

No. 49684-1-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.

IVAN EDWARDS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
#01-1-00509-2

RESPONDENT'S BRIEF

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR

1. Is the petitioner bound by his attorney’s agreement to continue the case beyond the speedy trial deadline?
2. May the court retroactively order a continuance if the defendant objects?
3. Does neglect of a case by defense counsel justify non-compliance with speedy trial deadlines?
4. May the defendant assert his right to allocution for the first time on appeal?

C. FACTS

On May 21, 2001, Ivan Edwards (“Defendant” or “Petitioner”) was charged with one count of possession of stolen property in the second degree. CP 28-29. Arraignment was held on June 1, 2001 and an agreed order set trial for July 23 and 25, 2001. However, prior to that trial date, prosecutor Elizabeth Gallery (“Prosecutor”) and defense counsel Laura Smith (“Ms. Smith”) of the Whatcom County Public Defender’s Office agreed to a continuance and re-setting of the trial date to September 25, 2001. Supp. CP ___ (sub. No 24, Copy of Agreed Order Re: Trial Date); 1 RP 3; 3 RP 5. Ms. Smith confirmed this version of events and indicated that she believed that she had filed a waiver the Defendant’s right to a

speedy trial and continuance of the trial date. 1 RP 4. The respective counsel signed a trial-setting order reflecting this agreement, 2 RP 1, and the date was placed on the court's calendar by the clerk. 1 RP 5. However, unbeknownst to the Prosecutor, Ms. Smith failed to file the executed form with the court. 1 RP 5; 2 RP 1; see Supp. CP ____ (sub. No 24, Copy of Agreed Order Re: Trial Date). (It is standard practice in the Whatcom County Superior Court, after a trial setting conference, for defense counsel to have the agreed order signed by the defendant and then submit it to the court for entry of the order. 1 RP 5.)

Pursuant to the agreed trial setting, the court clerk docketed the trial date as September 25, 2001, and no objections to that date were registered. 1 RP 5-6. However, at some time prior to the agreed trial date, the Public Defender's Office was disqualified from the case. 1 RP 2; 3 RP 4. Defense counsel Smith mentioned this to the Prosecutor in casual conversation, 3 RP 5, but did not file anything with the court indicating a withdrawal from the case or the appointment of a substitute defense counsel, 3 RP 4-5, until Tom Lester ("Mr. Lester") entered an appearance for the Defendant on September 24, 2001, one day prior to the previously agreed trial date. 3 RP 10-11. Although Mr. Lester received his appointment on or before September 21, 2001, he did not meet with the Defendant until September 24, 2001, the day he entered his appearance with the court.

Given these circumstances it is doubtful that Mr. Lester could have been adequately prepared for trial on September 25, 2001 as scheduled. See 3 RP 7, 11. As the trial date approached, Ms. Smith was engaged in a two-week trial and could not be contacted by either the Prosecutor or Mr. Lester. 1 RP 1-2, 3-4; 3 RP 5-6. The Prosecutor did not know how to contact the Defendant and had not been informed of who was representing him and, thus, did not call the case on the scheduled trial date. Id. The Prosecutor did not receive Mr. Lester's appointment until September 26, 2001, one day after the agreed trial date. 3 RP 6. However, as soon as the Prosecutor learned of Lester's appointment, she set a status conference for the following day to re-set the trial date. . At that conference the Prosecutor, Mr. Lester, and Ms. Smith explained the events that lead to the delay, and the Court retroactively granted a continuance and re-set the trial date. 1 RP 6. On that occasion, the Defendant objected to re-setting the trial date on the assertion that it violated his right to a speedy trial under CrR 3.3.¹

¹ CrR 3.3(c)(1) states, in relevant part:

A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment. A defendant released from jail whether or not subjected to conditions of release pending trial shall be brought to trial not later than 90 days after the date of arraignment.

D. ARGUMENT

“A decision to grant a continuance” beyond the Rule 3.3 deadline “will not be disturbed absent a showing of manifest abuse of discretion.” State v. Thomas, 95 Wn. App. 730, 976 P.2d 1264, 1268 (1999); State v. Campbell, 103 Wn.2d 1, 691 P.2d 929, 937 (1984); State v. Miles, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970); State v. Adamski, 111 Wn.2d 574, 761 P.2d 621, 623 (1988).

1. **The Defendant is Bound by His Attorney’s Decision to Seek a Continuance and Need Not Personally Waive His right to a Speedy Trial Under CrR 3.3**

Continuances or other delays may be granted as follows:

(1) Upon the written agreement of the parties which must be signed by the defendant or all defendants. The agreement shall be effective when approved by the court on the record or in writing.

(2) On motion of the State, the court or a party, the court may continue the case when required in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense. The motion must be filed on or before the date set for trial or the last day of any continuance or extension granted pursuant to this rule. The court must state on the record or in writing the reasons for the continuance.

CrR 3.3(h)(emphasis supplied).

In the present case, the Prosecutor and Ms. Smith agreed to con-

tinue the trial date to September 25, 2001, and Ms. Smith believed that she had filed an agreed order embodying that agreement. 1 RP 3-4; 3 RP 5; Supp. CP ____ (sub. No 24, Copy of Agreed Order Re: Trial Date). The decision to seek a continuance exceeding the deadlines imposed by CrR 3.3 is a procedural matter and a strategic decision within the power of defense counsel to make without authorization from the defendant.

The Supreme Court has made clear that “CrR 3.3” is “designed to *protect* but not *guarantee* the right [to a speedy trial].” State v. Mack, 89 Wn.2d 788, 576 P.2d 44, 47 (1978). The Appellant is correct that the Supreme Court held in State v. Adamski, 111 Wn.2d 574, 761 P.2d 621, 625 (1988), that Rule 3.3 “emanates from state and federal constitutional guaranties”, the Court also took pains to declare that “the specific rights conferred by the rule are not of constitutional magnitude.” Id. The charges were dismissed in that case because “[t]he State did not exercise due diligence” in preparing for trial, and had received a continuance in order to subpoena a key witness for the prosecution. Id. However:

The Superior court speedy trial rules were not designed to be a trap for the unwary. Where the rules are unclear, and the defendant has not informed the prosecutor of his or her intent to rely on the rules before the speedy trial period has expired, we will not direct a dismissal of the charges.

State v. Lemley, 828 P.2d 587, 589-90 (1992) (quoting State v. Flabeo, 113 Wn.2d 388, 394, 779 P.2d 707, (quoting Barker v. Wingo, 407 U.S.

514, 522 (1972); State v. Christensen, 75 Wn.2d 678, 686, 453 P.2d 644 (1969))). Far from informing the Prosecutor of any intent to rely on the speedy trial right, Ms. Smith made an agreement for a continuance and then disappeared without informing the prosecution of her replacement or even filing the paperwork that had been completed pursuant to the agreement.

The Court of Appeals has held that “a defendant bears some responsibility for ensuring compliance with the speedy trial rule.” State v. Ledenko, 87 Wn. App. 39, 43, 940 P.2d 280,282 (1992). When the defendant fails to make a timely objection or the delay is unavoidable, retroactive continuances have been granted to avoid violating the speedy trial rules. Id. In another case relied upon by the petitioner, the Supreme Court is clear in stating that there is no remedy for a violation of the speedy trial rules unless there is “a timely motion of the defendant[.]” State v. Striker, 87 Wn.2d 870, 557 P.2d 847, 852 (1976). In this case, far from a timely objection, defense counsel not only failed to raise any objection until the trial date had passed, but agreed to the continuance of the trial date, and present counsel for the Petitioner now relies on his predecessor’s failure to file the appropriate paperwork for his assertion that his charges and conviction should be dismissed. 1 RP 3-4; 3 RP 5; Supp. CP ____ (sub. No 24, Copy of Agreed Order Re: Trial Date). A recent Su-

preme Court decision clarifies that “the defendants effectively waive their right to speedy trial under CrR 3.3 if they do not raise the issue when action could still be taken to avoid a speedy trial violation.” State v. Carson, 128 Wn.2d 805, 818-19, 912 P.2d 1016 (1996). In this case, defense counsel Smith would not have done so, because she believed that she had “agreed to a continuance and [a] speedy trial waiver was filed.” 1 RP 4. The fact that she had failed to file the proper paperwork to effectuate her agreement should not revive the Petitioner’s opportunity to object after the speedy trial deadline has passed.

The petitioner admits that State v. White, 23 WnApp. 438, 440, 597 P.2d 420, 422 (1979), stands for the principle that a waiver of the speedy trial right may be implied in either of the following circumstances:

- (a) where defendant fails to raise the issue prior to trial; or
- (b) where defendant or his counsel requests a continuance or late trial date and states good cause for the record.

Id. In this case, defense counsel requested the continuance but failed to file the appropriate documents with the court, even though she signed documents setting the trial date, leading the Prosecutor to believe that they would be filed. 1 RP 3-4; 3 RP 5; Supp. CP ____ (sub. No 24, Copy of Agreed Order Re: Trial Date). Furthermore, neither defense counsel raised the speedy trial issue until the agreed trial date had come and gone. It is important to note that the trigger point of the waiver is when “counsel

requests a continuance” and not necessarily when the court grants it. See Id.

In another case relied upon by the petitioner, defense counsel failed to discuss the waiver of the right to a speedy trial with his client. State v. Franulovich, 18 Wn. App. 290, 567 P.2d 264, 265 (1977). In that case, defense counsel made the following statement about the waiver:

[A]t no time during [the arraignment] did I seek to nor did I waive the defendant’s Constitutional right to a speedy trial. What I do admit to doing was to waive application of a procedural rule which insures the Constitutional guarantee; we waived the 90-day rule or CrR 3.3—not the defendant’s right to a speedy trial.

Id. The Court of Appeals responded to the foregoing statement as follows:

[State v. Williams, 85 Wn.2d 29, 530 P.2d 225, 227 (1975)] does not preclude an attorney from waiving a *procedural* (as opposed to a substantive) right for tactical purposes.

Id. The court further held that “the statutory right to be tried within 60 days . . . cannot properly be termed ‘fundamental’ in the foregoing sense and therefore beyond counsel’s primary control.” Id. While it is true that defense counsel does not have “carte blanche under any and all conditions to postpone his client’s trial indefinitely” it is also true that “the defendant was bound by the actions of his attorney in waiving his statutory right to a speedy trial” unless the defendant was “the victim of inadequate representation” and “incompetency of counsel.” Id. There is no indication Ms. Smith’s decision to seek a continuance was not in the Petitioner’s

interest, particularly since he was not suffering a deprivation of his liberty during the delay.

The defendant relies heavily on the Lemley case, stating that where defense counsel failed to execute a speedy trial waiver and to inform the defendant of a new trial date, the defendant had no obligation to object to the trial date. (Petitioner’s Br. at 22.) That is not the subtext of the Lemley decision. The essential fact in Lemley was that “[t]he State erroneously believed Lemley had executed a waiver to the November 21 date and gave its assurances of this fact to the court” even though the defendant was actively objecting during proceedings. Lemley, 828 P.2d at 590. The Lemley Court concluded that “Lemley should not be penalized because the State, the court, and his substitute counsel failed to pay attention to him.” Id. In the present case, there was no such error. Ms. Smith did, in fact, execute a speedy trial waiver and continuance, and the defendant never made any attempt to object to the continuance until the scheduled trial date passed.

2. The Court May Retroactively Order A Continuance to Protect the Right to a Fair Trial Even over Defendant’s Objections Where Delay Was Unavoidable

In this case, Mr. Lester met the Defendant for the first time, only one day before the trial date agreed to by Ms. Smith. 3 RP 11. There is

no evidence in the record that Mr. Lester had copies of the police reports or was adequately prepared for trial only one day after meeting the Defendant. See 3 RP 11. It strains reason to think that Mr. Lester had adequate time to prepare for trial in only one day, despite his post-hoc assertions that he could have done so. See 3 RP 10.

In a case relied upon by the petitioner, where the court granted a continuance because it doubted the voluntariness of a guilty plea, the defendant argued that he and his counsel were best able to determine the voluntariness of the plea. State v. Ford, 125 Wn.2d 919, 924, 891 P.2d 712, 715 (1995). However, the Supreme Court ruled that the court had a “duty to independently assess the voluntariness and factual basis of the plea.” Ford, 125 Wn.2d at 925. With respect to granting continuances in the interest of justice, the Court held that “[t]he court is part of the proceeding and is not a potted-palm functionary, with only the attorneys having a defined purpose.” Ford, 125 Wn.2d at 924-25. Similarly, under Rule 3.3(h), the court has an important role in determining whether a continuance is “required in the administration of justice” and whether the defendant will be “substantially prejudiced in the presentation of the defense” if the continuance is granted.

In another case cited by the petitioner, the Court of Appeals held that the defendant’s right to a fair trial was superior to his right to a speedy

trial, and found that a delay required in order to resolve a potential conflict of interest was a sufficient reason for a continuance. State v. Davis, 17 Wn. App. 149, 561 P.2d 699, 700 (1977). As the court concluded:

The fact that defense counsel, without the consent of the defendant, sought the guidance of the court neither obviates the trial court's duty to insure defendant a fair trial, nor violates the mandate of *State v. Williams*, 87 Wash.2d 916, 557 P.2d 1311 (1976), relative to waiver of the right to a speedy trial.

Id. Another case upon which petitioner relies follows on this analysis by holding that “[t]o represent a criminal defendant up to the point of trial, notwithstanding a potential conflict known to counsel but undisclosed to the client, is not adequate representation.” State v. Thomas, 95 Wn. App. 730, 736-37, 976 P.2d 1264, 1268 (1999). In that case, however, the inadequacy of representation alone did not require reversal. The Court said:

A waiver of a constitutional right to a speedy trial must be knowing, intelligent and voluntary and will not be presumed. [State v. Davis, 69 Wn. App. 634, 638 849 P.2d 1283 (1993).] But that is not the standard for testing the validity of a waiver of the right to speedy trial provided by court rule. Instead, the applicable test is found in the rule itself, which authorizes a trial court to continue a criminal case “when required in the administration of justice and the defendant will not be prejudiced in the presentation of the defense.” [CrR 3.3(h)(2); State v. Livengood, 14 Wn. App. 203, 208-09, 540 P.2d 480 (1975).] A trial court may decide to grant a continuance even over the express objections of a defendant. [State v. Luvane, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995)] “If a defendant’s consent is not required to waive a procedural right then it is illogical to conclude that the defendant must nevertheless under-

stand fully the right being waived.” [State v. Finch, 137 Wn.2d 792, 807, 975 P.2d 967 (1999).]

Thomas, 976 P.2d at 1268. The Court’s action in granting a retroactive continuance is, in part, recognition that Mr. Lester would probably not have been able to try the case the first day after meeting the Defendant. See 3 RP 12-13. When the defendant fails to make a timely objection or the delay is unavoidable, retroactive continuances have been granted to avoid running afoul of the speedy trial rules. Ledenko, 940 P.2d at 282. In the present case, the delay was unavoidable, largely due to the last-minute substitution of Mr. Lester for Ms. Smith because of a conflict of interest.

The petitioner relies heavily on State v. Jenkins, 76 Wn. App. 378, 884 P.2d 1356 (1994), for the propositions that the state has the primary duty to bring the defendant to trial, and that a trial date may only be extended for five days under CrR 3.3(d)(8) once it has been set. However, the salient factual finding in the Jenkins case was actually that:

The State does not contend that it had any intention of starting the trial on September 13, and it makes no pretense that any other trial date had been set. Under the circumstances, the trial court properly refused to exercise its discretion and denied the motion for the extension.

Jenkins, 76 Wn. App. at 382. In the present case, there is no such evidence of prosecutorial neglect. Furthermore, the Jenkins opinion merely

affirmed the trial court's exercise of discretion, but did not indicate that a continuance would have been improper. In the present case, the trial did not begin on the appointed day because defense counsel had unexpectedly been conflicted out of the case, and no one entered an appearance for the Defendant until the day prior to the agreed date for trial. In another case, a continuance beyond the Rule 3.3 deadline was upheld, "to allow defense counsel time to prepare an adequate defense" where the prior defense counsel had been terminated shortly before trial. State v. Dowell, 16 Wn. App. 583, 557 P.2d 857, 860 (1977).

In a case analogous to the present case in almost every important respect, a public defender discovered shortly prior to trial that he had a conflict of interest and, thus, moved to continue the matter until a new defense counsel could be appointed. State v. Livegood, 14 Wn. App. 203, 540 P.2d 480, 483 (1975). The court found that it would have been erroneous for the trial court to deny the continuance because "counsel believed he had a conflict of interest and he was unprepared." Id.

We do not believe the defendant, under the circumstances of this case, can now be allowed to say he disavows the motion and stipulation of his counsel, particularly when it was done for his benefit and did not prejudice him in the presentation of his defense.

Id. Similarly, in the present case, the defendant was not prejudiced in his ability to prepare a defense by the short delay occasioned by the continu-

ance granted by the court. In fact, he did not have an attorney legally qualified to represent him until September 24, 2001, only one day prior to the agreed trial date. In another case, the Supreme Court recognized that a trial court could grant a continuance over the objection of the defendant to ensure adequate preparation time for counsel.

Mr. Luvane argues that by granting the continuance, the court denied him his right to a speedy trial. We have previously held, however, that a trial court may grant a continuance to allow the defense counsel opportunity to prepare for trial over the express objections of a defendant. The trial court, therefore, committed no error in granting the continuance.

State v. Luvane, 127 Wn.2d 690, 699, 903 P.2d 960, 966 (1995). “Counsel was properly granted the right to waive trial in 60 days, over defendant’s objection, to ensure effective representation and a fair trial.” State v. Campbell, 103 Wn.2d 1, 691 P.2d 929, 937 (1984).

The petitioner also relies heavily on State v. Ledenko, 87 Wn. App. 39, 940 P.2d 280 (1997), referring to it as a “case on point.” (Pet. Br. at 23.) However, Ledenko is entirely inapposite. The delay in that case was occasioned by a combination of the prosecutor’s absence on vacation and a calendaring error in the court clerk’s office. Id.

The Ledenko Court found that there were no “unavoidable or unforeseen circumstances” that “would have justified an extension of the speedy trial date under CrR 3.3(d)(8)”, Id., in contrast to the holding in

Davis, 562 P.2d at 700, where a potential conflict of interest arising shortly before the intended trial date was sufficient reason to grant a continuance. The present case is much more analogous to the facts in Davis, since defense counsel was disqualified and new counsel could not be appointed until the day before the agreed trial date.

3. Defense Counsel’s Neglect Presents Adequate Justification for Non-Compliance With Speedy Trial Requirements

According to the primary case relied upon by the Petitioner: Dismissal is required under CrR 3.3(e) if the case is not brought to trial in accordance with the rule. A showing of prejudice to the defendant is unnecessary. . . . The doctrine of waiver, formerly applied by this court in cases such as *State v. Niblack*, 74 Wn.2d 200, 443 P.2d 809 (1968), is not entirely abrogated. The defendant must move for dismissal prior to going to trial.^[2]

The purpose of this rule is to insure speedy justice in criminal cases, insofar as reasonably possible. If continuances are necessary, they should be sought or entered upon formal motion, with the reasons therefor [sic] being made a matter of record.

Since the rule was not complied with and no justification for non-compliance has been shown, we conclude that the court was required to dismiss the action with prejudice.

² A recent Supreme Court decision clarifies that “the defendants effectively waive their right to speedy trial under CrR 3.3 if they do not raise the issue when action could still be taken to avoid a speedy trial violation.” State v. Carson, 128 Wn.2d 805, 814, 912 P.2d 1016 (1996). The idea that Mr. Lester may have objected before the actual trial took place is, therefore, unavailing.

State v. Williams, 85 Wn.2d 29, 530 P.2d 225, 227 (1975) (emphasis supplied. Some citations omitted). In the present case, however, ample justification for non-compliance has been shown. The Petitioner did not make an objection to the agreed trial date until it was too late to ensure compliance therewith.³ His counsel, in fact, agreed to the trial date. 1 RP 3-4; 3 RP 5; Supp. CP ____ (sub no. 24, Copy of Agreed Order Re: Trial Date).

Perhaps more important, the case was not called on the agreed trial date because Ms. Smith was disqualified and absent-mindedly failed to file the new stipulated order continuing the trial with the court before the new defense counsel was appointed only one day prior to the agreed trial date. 1 RP 5; 2 RP 1; see Supp. CP ____ (sub. No 24, Copy of Agreed Order Re: Trial Date). It is not the duty of the prosecutor to anticipate defense counsel's potential conflicts of interest for the purpose of ensuring compliance with speedy trial deadlines.

The State has a duty to avoid delay in providing discovery and amending the information. Offered no authority or pol-

³ CrR 3.3f(2) provides that when a trial date is reset by the court, and the parties are notified thereof, a party must object within ten days after notice or any such objection is waived. In the present case, Ms. Smith was clearly aware of the trial date, signed her name endorsing it, and had ample opportunity to object. Supp. CP ____ (sub. No 24, Copy of Agreed Order Re: Trial Date). The defendant should not now be permitted to enter a belated objection after it is too late for the government to comply with the speedy trial deadline, based on his own counsel's neglect of the case. Otherwise, defense counsel would be encouraged to neglect their cases in hopes of gaining procedural dismissals. Thomas, 976 P.2d at 1268-69.

icy argument for doing so, we decline the invitation to impose on the State a new and equivalent duty to resolve potential defense conflicts. . . . Unless the State has unique knowledge of facts creating the potential conflict, the duty to avoid conflicted representation of the defendant belongs to defense counsel, not the State.

Thomas, 976 P.2d at 1268-69 (citations omitted). On this basis, the court held that “there was no violation of the speedy trial rule” notwithstanding the inevitable delay caused by the appointment of new defense counsel.

Id.

Furthermore, the Supreme Court has held that Washington’s “courts of appeal have consistently held that unavailability of counsel may constitute unforeseen or unavoidable circumstances to warrant a trial extension under CrR 3.3(d)(8).” Carson, 128 Wn.2d at 814. The fact that Mr. Lester was not appointed to represent the Defendant until one day before the agreed trial date, and the fact that Ms. Smith was in trial and unavailable for contact by Mr. Lester to learn the procedural posture of the case were essential factors causing the delay in the present matter. Furthermore, “a mistaken belief about the speedy trial expiration date” has also been found to constitute an unavoidable or unforeseen circumstance warranting extensions under CR 3.3(d)(8). Carson, 128 Wn.2d at 815. In this case, the Prosecutor was under a reasonable (although mistaken) belief that the speedy trial expiration date had been dealt with, according to

her agreement with Ms. Smith.

The Petitioner attempts to argue that an “extension of trial, however, can only be granted once a trial date has been set.” Petitioner’s Br. at 26. However, even if the September 25, 2001 trial date could be discounted, no party disputes that there was an initial trial date set for July 23, 2002. 1 RP 3, 6. The Carson Court also made clear that, under such unforeseen circumstances as unavailability of counsel or a reasonable mistake, a court could grant “multiple retroactive trial extensions to meet the speedy trial requirement.” Carson, 128 Wn.2d at 817. The Petitioner contends, however, that the court might not have styled the extension it granted as “a series of 5-day extensions to permit trial under the rule.” Petitioner’s Br. at 27. This argument elevates form over substance and is “designed as a trap for the unwary” which is contrary to the purpose of the speedy trial rules. Carson, 128 Wn.2d at 815.

It was the failure of defense counsel Smith to (1) identify her conflict of interest, (2) follow up in filing the agreed trial date, and (3) see that new defense counsel was appointed before abandoning the case, that ultimately lead to the delays of which Petitioner now complains. This conduct departed from standard practice in Whatcom County Superior Court. As the Prosecutor indicated, “ninety-nine point nine percent of the time this goes fairly smoothly in terms of the defense getting their client to sign

the trial setting and getting a waiver.” 1 RP 5. Defense counsel changed its position and decided to rely on speedy trial rights without notice to the prosecution until after the agreed trial date had passed without the trial taking place as scheduled.

The Court of Appeals held that delays caused by the conduct of defense counsel could not justify a dismissal on speedy trial grounds. Otherwise, defense counsel could gain advantage by neglecting a case or deliberately causing delays.

We further hold that a speedy trial waiver forced solely by defense counsel’s conduct, and not in any way attributable to the State or the court, is not a violation of Criminal Rule 3.3, and does not justify a dismissal of charges. Otherwise, as the State argued in *Campbell*, defense counsel could obtain dismissal of charges by neglecting to prepare a case. Dismissal of charges after a defendant is convicted in a fair trial is “Draconian” and can only be justified by a compelling public policy. Thomas has put forth no policy compelling such an interpretation of CrR 3.3. In cases where the State’s conduct has forced the defendant to waive speedy trial, the courts have relied on CrR 8.3(b) as the rule authorizing dismissal, not CrR 3.3. Dismissal of charges under CrR 8.3(b) requires a showing of arbitrary action or governmental misconduct. Inadequacy of representation by defense counsel does not satisfy this requirement.

Thomas, 976 P.2d at 1268-69 (citations omitted). In the present case, there is no evidence of government misconduct or arbitrary action. Granting a dismissal on speedy trial grounds, where delays were caused by defense counsel, would indeed be “Draconian” and is unwarranted in this

case.

4. The Petitioner Failed to Exercise His Right of Allocation at Sentencing and May Not Raise it For the First Time on Appeal

Washington's right of allocation is based in the following statute:

Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. . . . The court shall . . . allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

RCW 9.94A.110. In a case relied upon by the Petitioner, the Supreme Court stated, with respect to the right of allocation:

Citing *Hill v. United States*, [368 U.S. 424, 428, (1962)], the Court of Appeals in this case correctly concluded Petitioner's right of allocation is nonconstitutional in nature.”

In re Personal Restraint of Echeverria, 141 Wn.2d 323, 340, 6 P.3d 573

(2000). The Rules of Appellate Procedure are clear that the Petitioner has no right to raise issues that are neither constitutional nor jurisdictional for the first time on appeal.

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5(a). The right of allocation is within none of these exemptions.

There is no evidence in the record that defendant or his counsel asserted or

objected to denial of the right of allocution at the sentencing. 2 RP 67-72.

Even if the Petitioner could somehow assert his right of allocution for the first time on appeal, a constitutional error is only “manifest” for purposes of RAP 2.5(a)(3) if it results in actual prejudice. State v. Walsh, 143 Wn.2d 1, 10, 17 P.2d 591 (2001). There is no indication in the record of what Petitioner might have said if he had exercised his right of allocution, nor whether it was likely to change the resulting sentence.

E. CONCLUSION

Based on the analysis set forth above, the State respectfully requests that this court uphold the trial court's holdings and affirm Edwards' conviction for possession of stolen property in the second degree.

Respectfully submitted this _____ day of November, 2002.

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CERTIFICATE
I certify that I mailed a copy of the attached document to this COURT and ERIC NIELSEN, Appellant's attorney, at :

NIELSEN, BROMAN & ASSOCIATES
810 Third Avenue, Suite 320
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postage prepaid, on _____, 1999.

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