IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 28462-0-III
Respondent,	)	
v.	)	
JOSE GUSTAVO CHAVEZ-ROMERO,	)	PUBLISHED OPINION
Appellant.	)	

Kulik, J. — While searching for the source of a 911 hang-up cell phone call, police found 21-year-old Jose G. Chavez-Romero in the backseat of a car with his girl friend, a 13-year-old. Franklin County charged Mr. Chavez-Romero with second degree child rape. At the pretrial hearing held one week before the expiration of Mr. Chavez-Romero's 60-day time for trial date, the State failed to produce its witness. The State asked the trial court to release Mr. Chavez-Romero on his own recognizance and move his trial date within the applicable 90-day time for trial period. Mr. Chavez-Romero objected to the release, explaining that he would immediately be detained by Immigrations and Customs Enforcement (ICE), which would cause him to miss his next

court date. Nevertheless, the trial court released Mr. Chavez-Romero and, as predicted, he missed his next court date due to his detainment by ICE. The trial court reset Mr. Chavez-Romero's trial date because he failed to appear. Again, Mr. Chavez-Romero objected. At trial, a jury convicted Mr. Chavez-Romero of the lesser offense of third degree child rape. Mr. Chavez-Romero appeals. He contends that his release resulted in a violation of his right to a speedy trial. We find that Mr. Chavez-Romero did not receive a speedy trial under CrR 3.3 and dismiss his conviction with prejudice. Because the remedy for a CrR 3.3 violation is dismissal, it is not necessary to address the issues regarding the findings of fact or the suppression motion. We will also not address Mr. Chavez-Romero's claim under CrR 8.3.

FACTS

On February 22, 2009, an unknown person placed a 911 hang-up call from the area of the Bonnie Brea apartments and trailer park in Pasco, Washington. The call came from a cell phone. Dispatch called the number back, and the caller told dispatch that she did not need any help. Dispatch heard someone in the background say "'drop the bat.'" Report of Proceedings (RP) (June 2, 2009) at 14. Officers Eric Fox, Robert Harris and Michelle Goenen[1] arrived at the apartment complex within a couple of minutes.

[1] At the time of the incident, Officer Goenen was known as Officer Keltch.

While searching for the source of the 911 hang-up call, Officer Harris noticed a vehicle parked in back of the trailer park with an occupant in the back seat. Officer Harris shined his spotlight on the car and approached the driver's side door. He knocked on the window, opened the back door, and asked Mr. Chavez-Romero for identification. Officer Harris found Mr. Chavez-Romero sitting in the back seat with a female occupant, M.L. Officer Harris advised Mr. Chavez-Romero and M.L. of the 911 hang-up call. Dispatch again called the telephone number associated with the 911 call, but no telephone rang in the vehicle. Officer Harris requested a warrant check on Mr. Chavez-Romero.

Officer Goenen and Officer Fox arrived at the vehicle while Officer Harris was talking to Mr. Chavez-Romero. Officer Goenen noticed an alcoholic beverage in the front cup holder of Mr. Chavez-Romero's car. Officer Fox removed M.L. from the car. M.L. told Officer Goenen that she was 13 years old, that Mr. Chavez-Romero was her boyfriend, and that they had had sex sometime within the past few months. Officer Goenen determined that Mr. Chavez-Romero was 21 years old. Mr. Chavez-Romero confirmed that M.L. was his girl friend.

Officer Fox transported Mr. Chavez-Romero to jail, based on Officer Goenen's belief that a crime had been committed. Mr. Chavez-Romero told a Spanish speaking

officer at the jail that M.L. made statements about her age which led Mr. Chavez-Romero to believe that she was 15 years old. Mr. Chavez-Romero was charged with second degree rape of a child.

Procedural History—Arraignment. On March 3, 2009, Mr. Chavez-Romero was arraigned on the charge of third degree rape of a child, later amended to second degree rape of a child. Trial was set for April 29, the 57th day following arraignment. For purposes of the speedy trial rule, CrR 3.3, the 60th day after arraignment was May 2 and the 90th day after arraignment was June 1. Mr. Chavez-Romero did not post bail and remained in custody.

April 21 (Pretrial Hearing). At the April 21 pretrial hearing to address Mr. Chavez-Romero's suppression motion, the State did not have its witness present. The State requested that the trial court postpone the suppression hearing for one week. The State also requested that the court release Mr. Chavez-Romero on his own recognizance and reset the trial date to coincide with the 90-day speedy trial date.

Mr. Chavez-Romero expressed concern about his release because of an ICE hold against him. The ICE hold meant that he would be taken into custody by ICE upon release from jail. Mr. Chavez-Romero wanted to resolve the charges against him and proceed to trial. The trial court and prosecutor discussed the issue:

> THE COURT: I don't know what the immigration will do with him if we drop our hold.
>
> MR. CORKRUM: I don't know, your Honor. That shouldn't be this Court's concern. That's a federal matter.
>
> THE COURT: I know. It isn't my concern, but you may lose your defendant.
>
> MR. CORKRUM: That's his problem, your Honor. I'll ask for a warrant at that time.

RP (Apr. 21, 2009) at 3.

The trial court reset the trial date to May 13. The pretrial suppression hearing was rescheduled for April 28. The trial court released Mr. Chavez-Romero on his own recognizance and ordered him to report to court on April 28. Mr. Chavez-Romero formally objected to his release and to the trial court's decision to reset the trial beyond the 60-day speedy trial date of May 2.

April 28 (Rescheduled Pretrial Hearing). Mr. Chavez-Romero failed to appear for the pretrial hearing on April 28. The State advised the trial court that the court had limited discretion when an individual fails to appear for a mandatory hearing. The State requested that the trial court issue a bench warrant for Mr. Chavez-Romero's arrest and strike the trial date based on Mr. Chavez-Romero's failure to appear.

Counsel for Mr. Chavez-Romero appeared on behalf of her client. She informed the trial court that Mr. Chavez-Romero was currently in the custody of ICE and was not

willfully failing to appear. Counsel reminded the trial court that she had previously objected to Mr. Chavez-Romero's release. She also reminded the trial court that Mr. Chavez-Romero was ready to proceed at the April 21 pretrial hearing and that the State had requested the continuance, knowing that Mr. Chavez-Romero would not be able to attend the hearing.

Counsel for Mr. Chavez-Romero asked the trial court to set over the pretrial hearing for one week to allow Mr. Chavez-Romero to file a motion for discretionary review of the trial court's decision to release him. Instead, the trial court issued the bench warrant and struck the trial date for Mr. Chavez-Romero's failure to appear.

On April 29, Mr. Chavez-Romero's counsel filed a written objection to the trial court's decision to release him on his own recognizance while knowing of the immigration hold. Mr. Chavez-Romero also objected to the trial court's issuance of a bench warrant for his failure to appear at the April 28 hearing. Mr. Chavez-Romero advised the trial court that he did not willfully fail to appear but, instead, was unable to appear because he was being held at the Northwest Detention Center.

May 15 and May 19 Appearances. On May 14, after release from federal custody, Franklin County police officers arrested Mr. Chavez-Romero on the bench warrant. He appeared in the trial court without his attorney on May 15. The trial court reinstated bail

and continued the matter to permit Mr. Chavez-Romero to meet with his attorney. Mr. Chavez-Romero did not post bail and remained in custody until trial.

On May 19, the trial court reset the pretrial conference for June 30 and trial for July 15. The court also scheduled the suppression hearing for June 2. Mr. Chavez-Romero, accompanied by his attorney, reminded the court of his objection to being released and to the resetting of the trial date outside the limits of CrR 3.3.

On May 27, Mr. Chavez-Romero filed a motion to dismiss for a violation of his CrR 3.3 right to trial. In Mr. Chavez-Romero's supporting memorandum, he stated that he objected to the trial court's April 21 decision to release him and reset the trial date outside the time frame allowed by CrR 3.3. He also stated that he objected to trial court's April 28 issuance of the bench warrant for the failure to appear and to the May 19 decision to reset the trial date outside the time allowed by CrR 3.3.

Mr. Chavez-Romero noted the State's position that his failure to appear at the April 28 hearing triggered a new commencement date. However, he contended due diligence required the State to bring him to trial in 60 days. He said that the State failed to exercise due diligence when it released him knowing of the immigration hold, that he would not appear, and that a bench warrant would be issued. Furthermore, he maintained that the time that elapsed while the bench warrant was issued should not be excluded

from the calculation of the speedy trial date because of the State's lack of diligence in securing his presence at the hearing.

In addition to the CrR 3.3 violation, Mr. Chavez-Romero contended that his case should be dismissed under CrR 8.3 because the trial court and the State treated him unfairly and arbitrarily in releasing him with the understanding that he would be unavailable at the next hearing and that a bench warrant would be issued. The trial court added Mr. Chavez-Romero's motion to dismiss to the June 2 hearing.

June 2 (Hearing for Suppression Motion and Motion to Dismiss). At the June 2 hearing, Mr. Chavez-Romero contended that the charges against him should be dismissed because the State's actions violated his speedy trial rights under CrR 3.3. Again, he argued that the State released him with the knowledge that he would miss the pretrial hearing, yet, the State did not make any effort to secure Mr. Chavez-Romero. He also contended that the State's acts were arbitrary under CrR 8.3 and prejudiced him by not providing him a trial in a timely fashion. The trial court denied Mr. Chavez-Romero's speedy trial motion, stating that Mr. Chavez-Romero "didn't show up to court and that wasn't the State's fault." RP (June 2, 2009) at 33.

Trial. On June 30, the trial court granted Mr. Chavez-Romero a continuance for good cause. Trial commenced on July 22. On July 24, a jury found Mr. Chavez-Romero

guilty of the lesser crime of third degree rape of a child.

Mr. Chavez-Romero seeks review of the trial court's denial of his motion to dismiss for a speedy trial violation and his motion to suppress.

ANALYSIS

"The application of the speedy trial rule to a particular set of facts is a question of law subject to de novo review." *State v. Raschka*, 124 Wn. App. 103, 108, 100 P.3d 339 (2004). Decisions affecting pretrial release are reviewed for an abuse of discretion. *State v. Kelly*, 60 Wn. App. 921, 926, 808 P.2d 1150 (1991). When a trial court denies a motion to dismiss for speedy trial purposes, the appellate court reviews that decision for an abuse of discretion. *City of Seattle v. Guay*, 150 Wn.2d 288, 295, 76 P.3d 231 (2003).

Prior to 2003, the State had a duty to act in good faith and due diligence in attempting to bring a defendant to trial when the defendant was incarcerated outside of Washington or in federal custody, and the prosecution was aware of the defendant's location. *State v. George*, 160 Wn.2d 727, 736-37, 158 P.3d 1169 (2007) (quoting *State v. Anderson*, 121 Wn.2d 852, 864, 855 P.2d 671 (1993)).

In 2003, the Supreme Court created the Time-for-Trial Task Force to clarify and simplify the time for trial rule. *George*, 160 Wn.2d at 738. One concern of the Task Force was that the appellate court's interpretation of CrR 3.3 expanded the rule by

imposing a due diligence standard on the State, and that this standard was vague and led to unpredictable decisions. *George*, 160 Wn.2d at 737-38; Time-for-Trial Task Force, Washington Courts, Final Report § II.B, at 21 (Oct. 2002) (on file with Admin. Office of Courts, available at http://www.courts.wa.gov/programs_orgs/pos_tft.reporthome). In response, the Task Force decided against including a specific minimum due diligence standard and, instead, fashioned the new rules to incorporate a standard of due diligence within the different provisions of the rule. Task Force, Final Report § II.C.(1), at 23-24. The rules were intended "to cover all the reasons why a case should be dismissed under the rule" and no reasons should be read into the rule beyond those that are expressly stated. Task Force, Final Report § I.B.1, at 6.

Mr. Chavez-Romero's Release. CrR 3.3 generally provides that a defendant shall be brought to trial within 60 days of arraignment if held in custody on the charge for which he or she was arraigned or within 90 days of such arraignment if released on that charge. CrR 3.3(b)(1), (2). If a defendant is released from jail before the 60-day time limit has expired, the time limit shall be extended to 90 days. CrR 3.3(b)(3). It is not an abuse of discretion for a judge to release a defendant in order to extend the time for trial. *Kelly*, 60 Wn. App. at 928.

The State did not have a duty under CrR 3.3 to retain Mr. Chavez-Romero in

custody. CrR 3.3(b)(3) does not contain a provision that precluded the State from requesting release of Mr. Chavez-Romero to extend the time for trial. A judge has the discretion to release a defendant specifically for that purpose. *See Kelly*, 60 Wn. App. at 928. While the trial court and the State were aware that Mr. Chavez-Romero would miss his next scheduled hearing, CrR 3.3 did not impose a duty on either party to retain Mr. Chavez-Romero under these circumstances. Requiring the State to exercise good faith and due diligence in deciding when to request release of a defendant would be judicially interpreting another provision into the rule. The State acted within the bounds of CrR 3.3 by requesting the release of Mr. Chavez-Romero in order to extend the time for trial. The court's release of Mr. Chavez-Romero extended his time for trial to 90 days.

Mr. Chavez-Romero's Failure to Appear. A failure to appear for a mandatory court hearing results in a resetting of the commencement date to the date of the defendant's next appearance. CrR 3.3(c)(2)(ii). CrR 3.3(c)(2)(ii) does not require the court to reset the time for trial in all situations where the defendant fails to appear. *George*, 160 Wn.2d at 738 (citing CrRLJ 3.3(c)(2)(ii)).[2] The "failure to appear" phrase refers to a defendant's unexcused absence from a court proceeding. *Id.* at 739.

[2] CrRLJ 3.3 is the counterpart to CrR 3.3 in courts of limited jurisdiction. *See City of Seattle v. Hilton*, 62 Wn. App. 487, 815 P.2d 808 (1991). "When interpreting a limited jurisdiction court rule, it is appropriate to consider an analogous superior court rule." *State v. Chhom*, 162 Wn.2d 451, 460, 173 P.3d 234 (2007).

The time during which a defendant is detained in a federal jail is excluded from the time for trial calculation. CrR 3.3(e)(6).

In *George*, the trial court reset Mr. George's time for trial after he failed to appear for two of his pretrial hearings. *George*, 160 Wn.2d at 731-32. At the time of the hearings, Mr. George was detained on a separate charge in a different jurisdiction. *Id*. Mr. George alleged that the court could not reset the trial date for his failure to appear under CrRLJ 3.3(c)(2)(ii) unless the State exercised "good faith and due diligence in bringing a defendant to court." *George*, 160 Wn.2d at 734.

The court decided that the plain language of CrRLJ 3.3(c)(2)(ii) did not require the State to demonstrate that it undertook a good faith attempt to bring Mr. George to trial. *George*, 160 Wn.2d at 738. However, the court also said that the State could not use the provision to reset the time for trial "regardless of the cause for the defendant's absence." *Id*.

Instead, the court determined that the "failure to appear" provision "is intended to apply to a defendant who thwarts the government's attempt to provide a trial within the time limits." *Id*. at 739. "CrRLJ 3.3(c)(2)(ii) was not intended to apply when the State elects not to transport the defendant to a proceeding." *George*, 160 Wn.2d at 739. Instead, the time the defendant is detained on unrelated charges is excludable under

CrRLJ 3.3(e)(2). *George*, 160 Wn.2d at 739.

Ultimately, the *George* court concluded that the trial court erred by relying on CrRLJ 3.3(c)(2)(ii) (failure to appear) to reset the clock because Mr. George was incarcerated on unrelated charges and that Mr. George's absence was controlled by the exclusionary period in CrRLJ 3.3(e)(2). *George*, 160 Wn.2d at 739-40.

The substantive differences between CrR 3.3 and CrRLJ 3.3 are few. Task Force Final Report § II.B at 11, n.8. The court's analysis of CrRLJ 3.3 instead of CrR 3.3 in *George* does not alter the applicability of *George* to this situation. Mr. Chavez-Romero's situation is almost identical to *George*. The State and the trial court knew that Mr. Chavez-Romero failed to appear because of his federal detention. CrR 3.3 did not impose a duty of due diligence on the State to bring Mr. Chavez-Romero to his April 28 pretrial hearing. Nonetheless, Mr. Chavez-Romero's absence due to his federal detention did not justify the trial court's decision to reset the trial date under CrR 3.3(c)(2)(ii). Mr. Chavez-Romero did not willfully fail to appear. Instead, CrR 3.3(e)(6) excludes this period of detention from the time for trial calculation. The trial court should not have reset Mr. Chavez-Romero's trial date.

The court's decision to release Mr. Chavez-Romero when it knew he would be placed in federal detention left the State with two options: (1) obtain Mr. Chavez-Romero

from federal custody, or (2) allow the time for trial to toll. By not securing Mr. Chavez-Romero's presence, the State allowed the time for trial to toll. The court and the State had a duty to comply with Mr. Chavez-Romero's time for trial within 90 days of his arraignment, subject to revision based on the tolling period.

Failure to Object. A defendant waives his speedy trial rights under the court rules if the defendant does not timely object to the violation. *State v. Harris*, 130 Wn.2d 35, 45, 921 P.2d 1052 (1996). "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 time 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 a date is not within the time limits prescribed by this rule." CrR 3.3(d)(3). The 2003 revised version of CrR 3.3 has not altered the burden on defendants to file a written objection within 10 days of the notice of the trial date. *State v. Farnsworth*, 133 Wn. App. 1, 13 n.5, 130 P.3d 389 (2006).

"If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3) [for an untimely objection], that date shall be treated as the last allowable date for trial." CrR 3.3(d)(4). "Thus, even if the trial date is not within the time frame prescribed in CrR 3.3, absent a timely

objection, the trial date set by the trial court becomes the last allowable trial date." *Farnsworth*, 133 Wn. App. at 13.

"Timely objections are required so that, if possible, the trial court will have an opportunity to fix the error and still satisfy the speedy trial requirements." *Harris*, 130 Wn.2d at 45. A defendant's objections must be specific enough to alert the trial court to the type of error involved. *State v. Frankenfield*, 112 Wn. App. 472, 475-76, 49 P.3d 921 (2002).

In *Frankenfield*, the court determined that Mr. Frankenfield's objection was not specific enough because it referred to CrR 3.3 in general and vaguely requested a trial date within the speedy trial time frame. *Frankenfield*, 112 Wn. App. at 476. The objection "did not apprise the court of the type of error involved or what was required to correct the error." *Id*.

In *City of Kennewick v. Vandergriff*, 109 Wn.2d 99, 102, 743 P.2d 811 (1987), the court determined that a letter sent by the defendant that cited a specific speedy trial rule and included a date that the defendant believed to be the last date for trial was clear enough to constitute a motion to set a trial date within the time limits. The court also determined that the letter clearly implied that the relief sought was a trial before the specific date given. *Id*. "'[T]he sufficiency of a motion is determined not by its

technical format or language but by its contents.'" *Vandergriff*, 109 Wn.2d at 102 (quoting *City of Kennewick v. Vandergriff*, 45 Wn. App. 900, 903, 728 P.2d 1071 (1986), *rev'd on other grounds*, 109 Wn.2d 99).

In *George*, the defendant objected to the trial date and noted a motion to dismiss for a violation of the time for trial rule after the trial court reset Mr. George's trial date due to his failure to appear. *George*, 160 Wn.2d at 732. It appears the Supreme Court accepted the motion to dismiss as an objection that addressed the merits of Mr. George's speedy trial claim even though Mr. George incorrectly assumed in the motion that his time for trial had expired. *See id*. at 733.

Here, Mr. Chavez-Romero's oral objection put the trial court on notice that the resetting of the trial date was in violation of Mr. Chavez-Romero's right to a speedy trial. The objection sufficiently notified the trial court of the nature of the violation.

In addition to the oral objection, Mr. Chavez-Romero complied with CrR 3.3(d)(3) by filing his motion to dismiss within 10 days of the trial court's decision to reset the trial date. While not specifically titled as an "objection," Mr. Chavez-Romero's motion to dismiss served as an effective written objection to the resetting of the trial date. As in *George*, the fact that Mr. Chavez-Romero's time for trial had not expired when he filed the motion to dismiss does make the motion inapplicable as an objection. Based on Mr.

Chavez-Romero's contention that the 60-day rule had passed, there was no need for him to ask for a new trial date because he believed no trial date could be set to satisfy CrR 3.3.

The motion to dismiss specifically notified the trial court that Mr. Chavez-Romero did not willfully fail to appear and that the trial court should not have reset the trial date. Admittedly, Mr. Chavez-Romero's motion to dismiss largely addressed his contention that due diligence required the State to bring the matter to trial within 60 days. He also wrongfully contended that the trial court should not exclude the time he spent in federal custody because the State made no attempts to secure his presence at trial. These faulty contentions should not nullify the entire motion to dismiss. The motion stressed the State's arbitrary action in requesting a bench warrant for failure to appear while Mr. Chavez-Romero was detained in federal custody, which led to the improper resetting of the trial date. The contents of Mr. Chavez-Romero's motion to dismiss put the court on notice that it had violated CrR 3.3 by resetting the trial date for a willful failure to appear.

Furthermore, both the trial court and the State abused their duties under CrR 3.3. The trial court is responsible for ensuring that the trial is held in accordance with the rules. CrR 3.3(a)(1); *see also* Task Force, Final Report § II.B, at 12. But, as between the State and a criminal defendant, the State is responsible for bringing the defendant to trial

within the speedy trial period. *State v. Wilks*, 85 Wn. App. 303, 309, 932 P.2d 687 (1997).

The trial court did not ensure that Mr. Chavez-Romero received a speedy trial. Although the trial court had the authority to release Mr. Chavez-Romero in order to extend the time for trial, the trial court scheduled Mr. Chavez-Romero's next hearing knowing that he could not present himself on that date. Then, when Mr. Chavez-Romero missed the hearing, the trial court erroneously struck the trial date even though it knew that Mr. Chavez-Romero did not willfully fail to appear but, instead, had a strong desire to have his case brought to trial. The trial court disregarded the option of setting over, for one week, the decision to reset the trial date to allow Mr. Chavez-Romero to seek discretionary review. The trial court failed to provide Mr. Chavez-Romero with a trial within the time limits of CrR 3.3 by denying his repeated objections to his release, to his failure to appear, and to the resetting of the trial date.

As for the State, the amended version of CrR 3.3 retains the "fundamental principle that the State must exercise due diligence in bringing a defendant to trial" even though the State no longer has the obligation to exercise due diligence in attempting to procure a defendant's presence at trial. *George*, 160 Wn.2d at 738. The State ignored its duty by misleading the trial court that it was solely Mr. Chavez-Romero's problem that

he would miss his court date while in federal detention and that the court's limited recourse was to issue the bench warrant, strike the court date, and restart the time for trial. The State should not be allowed to disregard the provisions of CrR 3.3 and then fault Mr. Chavez-Romero for failing to sufficiently object.

In sum, Mr. Chavez-Romero objected with enough specificity to put the trial court on notice that a speedy trial violation occurred by resetting the trial date. Because Mr. Chavez-Romero sufficiently objected, he retained the right to trial within 90 days. After excluding the period of time Mr. Chavez-Romero spent in federal custody based on CrR 3.3(e)(6), the last day for trial was June 23. Mr. Chavez-Romero's trial did not commence before June 23. Consequently, Mr. Chavez-Romero's time for trial did not comply with CrR 3.3.

"A charge not brought to trial within the time limit determined by [CrR 3.3] shall be dismissed with prejudice." CrR 3.3(h). Therefore, we dismiss Mr. Chavez-Romero's conviction with prejudice.

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Kulik, J.

I CONCUR:

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Sweeney, J.