IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,	)	NO. 63831-9-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
DONALD JAMES LYNCH,	)	
	)	
Appellant.	)	FILED: October 26, 2009

BECKER, J. — Appellant Donald Lynch's trial was delayed for a five month period during which the trial court orally dismissed the charges and then reconsidered its decision. We hold that an oral order of dismissal does not stop the speedy trial clock in superior court. It takes a final order entered in writing to stop the clock and initiate the excluded period between "dismissal of a charge and the refiling of the same or related charge" under Cr 3.3(e)(4). Because Lynch's trial was not timely under the rule, his conviction must be reversed and the charges dismissed with prejudice.

According to the parties' testimony at trial, on November 24, 2006, Lynch purchased a boxed bicycle for his daughter at a Wal-Mart store in Chehalis. George Shepherd, a Wal-Mart greeter, asked to see Lynch's receipt for the bicycle as Lynch approached the exit. Lynch refused. Lynch pushed Shepherd, who fell. Another greeter instructed Lynch to wait until police arrived. Lynch waited and was arrested. Lynch, 53 years old at the time, testified that he pushed 75 year old Shepherd instinctively in self defense. The State's witnesses, including Shepherd, denied that Shepherd touched Lynch first in any way.

The City of Chehalis charged Lynch with fourth degree assault, a misdemeanor. When it appeared that Shepherd's injuries were more serious than initially thought, the Chehalis Municipal Court granted the City's request to dismiss the charge without prejudice so that the State could file felony charges in superior court.

The superior court case went to trial in March, 2008. A jury acquitted Lynch of the felony charges but convicted him of the misdemeanor of fourth degree assault as a lesser included offense. Lynch, an accountant, was given a suspended sentence on condition that he provide tax preparation assistance to 100 elderly individuals or couples of limited income. Lynch appeals, raising numerous issues. We find the speedy trial issue dispositive.

The speedy trial rule in superior court sets a specific number of days in which a criminal defendant must be brought to trial or else the case will be

dismissed. When a defendant is not in custody while awaiting trial, as in the present case, the time for trial is 90 days. CrR 3.3(b)(2). As amended in 2003, the rule establishes that the day the defendant is arraigned in superior court is the day the clock begins to run. CrR 3.3(c)(1) ("The initial commencement date shall be the date of arraignment as determined under CrR 4.1").

The rule excludes certain periods from the computation of the 90-day period. CrR 3.3(e). The rule also identifies specific circumstances that trigger a new commencement date and start a new 90 day period. CrR 3.3(c)(2). If more than 90 days elapses after superior court arraignment, and there has been no excluded period and no event resetting the commencement date, then the trial is not timely under the rule, and the charges must be dismissed with prejudice. CrR 3.3(h).

Before the amendment in 2003, the rule for superior court provided that time elapsed in a court of limited jurisdiction would be deducted from speedy trial time when charges were refiled in superior court. Former CrR 3.3(c)(2)(i) ("A defendant released from jail … shall be brought to trial not later than 90 days after the date of arraignment, less time elapsed in district court") (2002). As a result of the amendment in 2003, the amount of time elapsed in a court of limited jurisdiction does not now figure into the computation of the time for trial in superior court. See State v. George, 160 Wn.2d 727, 741, 158 P.2d 1169 (2007) ("time elapsed in district court is no longer deducted from the time for trial when a charge is refiled in superior court"). The clock begins to run upon

arraignment in superior court.

In the present case, Lynch was arraigned in Chehalis Municipal Court on December 6, 2006. On February 21, 2007, the municipal court granted the City's request to dismiss the charge without prejudice. Two months later, the State charged Lynch in Lewis County Superior Court with second and third degree assault. During the proceedings in superior court, Lynch at first represented himself, later had standby counsel appointed, and was represented by counsel at trial.

The State arraigned Lynch in superior court on May 17, 2007. At the hearing Lynch, pro se, noted his objection to the date of arraignment for speedy trial purposes.

On June 8, 2007, Judge Brosey of Lewis County Superior Court held a hearing on various motions brought by Lynch, including a motion to dismiss for violation of the speedy trial rule. Lynch argued that the time elapsed in municipal court should be counted. The State responded that the time for trial began on the date of arraignment,[1] citing State v. Duffy, 86 Wn. App. 334, 936 P.2d 444 (1997). Duffy affirmed a trial court's decision to dismiss charges of DWI and hit-and-run brought in superior court because of a speedy trial violation. As to the DWI charge, too much time had elapsed in district court where the charge had originally been brought. Duffy, 86 Wn. App. at 342-44. And the hit-and-run charge was deemed sufficiently "related" to the DWI charge

[1] Report of Proceedings (June 8, 2007) at 18-19.

so that the speedy trial commencement date was the same for both charges. Duffy, 86 Wn. App. at 345-46.

Judge Brosey reviewed the speedy trial rule and ruled that the State was correct in arguing that the date of arraignment in superior court was the commencement date. The court reached this conclusion both under Duffy and also under the language of the rule as amended in 2003. Accordingly, the court denied Lynch's motion and determined that the time for trial would expire on August 15, 2007. The court set trial for the week of July 30, 2007.

On June 12, 2007, Lynch objected in writing that the trial date of July 30 would be outside the speedy trial period allowed by the rule.[2] At the omnibus hearing on July 5, 2007, Lynch – represented by counsel – again raised a speedy trial objection.[3]

On July 10, 2007, Lynch, again pro se, filed a motion to dismiss for violation of the speedy trial rule. He contested the State's application of Duffy and maintained that the court's ruling on June 8 was in error because it did not consider the time elapsed in municipal court.[4] He submitted a copy of the municipal court docket[5] and declared that 85 days elapsed between his arraignment in that court and the dismissal of the charge there.[6] He did not address the language of the present rule.

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[2] Supplemental Clerk's Papers at 164.
[3] Report of Proceedings (July 5, 2007) at 2.
[4] Supplemental Clerk's Papers at 160-63.
[5] Supplemental Clerk's Papers at 154-58.
[6] Supplemental Clerk's Papers at 150-51.

On July 30, 2007, as trial was about to begin, the court considered Lynch's motion. A visiting judge from Grays Harbor Superior Court was presiding. The parties argued about whether or not Duffy was applicable and discussed other cases without realizing that all of them were cases where the former version of the speedy trial rule controlled.[7] Neither party drew the court's attention to the fact that the 2003 amendment removed the language about deducting time elapsed in district court.

After reviewing the cited cases, the court concluded that the time elapsed in municipal court had to be deducted from superior court speedy trial time.[8] Because it appeared to the court that the time elapsed in municipal and superior court combined was by this time far beyond 90 days, the court made an oral ruling that Lynch was entitled to a dismissal of the charges with prejudice.[9]

Lynch had standby counsel at this hearing, who offered the court a written order of dismissal to sign. The court, however, was not yet prepared to sign an order of dismissal. The court wanted to see the matter noted up for entry of findings and a final order, and indicated that the State might be given another opportunity to argue:

> Mr. Blair [standby counsel]: I've written up a dismissal order, if Mr. Baum agrees with it.
>
> The Court: Well, let's not – I've ordered the matter orally on the record, and I'm going to give them their opportunity here, counsel, and that is to note it up for entry of final orders. I'm not going to rush to the gate and sign something here without giving

[7] Report of Proceedings (July 30, 2007) at 13-19.
[8] Report of Proceedings (July 30, 2007) at 48-59.
[9] Report of Proceedings (July 30, 2007) at 59.

> them their day.
>
> Mr. Baum: Thank you, Your Honor.
>
> Mr. Blair: Thank you.
>
> The Court: You've won the battle, but maybe not the war. I don't know.[10]

The State filed a motion to reconsider on August 1, 2007. The State filed a brief in support of the motion on November 9, 2007. In the brief, the State informed the court that the older cases discussed by the parties on July 30 were inapplicable because they were applying the former version of the rule. "We failed to realize that these cases had been superseded by the new rule."[11] The State conceded that the applicability of the new time for trial rule had not been sufficiently presented to the court. The State still maintained, however, that events in municipal court determined the commencement date of the speedy trial period because the charges in the two courts were "related charges" under CrR 3.3(a)(5). According to the State's brief, due to a waiver Lynch filed in municipal court, the commencement date of his speedy trial period was February 14. The State reasoned that since the dismissal of charges in that court occurred on February 21, only seven days had expired in municipal court when the dismissal tolled the clock.[12] The State thus contended that as of May 17, the date of arraignment in superior court, 83 days remained for trial and consequently July 30 had been within the allowable time for trial.

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[10] Report of Proceedings (July 30, 2007) at 59-60.

[11] Supplemental Clerk's Papers at 103.

[12] Supplemental Clerk's Papers at 102-08.

Various delays occurred, and the court did not hear the State's motion to reconsider until December 17, 2007. In oral argument presented at the hearing, the State abandoned the position that municipal court time had any bearing on the computation and instead took the position that Judge Brosey had been correct in his original determination that the commencement date was the date of arraignment in superior court. Both in the brief and in oral argument, the State calculated that on July 30 there had still been days to spare. The State maintained that, had it not been for the court erroneously dismissing the charges on July 30, the State would have gone ahead with trial on that date. The State asked the court "to reinstate the charges" and "reset the commencement date with another 90 days so we can try the matter."[13] Lynch, pro se again, urged that the court's July 30 ruling dismissing the case had been correctly reasoned.[14]

The trial court adopted the position set forth by the State in its brief, ruling that under the new rule the date of arraignment in superior court was the commencement date, but seven days from "the prior related matter of dismissal" in municipal court should be added to the time elapsed in superior court.[15] Even with that time added on, a week or more of time would have remained on July 30, and the court therefore concluded that dismissing the matter on that date had been a mistake.[16]

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[13] Report of Proceedings (Dec. 17, 2007) at 10.
[14] Report of Proceedings (Dec. 17, 2007) at 10-13.
[15] Report of Proceedings (Dec. 17, 2007) at 25.
[16] Report of Proceedings (Dec. 17, 2007) at 24-25.

The State then characterized the posture of the case as one where the court had dismissed charges and was now reinstating them. According to the State, this amounted to an order for a new trial that establishes a new commencement date under CrR 3.3(c)(2). The rule provides that a new commencement date shall be set, and the elapsed time shall be set to zero, upon the occurrence of certain events. One such event is a new trial: "The entry of an order granting a mistrial or a new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered." CrR 3.3(c)(2)(iii). The court adopted this view and ruled that the State would have another 90 days to bring Lynch to trial.

The court set February 25, 2008 as the new trial date. Lynch objected, again arguing that the speedy trial period had long expired in several different ways.[17] One of his arguments was that there had been neither a mistrial nor an order for a new trial, and so the trial court's rationale for resetting the clock for another 90 days was in error. He argued that the period from the oral dismissal on July 30 until the decision to reinstate the charge on December 17 was, at best, an "excluded period" under the rule. By that reasoning, the State had only 30 days to bring him to trial. See CrR 3.3(b)(5). He thus contended that trial had to be set on or before January 16, 2008.

On February 13, 2008, the court denied Lynch's motions to dismiss for

[17] Report of Proceedings (Dec. 20, 2007) at 8, 13; Supplemental Clerk's Papers at 83-84.

speedy trial violations. Trial began on March 10, 2008. Lynch was convicted after a three day trial. This appeal followed.

"The determination of whether a defendant's time for trial deadline 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).

The period between the "dismissal of a charge and the refiling of the same or related charge" is one of the excluded periods under CrR 3.3(e) that triggers an extension of the last allowable trial date. CrR 3.3(e)(4). In other words, a dismissal stops the clock. Lynch contends that the speedy trial clock kept running on July 30, 2007 because the court did not enter a final order of dismissal on that date. If this is so, then the 90-day time for trial period expired on August 15, 2007, 90 days after Lynch was arraigned in superior court.

An oral order of dismissal issued by a superior court is not final unless it is reduced to writing and signed by the judge. State v. Collins, 112 Wn.2d 303, 308-09, 771 P.2d 350 (1989). The State concedes there was no final order of dismissal entered on July 30, 2007. The State nevertheless contends that an oral order of dismissal, no less than a written order, should be sufficient to initiate the excluded period provided for in CrR 3.3(e)(4). The problem with this argument is that it would create uncertainty about when a case has actually been dismissed and thus would generate the same kinds of unpredictable results that the 2003 amendment to the rule was intended to eliminate. The court in Collins explained why an oral order of dismissal should not be regarded

as final:

> Much of the determination comes down to after-the-fact analysis of subtle distinctions preserved in the record of the proceedings. The outcome of something as important as deciding whether a defendant was exposed to double jeopardy should not hang on such guesswork.

Collins, 112 Wn.2d at 308. The State cites no authority that would support a special interpretation of the speedy trial rule as allowing an oral order of dismissal to have the same effect as a written order of dismissal.

We follow Collins and hold, for the reasons discussed in that case, that dismissal does not occur until a judge signs a written order. Therefore, the period following the court's oral order of dismissal on July 30 was not an excluded period under CrR 3.3(e)(4) and the clock did not stop. By the same token, the court's reconsideration and reversal of that oral decision on December 17 did not bring about "the refiling of the same or related charge". The same charges were pending against Lynch for the entire period. Although the State asserts that Lynch's freedom was unencumbered during this time, the record reflects that he was twice directed to sign case setting forms directing him to appear for certain hearings or else face arrest.[18]

We note parenthetically that even if the period between July 30 and December 17, 2007 could be excluded under CrR 3.3(e)(4), Lynch would still be entitled to dismissal because under CrR 3.3(b)(5), the State would have had 30 days at most from December 17 to begin the trial.

[18] Supplemental Clerk's Papers at 101, 138.

As an alternative to the "excluded period" argument, the State contends that the trial court's decision to reconsider and reverse its earlier oral dismissal was equivalent to granting a new trial. The entry of an order "granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty" is one of the enumerated circumstances that triggers the setting of a new commencement date. CrR 3.3(c)(2)(iii). This was the argument accepted by the trial court as the basis for setting December 17 as a new commencement date beginning a new 90-day time for trial. This argument also fails. As of December 17, Lynch had not yet gone to trial. If there is no *first* trial, there cannot be a *new* trial.

We conclude that neither the oral order on July 30 nor the reconsideration on December 30 had any effect upon the computation of Lynch's speedy trial period. He was arraigned in superior court on May 17, 2007, and the clock began to run. It reached 90 days on August 15, 2007.

In a third alternative argument against dismissal, the State contends that the particular circumstances of the delay that occurred in this case are not specifically addressed in the speedy trial rule, and therefore Lynch is entitled to dismissal only if he establishes a violation of his constitutional right to a speedy trial. This argument is based upon a rule of construction adopted as part of the 2003 amendments:

> The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

CrR 3.3(a)(4).

Under this rule of construction, the default to the constitutional speedy trial analysis occurs only where the trial was "timely under the language of this rule." As discussed above, Lynch's trial was not timely under the language of the rule. Therefore, he is entitled to the remedy the rule provides: dismissal.

The State asserts that there should be more flexibility in the rule because dismissal in the present case is an absurd result that places the State in an untenable position when a judge makes an oral decision to dismiss. In the State's view, when a defendant makes a complex speedy trial motion close to the end of the speedy trial period, and the judge has tentatively decided to dismiss but would like to hear the State argue for reconsideration before entering a final order, the State would have to put pressure on the trial judge either to enter a final order of dismissal or else begin the trial immediately so that the clock would not run out.

This is not a persuasive argument, because the rule already contains provisions that allow the State and the trial court to deal responsibly with last-minute situations. The primary responsibility for ensuring a speedy trial rests with the court. CrR 3.3(a)(1). On a motion by the State or on its own motion, the trial court has broad discretion to "continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR

3.3(f)(2). When a continuance is granted, the speedy trial clock is tolled until the date specified in the continuance. CrR 3.3(e)(3). After that excluded period, the State has a minimum of 30 days to bring the defendant to trial. CrR 3.3(b)(5). Also, the trial court has authority to grant a short "cure period" if the clock expires due to unanticipated events:

> The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

CrR 3.3(g). These provisions make a rule-based dismissal avoidable in almost every circumstance.

Here, Lynch's time for trial expired, not because the rule as we have interpreted it is absurd, but because neither the court nor the State used the tools that the rule provides.

We reverse Lynch's conviction and order the charges against him dismissed with prejudice. Therefore, we need not reach other claims raised by Lynch in his appeal.

Reversed.

Becker, J.

WE CONCUR: