No. 28462-0-III

Korsmo, C.J. (dissenting) — The defense never moved for a new trial date even though a timely trial was still possible. Under the plain language of CrR 3.3(d)(3) and long-standing precedent, that failure waived any objection to the revised trial dates.

BACKGROUND

The problems in this case had their genesis in a motion to suppress and dismiss filed on Friday, April 17, 2009, for a hearing four days later. Unsurprisingly, one of the State's three necessary witnesses was not available for a hearing on such short notice. In order to give the defendant a timely hearing before trial on a potentially dispositive motion, the trial date needed to be continued. The defense did not volunteer to move the trial date in order to accommodate its motion. The prosecutor, having an easy way to gain time for the hearing, instead made his suggestion to release Jose Chavez-Romero and reset the trial date within the new 90-day period.

The defense opposed the suggestion to release Mr. Chavez-Romero given the Immigration and Customs Enforcement (ICE) hold on him, but propounded no other possibilities for the trial judge. Despite the fear that ICE would intervene, the defense did not seek to drop its apparently useless[1] motion, nor did it seek a short trial continuance to

accommodate its desired hearing. Fully aware that it was highly likely the defendant would not be able to appear, but having no other alternative suggestion, the trial court granted the State's request and continued the trial date to May 13. The hearing was continued one week to April 28.

As anticipated by the court and the parties, Mr. Chavez-Romero did not appear at the April 28 motion hearing. Defense counsel did ask that the matter be set over one week so that she could seek discretionary review in this court. Instead, a bench warrant issued and the trial date was stricken. As could be reasonably anticipated, Mr. Chavez-Romero was returned to local authorities by ICE in relatively short order.[2] He appeared in Benton-Franklin Superior Court again on May 15; the local bench warrant had been served the day before.

On May 19, the trial court set the suppression hearing for June 2 and scheduled

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[1] Although the motion sought to suppress all evidence derived from an investigatory seizure, there was no physical evidence obtained. The parties stipulated to the admission of the defendant's statements to police that night. Instead, as the very belatedly filed findings indicate, the only evidence sought to be suppressed was the testimony of the victim. However, the testimony of a witness discovered through an illegal search is not itself subject to suppression. *See State v. Hilton*, 164 Wn. App. 81, 89-90, 261 P.3d 683 (2011), *review denied*, 173 Wn.2d 1037 (2012). Thus, the motion seems to have served no purpose.

[2] If ICE had an interest in removing Mr. Chavez-Romero for reasons other than the pending child rape charges, it likely would have done so earlier, so the return to local control for purposes of resolving the pending charges was reasonably foreseeable.

trial for July 15. Eight days later, defense counsel moved to dismiss for alleged violation of CrR 3.3 and CrR 8.3. The essence of the defense's argument was that Mr. Chavez-Romero should not have been released and that the time for trial therefore had expired May 4.[3] The defense also argued that the prosecution had not used due diligence in seeking Mr. Chavez-Romero's appearance for the April 28 hearing.

The trial court denied both the CrR 3.3 motion to dismiss as well as the motion to suppress. The defense subsequently requested and received a continuance of the trial date to July 22 so that counsel could bring a new motion to exclude the victim's testimony. Trial ultimately commenced July 22.

ANALYSIS

The majority correctly rejects the arguments made by appellant in his attempt to return a due diligence requirement to CrR 3.3.[4] *See* Majority at 9-10. It also very wisely rejects the implicit argument undergirding the briefs of both appellant and amicus that there is a right to remain in custody. *Id*. at 11. The fact that someone is sought by multiple jurisdictions does not require the first jurisdiction to maintain its hold at the risk

[3] This presumably was a typographical error since the 60th day from the March 3 arraignment would have been May 2, a date also recognized at the time of arraignment.

[4] Despite express statements by the court that it was not reading a due diligence requirement into the amended rule, appellant insisted that the court had done so in *State v. George*, 160 Wn.2d 727, 158 P.3d 1169 (2007).

of losing its case forever. Unfortunately, the majority reads facts into the opinion in *State v. George*, 160 Wn.2d 727, 158 P.3d 1169 (2007) that simply are not there in order to find a proper objection to the revised trial dates. There are two specific reasons why Mr. George did not properly object and the case was timely heard.

Although *George* is instructive on some of the issues presented here, it is a provision not construed in that opinion which happens to govern this case. CrR 3.3(d)(3) provides:

> (3) *Objection to Trial Setting.* A party who objects to the dates 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 time limits.* Such motion *shall be promptly noted for hearing by the moving party* in accordance with local procedures. *A party who fails, for any reason, to make such a motion shall lose the right to object* that a trial commenced on such a date is not within the time limits prescribed by this rule.

(Second emphasis added.)

The rule sets out a clear standard. If a party has an objection to a trial date, it *must* file and note a motion to set the date within the time limits. Case law has added the gloss that a motion to dismiss is sufficient to comply with this rule *if* the time for trial has already expired. *E.g.*, *State v. Greenwood*, 120 Wn.2d 585, 606, 845 P.2d 971 (1993). However, if there is still time remaining under CrR 3.3, then the motion must be brought

before the time expires so that a timely trial can be held. *E.g.*, *State v. Carson*, 128 Wn.2d 805, 818-19, 912 P.2d 1016 (1996) (citing cases); *State v. Rose*, 110 Wn. App. 878, 883, 43 P.3d 48 (2002); *State v. Austin*, 59 Wn. App. 186, 197-200, 796 P.2d 746 (1990). As noted in *Austin*: "A tardy reliance on the speedy trial rules cannot justify a dismissal." 59 Wn. App. at 200.

George involved a defendant who was facing charges for violating a no-contact order in both the Kent and Renton municipal courts. He kept failing to appear in the Renton court because Kent (and later the superior court) was holding him in custody. *George*, 160 Wn.2d at 731. He also was charged in superior court with felony offenses arising out of the incident being prosecuted in the Kent municipal court. *Id*. at 731-32. The Kent charges were ultimately dismissed by the municipal court. The Renton charge was also dismissed by the municipal court so that it could be added to the pending felony case. *Id*. at 732.

Mr. George challenged the timeliness of the Renton charge, arguing that time had expired in municipal court before it was added to the superior court case. His objections were overruled and he was convicted in superior court. *Id*. This court upheld the convictions on the basis that the failures to appear in Renton municipal court had reset the commencement date of the time for trial period in accordance with CrR 3.3(c)(2)(ii)

and CrRLJ 3.3(c)(2)(ii). *George*, 160 Wn.2d at 732-33.

In its review, the Washington Supreme Court concluded that Mr. George received a timely felony trial and affirmed the convictions. *Id*. at 731, 745. However, the court rejected the argument that the reset provision of CrR 3.3(c)(2)(ii) applied since another provision, CrR 3.3(e)(2), acted to toll the time for trial during the pendency of other cases. *George*, 160 Wn.2d at 740-42, 745. Instead, it treated CrR 3.3(c)(2)(ii) as a catch-all provision that was inapplicable when other provisions expressly addressed the factual situation at hand. *George*, 160 Wn.2d at 738-40.[5] Since CrR 3.3(e)(2) governed the situation where the defendant was facing other charges, the trial court erred in applying CrR 3.3(c)(2)(ii). *George*, 160 Wn.2d at 739-40, 745. In the course of its analysis, the court included a statement that the reset provision "was not intended to apply when the State elects not to transport the defendant to a proceeding." *Id*. at 739.

It was this quoted statement that appellant has used to try and find a due diligence requirement in *George* despite that court repeatedly rejecting the argument. Unfortunately, while acknowledging the *George* holding rejecting due diligence, the

[5] In that regard, the court treated CrR 3.3(c)(2)(ii) in the same manner that it has treated the catch-all provisions of the civil and criminal rules governing motions for new trial—the catch-all provision does not apply if an express rule provision governs. *E.g.*, *Metro. Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 439 n.3, 723 P.2d 1093 (1986) (CR 60); *State v. Brand*, 120 Wn.2d 365, 369, 842 P.2d 470 (1992) (CrR 7.8).

majority nonetheless applies the concept in its own analysis, faulting the State for not living up to alleged "duties" under CrR 3.3 and claiming the State has a superior obligation to bring a defendant to trial than the defendant himself has. Majority at 17-18. These statements miss the central holding of *George* and the impact of the new time for trial rule enacted in 2003: the duty of due diligence is reflected in the express terms of CrR 3.3, and if that rule does not specify an action, then the State has no duty to perform the action and its failure to do so is meaningless. *See George*, 160 Wn.2d at 737-38 (discussing meaning of CrR 3.3(a)(4)).[6] The prosecutor had no superior duty to ensure that Mr. Chavez-Romero resolved his problems with federal authorities in a prompt manner and was then returned to local control; neither did the prosecutor have an obligation to seek to maintain the current time line for trial merely because the defendant desired to have a motion heard and also keep his scheduled trial date when it was not possible to do both. It is error to conclude otherwise.

The majority also fails to properly apply CrR 3.3(d)(3). That rule requires the defendant, when objecting to a trial date, to also *move the court to set a date within the limits*. Mr. Chavez-Romero *never* did so. He objected to the release and the continuance

[6] Accordingly, reliance on pre-2003 cases discussing due diligence (and there should be few, if any, after that time) is misplaced for all but historical analysis since the obligations imposed in those cases were either imported into the new rule or rejected by exclusion from the rule.

of the trial date to May 13. He never asked to have a trial before the June 1 deadline that resulted from the release decision. Instead, he put all of his eggs in the basket of challenging the validity of the ruling that released him and extended the time for trial to the end of the 90-day period from his arraignment. Since the majority properly rejected his argument concerning the release decision, it logically also has to reject his claim of a CrR 3.3 violation allegedly resulting from that ruling.

The majority correctly applied *George* when it concluded that the trial court erred in resetting the commencement date upon the defendant's failure to appear for the April 28 hearing. Based on the construction of the rule in *George*, the trial court could not reset the commencement date because the defendant's absence was not voluntary.[7] *George*, 160 Wn.2d at 739. Instead, the court should have treated the 17-day period of absence between April 28 and May 15 as an excluded period under CrR 3.3(e)(6), which excludes time spent in federal custody from time for trial computation. So applied, the

[7] This aspect of *George* creates both a calendar management problem and a potential trap for trial courts who are confronted with a missing defendant since the court cannot rely on the literal language of CrR 3.3(c)(2)(ii), but must discern the reason for the absence. When a defendant misses a pretrial hearing, and the reason for the absence is unknown, the court does not know if it can safely strike a matter from the trial calendar at that point since a brief, but involuntary, absence will only extend the trial date a short period rather that reset the entire clock. This means parties must still be prepared for trial even though a mandatory hearing could not take place. In multi-judge counties, a second judge who has to address the matter may be left in the dark on whether the first judge found a valid basis for resetting the commencement date or not.

final day of the 90-day time for trial period in this case would have been June 18.

When the court on May 19 scheduled trial for July 15, Mr. Chavez-Romero had a 10-day period in which to ask that the matter be scheduled by June 18. He did not. Instead, he insisted on continuing to seek dismissal based on violation of an alleged duty of due diligence that did not exist. He still had the opportunity to have a trial that was timely within the meaning of CrR 3.3 as properly construed, but failed to do so. This action waived his right to a trial by June 18 in accordance with the plain terms of CrR 3.3(d)(2) and also waived any objection to the July 15 trial date. *Austin*, 59 Wn. App. at 200.

Since the 2003 amendments to CrR 3.3, there is a second reason why there could be no violation of the time for trial rule in this case. CrR 3.3(b)(5) states, in part, that whenever there is an excluded period, "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." Mr. Chavez-Romero's appearance on May 15 meant that there were at least an additional 30 days remaining before the time for trial could expire. Thus, for this second reason, there was still plenty of time for trial under the rule when the defense moved to dismiss on May 27.

That brings us to the final aspect of the majority opinion. It rejects defense counsel's erroneous argument to the trial court (and repeated here on appeal), but

essentially excuses it as close enough to put the trial court on notice of the actual problem despite the waiver provisions of CrR 3.3(d)(3) and despite the fact that counsel made the wrong argument. This approach rewards error and encourages counsel to make vague arguments in hopes that a reviewing court will make a better argument. How is a trial judge to discern from the objection to releasing Mr. Chavez-Romero that it was erroneous to reset the trial date and that the defense actually wanted a trial within the 90-day period after adding in the period of exclusion?[8] No judge in any court could possibly read this objection in such a manner and, more importantly, no judge should be held to such a standard. Mr. Chavez-Romero argued that his rule right had been violated when the April 29 trial date came and went without a trial. He did not ask that the July 15 trial date be rescheduled to a time before June 18.

It was his obligation to do so under the rule. *Carson*, 128 Wn.2d 805; *Rose*, 110 Wn. App. 878; *Austin*, 59 Wn. App. 186. If a criminal defendant wants to rely upon the terms of CrR 3.3, he needs to comply with the rule himself. *Carson*, 128 Wn.2d 805; *Rose*, 110 Wn. App. 878; *Austin*, 59 Wn. App. 186. In this case, that meant alerting the trial court to the fact that it erred in resetting the commencement date and alerting it to the

[8] Indeed, since Mr. Chavez-Romero does not even argue for that position on appeal, it is hard to understand why this court is addressing the issue. We should be addressing only the argument he actually made below and in this court.

end of the properly computed time for trial period. *Carson*, 128 Wn.2d 805; *Rose*, 110 Wn. App. 878; *Austin*, 59 Wn. App. 186. Not having done so, Mr. Chavez-Romero has no legitimate complaints now.

Nonetheless, the majority notes that in *George* a similar objection was sufficient to preserve an argument for appeal. Majority at 16 (citing *George*, 160 Wn.2d at 733). This observation reads more into *George* than it should. The question addressed by the *George* court was error preservation, not compliance with CrR 3.3(d)(3). That rule has two components—an objection and a motion for timely trial. *See State v. Wilson*, 113 Wn. App. 122, 130, 52 P.3d 545 (2002). An objection to the trial date preserves the time for trial issue one is raising; however, a motion to comply with the rule is also required to prevent waiver of any challenge to the new trial date. In *George*, the objection was sufficient to allow Mr. George to challenge the timeliness of the trial date arising from the Renton incident. There was no rescheduled trial date to which the waiver aspect of the rule would apply, so there was no need for *George* to construe the waiver component. More importantly, nothing in *George* purports to overrule *Carson* and the numerous other cases that have addressed the waiver aspect.

Properly applied, *George* permits Mr. Chavez-Romero's objection to the April 21 release order to be heard. However, since he never sought a trial date earlier than the

rescheduled July 15 date, he has waived any claim that the July trial setting was improper. That may well be why counsel has not pursued in this court the alternative argument reached by the majority. The decision that the April 21 ruling was proper is dispositive of this appeal.

The modern time for trial rule simply does not impose a free-standing duty of due diligence on the State beyond the express provisions of CrR 3.3 and the court errs in doing so. There was plenty of time to provide a trial within the limits of the rule at the time that the defense erroneously claimed otherwise. We should not reward an error that prevented the defendant from getting what he claims he wanted.

Any objection to the July 15 trial date was waived and the objection to the continuance of the April 29 trial date was meritless. Since the majority concludes otherwise on the waiver claim, I dissent.

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Korsmo, C.J.