

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 67131-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
PONZI BERNARD WILLIAM, JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 25, 2011
	)	

Lau, J. — On March 18, 2003, Ponzi William was arraigned in Pierce County District Court. The court set a pretrial hearing for a date after speedy trial expiration, and William did not object. When William failed to appear, the court issued a bench warrant that remained outstanding for almost five years. When William appeared to quash the warrant, he argued speedy trial expiration. The court denied the motion premised on William’s failure to object at arraignment and because the bench warrant reset the speedy trial date. After the superior court affirmed his RALJ appeal, William moved for discretionary review. Because no duty to object arose until a trial date was set and because speedy trial expired before the bench warrant issued, we reverse.

FACTS

On July 23, 2001, the Tacoma city attorney's office arraigned Ponzi William on three sexual assault charges and three harassment charges. The court set bail and took William into custody. On September 12, 2001, (51 days after arraignment) the City dismissed all charges against William without prejudice for lack of jurisdiction. On March 18, 2003, the Pierce County prosecutor's office charged William with three counts of communication with a minor for immoral purposes based on the same events that led to the city charges.

On April 2, 2003, William was arraigned and released on those charges in Pierce County District Court. At the arraignment, the court set a pretrial conference for May 27, 2003—55 days later. William acknowledges that he did not object to this date. The court issued a bench warrant for William's arrest when he failed to appear at the pretrial conference. William moved to quash the warrant on June 20, 2003, but failed to appear. The warrant remained outstanding for almost five years.

William was arrested on the warrant in February 2008. On March 18, 2008, William appeared at a pretrial conference and informed the court he intended to move to dismiss the case for violations of his speedy trial rights under CrRLJ 3.3. The court heard the motion on May 9, 2008.<sup>1</sup> The court ruled that because William failed to appear on May 27, 2003, and did not reappear until February 19, 2008, the State had

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<sup>1</sup> The court originally set the motion hearing date for April 14, 2008, but granted William's motion to continue until May 9, 2008, the day of a readiness hearing that had previously been set in this case.

90 days of speedy trial beginning on February 19, 2008. The court also ruled that William failed to preserve any speedy trial violation when he failed to object at the April 2, 2003 arraignment to the court setting a pretrial conference for May 27. After continuances by the State and the defense, the matter proceeded to jury trial on August 20, 2009. The jury convicted William as charged.

William appealed to superior court, raising five issues, including that his case should have been dismissed under former CrRLJ 3.3 when speedy trial expired prior to the May 27, 2003 pretrial hearing. The superior court affirmed William's convictions. Specifically, the court found that William failed to object when the pretrial hearing was set beyond the speedy trial limits provided for under CrRLJ 3.3 and then failed to appear for the pretrial hearing.

William moved for discretionary review to Division Two of this court on the issue of whether he was entitled to dismissal under former CrRLJ 3.3. A commissioner granted review.

#### ANALYSIS

William contends that this court must decide whether "when the state has allowed a case to expire under the applicable speedy trial rule and the defendant fails to appear after that expiration date, may the state re-initiate a prosecution despite the lack of any remaining speedy trial time?" Appellant's Br. at 5. The State counters that William waived any speedy trial issue when he failed to object to setting the pretrial hearing for May 27 at the April 2, 2003 arraignment. The State also argues that William's failure to appear at the May 27 pretrial hearing reset speedy trial.

A defendant's right to a speedy trial

is guaranteed by the federal and state constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The determination of whether a defendant's time for trial has passed requires an application of court rules to particular facts and is reviewed de novo. State v. Swenson, 150 Wn.2d 181, 186, 75 P.3d 513 (2003). If the time for trial has passed and the defendant has made a timely objection, the court has no discretion and the charges must be dismissed. Swenson, 150 Wn.2d at 186-87. If the objection is not timely, the court's order denying a motion to dismiss for a speedy trial violation is reviewed for manifest abuse of discretion. City of Seattle v. Guay, 150 Wn.2d 288, 295, 76 P.3d 231 (2003)

At the time William was arraigned in Pierce County in 2003, CrRLJ 3.3(f)(1) (2003)<sup>2</sup> read:

The court shall, within 15 days of the defendant's arraignment, or at the pretrial hearing, set a date for trial which is within the time limits prescribed by this rule, and notify the lawyer for each party of the date set. . . . A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those limits. . . . Failure of a party, for any reason, to make such a motion shall be a waiver of the objection that a trial commenced on such a date . . . is not within the time limits prescribed by this rule.

(Emphasis added.) When a defendant is arraigned on charges in one court and those charges are later dismissed and refiled in another court, the time for trial in the new

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<sup>2</sup> By the time William reappeared in 2008, CrRLJ 3.3(d)(3) (2008) stated, "A party who objects to the date set on the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice [of the trial date] is mailed or otherwise given, move that the court set a trial date within those limits. . . . A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such date, is not within the time limits prescribed by this rule."

court is counted from the date of the arraignment and is equal to the amount of time for trial that existed at the time of the dismissal. See State v. Hamilton, 121 Wn. App. 633, 641, 90 P.3d 69 (2004).

The case of State v. Jenkins, 76 Wn. App. 378, 884 P.2d 1356 (1994) controls. In that case, following a mistrial on June 15, 1993, the court scheduled a trial setting hearing on September 14. The State later discovered that speedy trial expired on September 13 and sought a five-day retroactive extension of the speedy trial period on the grounds of unforeseen or unavoidable circumstances since the prosecutor was in trial on those dates. Jenkins moved to dismiss for failure to bring him to trial within the speedy trial period. Jenkins, 76 Wn. App. at 380-81. The trial court “concluded that because a trial date was never set in the case, it was inappropriate to grant [the State’s requested] extension.” Jenkins, 76 Wn. App. at 381.

On appeal, the State argued Jenkins had “waived his right to complain of a speedy trial violation because he did not object to the trial date until after the expiration date had passed” as required by former CrR 3.3(f). Jenkins, 76 Wn. App. at 382. The court rejected that argument, noting:

[I]t is the trial court which bears the ultimate responsibility to ensure a trial is held within the speedy trial period,” but that “as between the defendant and the State, it is the State who has the primary duty to see that the defendant is tried in a timely fashion.

Jenkins, 76 Wn. App. at 382. The court held that the responsibility only shifts to the defendant when a trial date is set. Thus, the criminal rules did not require a defendant “to object to the date of a trial setting hearing scheduled after the expiration date.

Under CrR 3.3, it is only after a trial date is set that responsibility shifts to the defendant to object in a timely manner.” Jenkins, 76 Wn. App. at 383. The court concluded that the State’s argument failed because “Criminal Rule 3.3(f) never came into play because the State never set a trial date to which Jenkins was required to object.” Jenkins, 76 Wn. App. at 383.

Here, William was arraigned in Tacoma Municipal Court on July 23, 2001. On September 12, 2001, that court dismissed the charges after determining that Pierce County had jurisdiction. Between July 23 and September 12, 51 days of the 60-day speedy trial time had elapsed. The State refiled the matter in Pierce County District Court on March 18, 2003, and William was arraigned on April 2, 2003. At that time, the State had 39 days within which to bring the matter for trial—9 from the Tacoma case in which he was held in custody and 30 more because he was released from custody after arraignment in the Pierce County case.

The State did not set trial within this period. Rather, the court set a pretrial date for May 27, 2003—some 55 days after William’s arraignment. Thus, speedy trial expired on May 11. Contrary to the State’s assertions, William was under no obligation to object because “it is only after a trial date is set that responsibility shifts to the defendant to object in a timely manner.” Jenkins, 76 Wn. App. at 384. As in Jenkins, waiver under the CrRLJ 3.3(d)(3)<sup>3</sup> “never came into play because the State never set a trial date to which [William] was required to object.” Jenkins, 76 Wn. App. at 383. Accordingly, the trial court erred in denying William’s motion to dismiss.

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<sup>3</sup> Jenkins involved waiver under CrR 3.3.

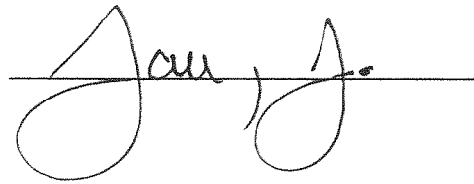
The State counters that Jenkins is distinguishable because “[u]nlike Jenkins where no future dates were set after the mistrial, defendant’s case was proceeding under normal procedure with future dates set.” Resp’t’s Br. at 10. But Jenkins is clear that a trial setting hearing was scheduled: “[T]he deputy prosecutor scheduled a trial setting hearing on September 14.” Jenkins, 76 Wn. App. at 380. The State’s argument is unconvincing. The State also contends that Jenkins is distinguishable because the “defendant here did not appear for the pre-trial date and then abscond[ed] for five years. Such a situation is not contemplated by Jenkins.” Resp’t’s Br. at 10. The State thus maintains that William’s absence reset speedy trial. The fact that William failed to appear for the pretrial hearing on May 27, 2003, is immaterial because speedy trial had already expired on May 11. Thus, his failure to appear could not have reset an already expired speedy trial. The State’s argument fails.

For the reasons stated above, we reverse and vacate William’s convictions.

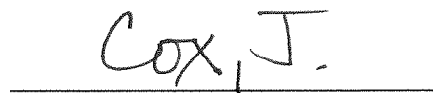


WE

ONCUR:



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