th day of the 90-day time for trial period.

On the day of the readiness hearing, the trial court indicated that it had received a waiver of speedy trial from Mode and a motion to sever from Pierce. Pierce's motion was filed on the morning of the readiness hearing. At the hearing, the State asserted that Pierce's motion to sever was untimely. It also sought to continue the joint Mode-Pierce trial past November 25. Pierce objected to the proposed continuance. He sought for his case to be severed from Mode's and for the case against him to proceed to trial as scheduled.

The deputy prosecutor requested a continuance, in part, to prepare to argue against the motion for severance, which he had not yet reviewed. In

¹ Pierce was also charged with one count of unlawful use of drug paraphernalia. However, the jury acquitted him of this charge, and it is not at issue in this appeal.

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addition, both the deputy prosecutor and Mode's attorney declared that they were unavailable on the scheduled date of the Mode-Pierce trial because they were jointly scheduled to appear in court for another trial on November 23. In response, Pierce asserted that the prosecutor's office should find another deputy prosecutor to try his case on the date scheduled.

The trial court declined to rule on the motion for severance at the readiness hearing and deferred that issue to the assigned trial judge for decision. Finding good cause for the continuance based upon the unavailability of both the deputy prosecutor and Mode's counsel on November 23, the trial court granted the motion for a continuance. Trial was set for December 3. On December 3, the motion for severance was granted. Pierce's trial commenced on December 7, 2009. On the following day, the jury returned its verdicts.

Pierce appeals.

II

Pierce contends that his right to a timely trial was violated because the trial court continued his trial, over his objection, beyond November 25. He is wrong.

We review de novo an alleged violation of the time for trial rule, CrR 3.3. State v. Carlyle, 84 Wn. App. 33, 35, 925 P.2d 635 (1996). A trial court's decision to grant or deny a continuance pursuant to CrR 3.3 "will not be

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disturbed absent a showing of a manifest abuse of discretion.” State v. Williams, 104 Wn. App. 516, 520-21, 17 P.3d 648 (2001). “Discretion is abused if it is exercised on untenable grounds or for untenable reasons.” State v. Melton, 63 Wn. App. 63, 66, 817 P.2d 413 (1991) (quoting State v. Barnes, 58 Wn. App. 465, 471, 794 P.2d 52 (1990)).

The trial court is responsible for ensuring compliance with the time for trial rule. CrR 3.3(a)(1). The court may grant a continuance where it is “required in the administration of justice,” provided that the defendant will not be substantially prejudiced in the presentation of his or her defense. CrR 3.3(f)(2). In granting a continuance, the court “must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(2). Furthermore, periods of delay resulting from the grant of a continuance are “excluded in computing the time for trial” period. CrR 3.3(e).

“[A]ll relevant factors” may be considered by the trial court in exercising its discretion to grant or deny a continuance. State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003). Such factors may include “surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.” State v. Downing, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004). Pursuant to CrR 3.3, the “unavailability of counsel may constitute unforeseen or unavoidable circumstances to warrant a trial extension.” Williams, 104 Wn. App. at 522 (quoting State v. Carson, 128 Wn.2d 805, 814, 912 P.2d 1016

(1996)). Furthermore, even routine scheduling conflicts may be a valid basis for granting a continuance. See Heredia-Juarez, 119 Wn. App. at 153-55 (holding that a continuance granted to accommodate a prosecutor's reasonably scheduled vacation was not an abuse of the trial court's discretion).

Pierce asserts that the trial court abused its discretion by granting the State's motion to continue his trial beyond the established time for trial period, rather than granting Pierce's motion to sever. He further contends that the trial court erred by failing to ascertain, before granting the continuance, whether the defendant in Mode's counsel's other November 23 case also had an approaching time for trial expiration date. He is wrong on both counts.

Contrary to Pierce's assertion, the readiness hearing judge was well within his discretion in leaving the determination of the untimely motion to sever to the eventual trial judge. Hence, at the time of the readiness hearing, when the motion to continue the trial needed to be addressed, the Mode-Pierce case remained joined for trial. Accordingly, the scheduling conflicts of both the deputy prosecutor and Mode's attorney were relevant considerations for the court. The deputy prosecutor and Mode's attorney were jointly scheduled to try a different case on November 23. Moreover, both the deputy prosecutor and Mode's attorney expressed their preference to try the other, unrelated case, prior to commencing the Mode-Pierce trial. The trial court reasonably concluded that "there is good cause for a continuance of the trial based upon the unavailability

of counsel on the date scheduled.” Report of Proceedings at 22. The delay resulting from this ruling was brief, justified, and excluded from the time for trial calculation by the provisions of the rule itself.

Furthermore, the trial court is not slavishly bound by the expiration dates of various defendants’ time for trial periods when determining which of two cases should be tried first. State v. Angulo, 69 Wn. App. 337, 343, 848 P.2d 1276 (1993) (holding that a court should consider all relevant facts, not just the expiration dates of speedy trial periods, in determining whether one case should be heard before another). The trial court did not abuse its discretion by choosing to consider the preference of the two attorneys involved in both November 23 cases, rather than employing the criteria desired by Pierce.

III

Pierce further contends that the trial court abused its discretion by refusing to instruct the prosecutor’s office to provide another attorney to try his case, given the unavailability of the assigned deputy prosecutor. We disagree.

There is no per se duty of reassignment where a prosecutor’s schedule conflicts with a defendant’s right to a speedy trial. Heredia-Juarez, 119 Wn. App. at 155; Williams, 104 Wn. App. at 523-24 (determining that the trial court did not abuse its discretion by granting five continuances in part due to counsel’s scheduling conflicts). A trial court does not generally abuse its discretion by failing to require reassignment of counsel where counsel’s unavailability forces a

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continuance beyond the expiration of a defendant's time for trial period. See Carson, 128 Wn.2d at 815-16 (holding that, where counsel and trial judge were participating in another case, the trial court properly granted a continuance beyond the expiration of the defendant's time for trial period); Angulo, 69 Wn. App. at 344 (concluding that it was a proper exercise of the trial court's discretion to grant a continuance in order to allow another case to go to trial).

Pierce asserts that the trial court abused its discretion by failing to require another prosecutor to try his case on its scheduled date in order to accommodate his speedy trial rights. However, because the trial court declined to rule on the motion for severance at the readiness hearing, Pierce's argument misses the point. At the time of the ruling challenged in this appeal, the prosecution of Pierce and Mode was a joint one. However, both the prosecutor and Mode's attorney were scheduled for another trial on November 23. Both attorneys preferred to try the other case first. Hence, even if the trial court had forced reassignment of the prosecutor, which the law does not require, Mode's attorney would have remained unavailable on the scheduled date. Thus, the reassignment would have been a pointless act, as the unavailability of Mode's counsel would still have presented a valid basis for granting a continuance—a continuance to which Mode was agreeing.

The trial court properly ruled on the issues before it.

Affirmed.

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Dupe, C. J.

We concur:

Leach, A. C. J.

Becker, J.