SCLCrR 8.2 MOTIONS

Comments

Commenter: Snohomish County Prosecutor's Office
Date Received: 6/8/2021
Comment:

Regarding the most poorly thought out Supreme Court rule in the criminal justice system--the CrR 3.5 rule. . . The mandatory nature of this rule is the source of the problem. The majority of our cases involve statements made by the defendant which are highly relevant to the determination of guilt, yet they are presumed inadmissible unless we undertake a burdensome testimonial hearing. As one might expect at a mandatory hearing, there is most often no issue and little argument from defense. Most noted pre-trial hearings are 3.5 hearings, which previously crowded the motion calendar and frustrated the bench. Most Counties, if not all others, try to lessen the burden of having this hearing by scheduling it for the beginning of trial (like a child hearsay hearing). That way, unnecessary hearings are eliminated and the burden on the witnesses is lessened. Unfortunately, the proposed new rule creates an even more burdensome procedure for having this mandatory hearing.

One wonders post-covid, how we can be expected to complete all these mandatory hearings, especially on the numerous non-violent cases. A new wrinkle to this situation is the adoption of the new CrR 3.4 rule, which specifically states that defendants no longer need to be present at hearings. This rule change was proposed by the state defense association and adopted by the Supreme Court. I doubt the proponents of the rule contemplated the idea that their client would not now need to even be present for 3.5 hearings, because, again, other counties do those hearings at the beginning of the trial, at which point the defendant's presence is still required by rule. Our office is now in the odd position that we cannot require the defendant's presence for these hearings, yet defense is going to object to proceeding without their client. I can imagine we will get many conflicting rulings on this, adding further confusion to an already unworkable situation.

There never seems to be a concerted effort to address this mandatory language with the Supreme Court, but in the absence of a change to the rule the idea of taking up the 3.5 issue with the motions in limine appears to be the only workable solution to this frustrating situation.

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I would strongly urge the Court to consider holding 3.5 hearings at the time a case is assigned out to trial (like we do with Child Hearsay hearings). Such an arrangement would have the following benefits:

(1) It does away with the challenge (and occasional gamesmanship) if getting the 3.5 scheduled prior to trial that has dramatically increased since doing away with the old omnibus hearing practice. There is no scrambling to determine if Officer Smith is available for a 3.5 on a given date when he is already under subpoena for trial as to that date – and their unavailability is something they presumably informed of us when they got the subpoena.

(2) This is less of a burden on the court. By the inherent logic of the system, 3.5 hearings would only be done on those cases that are going to trial.

(3) The trial judge is the one who actually made the 3.5 ruling and isn't trying to interpret some findings of fact and conclusions from some other judge that may or may not have been timely entered prior to trial call. The (admittedly rare) case where there was some uncertainty as to what the ruling meant as to some particularized statement that seemed inconsequential at pre-trial hearing and inadequately addressed, but now prominent at

trial isn't so big a deal. The judge knows the circumstances already and simply tells us what that ruling was as to the issue.

Finally, holding 3.5 hearings at the beginning of trial should be the default, but if either party believes there are legitimate questions about the voluntariness of the defendant's statements such that the Court's ruling may change the contours of the case, a motion to hold the 3.5 hearing can always be noted earlier (through the normal motions confirmation process).

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I had this issue recently and I know others have had the same issues or similar concerns, but the way this motions call is set up, it allows defendants to avoid hearings or not show up without repercussions. Defense is tasked with notifying their client—and the Court is limited in what they can ask about those communications. Because they claim privilege, we can't make records about the sufficiency of the notice they're providing their clients and the Court has hardly, if ever, held a defense attorney or a defendant responsible for the lack of contact when notice isn't given or a defendant does not appear.

I had a case with a law enforcement witness ready to go where defense said they had contact recently but just hadn't been able to notify them of the hearing. That was a month before my trial, and then I only had one more available week to set it to avoid the sanctions in the other part of the Court's rules. I couldn't ask for a warrant for the FTA, nor can I restart their commencement date with an FTA. Meanwhile the case keeps going towards trial and I spend my time preparing it even though defense doesn't have contact with their client.

Continuing to note motions in a way that provides defendants notice through their attorneys will delay cases further. Also, defense attorneys as a matter of practice should be notifying their clients of motions, just like we talk to witnesses about scheduling and don't rely solely on subpoenas. A system whereby we set motions in time slots set up like they are now, and confirm we're still ready the Friday before, but where we summons the Defendant for a noted time slot two weeks ahead of time would be more beneficial for our cases and for the Court in using resources judiciously. Having defense attorneys provide notice is not moving cases forward, which I assume is the ultimate goal of the Court.

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I have concerns about the fact that the rule doesn't contemplate the #1 issue with getting motions filed/set: Lack of communication with defense counsel. Nine out of ten times, the reason I can't get my 3.5 hearing set in time is because defense counsel never emails me back regarding their intentions to proceed/availability. Does a lack of response by defense counsel constitute good cause for delay?

Commenter: Kathleen Kyle
Date Received: 6/11/2021
Comment:

This is a detailed and well thought out rule that will give helpful guidance on the setting and scheduling of motions. SCPDA recommends solely an administrative confirmation process, similar to civil motions, rather than hold a motions call calendar.