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

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| **STATE OF WASHINGTON,** | ) | **No. 26315-1-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | **UNPUBLISHED OPINION** |
| **GREGORY LEE HYDE,** | ) | |
| | ) | |
| **Appellant.** | ) | |
| | ) | |

Brown, J.—Gregory L. Hyde appeals his first degree rape and first degree kidnapping convictions. His trial was delayed for competency evaluations. While incarcerated, Mr. Hyde communicated with his attorney through "kites." He asked jail authorities to copy these "kites." Mr. Hyde contends (1) his speedy trial rights were violated, (2) his attorney-client privilege was violated, and (3) the trial court erred in not granting his late continuance request. Pro se, Mr. Hyde argues he did not consent to a competency evaluation. We find no error, and affirm.

FACTS

The facts derive from the trial court's unchallenged findings of fact following Mr.

Hyde's motions to dismiss for speedy trial violation and attorney-client privilege violation. Since the court's findings are unchallenged, they are verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

The State charged Mr. Hyde with first degree rape and first degree kidnapping, and arraigned him November 22, 2005. He waived speedy trial until February 6, 2006. On January 18, 2006, defense counsel, Paul Wasson, presented a proposed agreed order for an examination of Mr. Hyde at Eastern State Hospital (ESH). The court inadvertently checked the box related to a sanity evaluation instead of a competency evaluation on the order. The judge, however, "clearly understood that there was an issue of the defendant's competency to stand trial." Clerk's Papers (CP) at 731.

ESH's evaluation report was filed in August 2006. Then, the court realized the original order for evaluation had not included a request for evaluation as to competency to stand trial. On September 27, 2006, another proposed agreed order was presented by Mr. Wasson. Since competency was not addressed in ESH's first evaluation, another order for evaluation was necessary. On November 6, 2006, Mr. Wasson again presented a proposed agreed order for mental health evaluation as to competency. The exam was to take place at ESH. This order stayed further proceedings pending the entry of an order of competency.

During this time, Mr. Hyde was sending several "kites" to Mr. Wasson. Kites are blank forms given to inmates in the Stevens County Jail to communicate with jail staff or

attorneys. In mid-2006, Mr. Hyde became unhappy with Mr. Wasson's representation and asked jail staff to provide him with a copy of kites he drafted for Mr. Hyde's file. Evidently, Mr. Hyde was trying to make a record of his correspondence with Mr. Wasson. Mr. Hyde knew he could contact his attorney by a more confidential manner (i.e., sealed envelopes), but instead chose to use the kite method. Some of the kites were sent to ESH for evaluating Mr. Hyde's competency and later to the prosecutor. The jail chief was clear that permission was first obtained by Mr. Wasson prior to letting ESH and the prosecutor review the kites.

On January 16, 2007, the court appointed new counsel for Mr. Hyde, Robert Simeone. The court granted Mr. Simeone's request for time to discuss the competency issue with Mr. Hyde. Although on January 24, Mr. Simeone requested additional competency evaluations, on March 19, 2007, he withdrew all defenses related to competency. On March 26, 2007, the court entered an order of competency; speedy trial expiration date was now April 16, 2007. The court set trial for April 16, 2007.

On April 2, 2007, Mr. Hyde objected to the trial date based on speedy trial expiration. Due to the trial judge's unavailability, the matter was not heard until April 16, 2007, the morning of trial. The court concluded Mr. Hyde's speedy trial rights were not violated. On April 13, Mr. Hyde requested a continuance so counsel could better prepare for trial, and agreed to waive his speedy trial argument if the continuance was granted. The continuance motion was also heard and denied on April 16. Mr. Hyde

requested discretionary review of the trial court's denial of his continuance request. A commissioner of this court stayed the proceedings pending a decision. Ultimately, discretionary review was denied. Trial began on May 10, 2007.

The jury found Mr. Hyde guilty as charged. He filed a CrR 8.3(b) motion to dismiss, contending the State violated his attorney-client privilege by providing copies of his kites to Mr. Wasson, ESH for its competency consideration, and eventually to the prosecutor. The court denied the motion, concluding the kites were not privileged. Mr. Hyde appealed.

ANALYSIS

A. Speedy Trial

The issue is whether Mr. Hyde's speedy trial rights under both CrR 3.3 and the state and federal constitutions were violated.

We review a trial judge's speedy trial rulings de novo. *State v. Carlyle,* 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996). As noted, the unchallenged findings of fact are verities on appeal. The standard of review in such a case requires the determination of whether the trial court's findings support the conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

CrR 3.3 generally requires the State to bring an in-custody defendant to trial within 60 days of arraignment; if not, the trial court will dismiss the case with prejudice. CrR 3.3(b)(1)(i),(h). The threshold for a constitutional speedy trial violation, however,

is higher than that for a violation of CrR 3.3. *State v. Fladebo,* 113 Wn.2d 388, 393, 779 P.2d 707 (1989); *see also* U.S. Const. amend. VI; Wash. Const. art. I, § 22. The constitutional right to a speedy trial is not violated by passage of a fixed time but, rather, at the expiration of a reasonable time. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). Courts consider four factors in determining whether a delay in bringing a defendant to trial impairs the constitutional right to the prompt adjudication of criminal charges: "the '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *In re Pers. Restraint of Benn,* 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting *Barker v. Wingo,* 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

Mental incompetence at the time of trial is a bar to trial. RCW 10.77.050. If the trial court has reason to doubt the defendant's competency to stand trial, the court must order an expert evaluation of the defendant's mental condition. RCW 10.77.060(1)(a). The "reason to doubt" language "vests a large measure of discretion in the trial judge." *City of Seattle v. Gordon,* 39 Wn. App. 437, 441, 693 P.2d 741 (1985). "Defense counsel's opinion as to the defendant's competence is a factor that carries considerable weight with the court." *State v. Harris,* 122 Wn. App. 498, 505, 94 P.3d 379 (2004). An order for evaluation under RCW 10.77.060(1)(a) automatically stays the criminal proceedings until the court determines that the defendant is competent to stand trial. CrR 3.3(g)(1).

Once initiated, Mr. Hyde's competency proceedings tolled the time calculations until the trial judge was satisfied Mr. Hyde was competent. Based on the unchallenged findings of fact, on January 18, 2006, Mr. Hyde's initial attorney secured an agreed competency determination order for Mr. Hyde's competency evaluation at ESH. ESH's evaluation was filed on August 30, 2006. During the interim time, neither party requested a hearing for a new trial date. On September 27, 2006, another proposed agreed order was presented by defense counsel, who "represented that he indeed felt his client lacked competency to stand trial." CP at 733. In December 2006, three competency reports were filed. Defense counsel was replaced and yet another evaluation was requested.

On March 26, 2007, "after making inquiry of counsel and the defendant himself as to defendant's competency, and being satisfied of defendant's competency to stand trial, the undersigned [trial judge] entered an Order on Competency." CP at 738. It was determined that the new expiration date for speedy trial under CrR 3.3 was April 16, 2007. The trial judge then entered an order setting the trial date for April 16, 2007. The matter was stayed per order of this court. Trial promptly commenced once discretionary review was denied.

Based on our record, speedy trial time was tolled to determine whether Mr. Hyde was deemed competent to stand trial. While competency was not initially checked on the evaluation order that oversight was corrected in a subsequent order per the court's

unchallenged findings of fact. The delay was necessary to ensure Mr. Hyde understood the nature of the charges and was competent to stand trial and assist in the nature of his defense as required by our State. *State* v. *Hahn,* 106 Wn.2d 885, 894, 726 P.2d 25 (1986). It is clear from the trial court's unchallenged findings of fact that the court correctly concluded that Mr. Hyde's right to speedy trial had not been violated under either CrR 3.3 or the United States or Washington Constitutions. "The constitution guarantees a fair trial, not a perfect trial." *State* v. *Ingle,* 64 Wn.2d 491, 499, 392 P.2d 442 (1964). The facts in the record show that occurred here.

B. Attorney-Client Privilege

The issue is whether the trial court erred in denying Mr. Hyde's CrR 8.3(b) motion to dismiss for violation of the attorney-client privilege. Mr. Hyde contends the kites to his attorney were privileged communication that should not have been provided to ESH and the prosecutor.

We review a trial court's denial of a motion to dismiss under CrR 8.3(b) for an abuse of discretion. *State v. Michielli,* 132 Wn.2d 229, 240, 937 P.2d 587 (1997). An abuse of discretion occurs when the trial court's order or decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ryan v. State,* 112 Wn. App. 896, 899, 51 P.3d 175 (2002) (citing *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

CrR 8.3(b) provides, "The court, in the furtherance of justice, after notice and

hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." This rule requires a defendant seeking dismissal to show both (1) that the government entity engaged in arbitrary action or misconduct and (2) that this misconduct "materially affected" the outcome of the case. The trial court found Mr. Hyde met neither prerequisite.

Mr. Hyde relies unsuccessfully on *State v. Cory,* 62 Wn.2d 371, 382 P.2d 1019 (1963) and *State v. Garza,* 99 Wn. App. 291, 994 P.2d 868 (2000) to support his argument the trial court abused its discretion in failing to grant his motion to dismiss. In *Cory,* the Washington State Supreme Court analyzed government intrusion into the attorney-client relationship. Mr. Cory met with his attorney to discuss his case in a private jail room, where the sheriff had secretly installed a microphone. *Cory,* 62 Wn.2d at 372. Ultimately, the Supreme Court set aside the judgment and sentence, and dismissed the charges based on clear prejudice from eavesdropping on confidential information about Mr. Cory's case and defense strategy. *Id.* at 377-78.

Unlike the facts in *Cory,* the unchallenged findings of fact show Mr. Hyde knew he could write to his attorney in a confidential manner by sending his communication in a sealed envelope. He chose instead to use the kite method. He then requested the kites be copied by jail staff. And, defense counsel later gave permission for the kites to be provided to ESH and subsequently the prosecutor. Thus, Mr. Hyde has failed to

establish governmental misconduct entitling him to dismissal under CrR 8.3(b).

Moreover, to prevail on a CrR 8.3(b) motion to dismiss, a defendant must show how the alleged prejudice "materially affected his or her rights to a fair trial." *Garza,* 99 Wn. App. at 295 (citing *City of Seattle v. Orwick,* 113 Wn.2d 823, 830, 784 P.2d 161 (1989)). Because Mr. Hyde failed to establish governmental misconduct, we do not elaborate on whether prejudice resulted, but note he fails to show how use of the kites "materially affected" his right to a fair trial. In sum, the trial court did not abuse its discretion in denying Mr. Hyde's motion for dismissal under CrR 8.3(b).

C. Continuance

The issue is whether the trial court erred in denying Mr. Simeone's request for a trial continuance. Mr. Hyde contends the court denied him his right to effective assistance of counsel by refusing to grant a continuance on the day of trial.[1]

We review the decision whether to grant a continuance for abuse of discretion. *State v. Flinn,* 154 Wn.2d 193, 199, 110 P.3d 748 (2005). As set forth above, a trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *Id.* But, "'[b]ecause claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo.'" *State v. A.N.J.*, ___ Wn.2d ___,

[1] Mr. Hyde contends he was denied effective assistance of counsel during Mr. Wasson's representation as well. To the extent this argument is outside his assignment of error that the court erred in denying Mr. Simeone's motion for a continuance, we do not reach this contention. *See* RAP 10.3(a)(4) (an appellant's assignment of error should be a "concise statement of each error a party contends was made").

___, ___ P.3d ___ (2010 WL 314512 at *8) (Jan. 28, 2010) (quoting *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)).

The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to professional standards. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Relying on *State v. Hartwig*, 36 Wn.2d 598, 219 P.2d 564 (1950), Mr. Hyde contends the court should have continued the trial date due to Mr. Simeone's late appointment. In *Hartwig*, unlike here, defense counsel only had a few hours to consult with his client in preparing his defense. Mr. Simeone was appointed on January 16, 2007. Trial did not commence until May 10, 2007, almost four months to prepare.

Mr. Hyde argues Mr. Simeone's unpreparedness resulted in his failure to timely designate an expert witness as a defense witness and to object to hearsay and damaging testimony. Yet, matters that go to trial strategy or tactics do not show deficient performance, and Mr. Hyde bears the burden of establishing there were no legitimate strategic or tactical reasons behind his counsel's choices. *State v. Rainey,* 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001). Mr. Hyde must further show his counsel's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been

different." *State v. Hendrickson,* 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Courts employ a strong presumption that counsel's representation was effective. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Further, we need not address both prongs if the defendant makes an insufficient showing on one prong. *State v. Fredrick,* 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

Counsel's choice of whether to object "is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Mr. Hyde fails to show where in the record hearsay and damaging testimony occurred that should have been objected to by defense counsel. Turning to counsel's alleged failure to timely designate a defense witness, Mr. Hyde fails to persuade this court that the outcome of the trial would have been any different given the evidence of guilt against Mr. Hyde. Given all, Mr. Hyde has failed to show he was denied effective assistance of counsel based on the trial court's refusal to grant a defense-requested continuance.

D. Additional Grounds

In his statement of additional grounds for review, Mr. Hyde argues pro se that he did not consent to a sanity/competency evaluation and therefore did not waive his right to a speedy trial.

A situation where a defendant may be forced to waive his speedy trial rights is not a trivial event. *Michielli,* 132 Wn.2d at 245. Our Supreme Court, "'as a matter of public policy has chosen to establish speedy trial time limits by court rule and to

provide that failure to comply therewith requires dismissal of the charge with prejudice.'" *Michielli,* 132 Wn.2d at 245 (quoting *State v. Duggins,* 68 Wn. App. 396, 399-400, 844 P.2d 441, *aff'd,* 121 Wn.2d 524 (1993)).

The unchallenged findings of fact show defense counsel presented a proposed agreed order for a competency examination. Several months later, another agreed order for evaluation was presented by defense counsel. And, following Mr. Simeone's appointment another competency evaluation was requested. Based on our record, Mr. Hyde consented to these evaluations which tolled the expiration of the speedy trial time. If Mr. Hyde has information outside this court's record showing defense counsel acted against his wishes, the appropriate procedure for review would be a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kulik, C.J.

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Korsmo, J.