

NO. 42989-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL CRAIG WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Russell Hartman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's refusal to grant appellant's motion for a continuance violated his rights to a fair trial and to present a defense.

2. The trial court erred in denying appellant's motion for a new trial based on newly discovered evidence.

Issues pertaining to assignments of error

1. Trial counsel was unable to contact material witnesses prior to trial and sought a continuance to do so. Where there had been no previous continuances and there was no indication the State's witnesses would be unavailable if the continuance were granted, did appellant's due process rights to present a defense and to a fair trial outweigh the court's concern regarding the timing of the motion?

2. Appellant was convicted of possession of a stolen vehicle. The State's case rested on testimony from a car salesman that appellant failed to return the car after driving it to a bank to obtain a down payment. Where trial counsel discovered evidence after trial which seriously challenged the credibility of the State's witness, did the court err in denying appellant's motion for a new trial?

B. STATEMENT OF THE CASE

On August 23, 2011, Daniel Wilson was arrested in Bremerton, when he was found in possession of a car that had been reported stolen. 1RP¹ 38-39. Wilson told the arresting officers that he had bought the car in Spokane. He had paid some money but was supposed to return to pay the tax, title, and license fee and finish the paperwork. 1RP 41-42. Wilson said he was planning to take care of that, and he asked the officers to call the car dealership to verify the arrangements. 1RP 44. The car was impounded, and Wilson was charged with possession of a stolen vehicle. 1RP 42; CP 1; RCW 9A.56.068.

The case was set for trial in Kitsap County Superior Court before the Honorable Russell Hartman. Prior to jury selection, Wilson's trial counsel moved for a continuance on the grounds that the defense investigator had been unable to contact witnesses Wilson identified the day before. 1RP 3-4. Counsel stated she believed the witnesses were relevant to the case and important to the defense. 1RP 4. She explained that the State's position was that Wilson took the car for a test drive in Spokane and did not return it, and he was found in possession of the car in Bremerton a few days later. The witnesses identified by Wilson would establish that Wilson had the car with permission before the date the

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—11/2, 3, 4/11; 2RP 12/23/11.

State's witness would say it was taken. 1RP 4. Counsel argued that these witnesses were material to the case, since the issue was whether Wilson had authority to possess the car in question, and she needed time to contact the witnesses. 1RP 5, 9.

The State opposed the motion for continuance, saying it would be inconvenient to the witness traveling from Spokane. 1RP 5. The State also argued that Wilson should have spoken to counsel about the witnesses sooner. 1RP 6. The court agreed and denied the requested continuance. It stated that Wilson should have disclosed the witnesses to counsel earlier, he had had sufficient time to prepare his case, and there was no basis to continue. 1RP 11. The case proceeded to trial.

Ryan Steele is the sales manager at Affordable Motors in Spokane. 1RP 53-54. He testified he had met Wilson when Wilson helped his daughter buy a car. 1RP 59-61. Steele said he next saw Wilson on Saturday, August 20, 2011, when Wilson spoke to him about purchasing a black 1998 Cadillac. 1RP 59. Wilson took the Cadillac on a test drive and returned, saying he wanted to purchase it. 1RP 62-63. According to Steele, he then let Wilson drive the Cadillac to the bank to get the down payment, at about 4:00 in the afternoon, but Wilson never returned. 1RP 65, 67, 77. Two days later Steele told the owner of the car lot what had

happened. The owner located the Cadillac in Bremerton using the car's GPS, and he called the police. 1RP 68-69.

On cross examination, Steele testified that Wilson had taken the Cadillac for a test drive on a Saturday, and he was certain Wilson had not been in earlier in the week. 1RP 74. He denied letting Wilson take the car before August 20, 2011. 1RP 81. He also denied that Wilson had paid any part of the purchase price of the Cadillac. 1RP 81.

Wilson's sister then testified that Wilson had been with her on August 20, 2011. There were four birthdays in the family that weekend, and there was a party in Tacoma on Saturday. Wilson came over for the party, arriving at her house in Seattle between 9:00 and 10:00 a.m. 1RP 101-02.

After the jury returned a guilty verdict, Wilson moved for a new trial. CP 60, 199-202. Counsel informed the court that critical impeachment evidence had been discovered. 2RP 2-3. Evidence came to counsel's attention after trial that Wilson had been involved in a traffic stop in Spokane on August 18, 2011. 2RP 3-4. Wilson did not recall the traffic stop until after trial, when he was speaking with the person who had been in the car with him. 2RP 4. Since then, counsel had learned that the incident report from that stop indicates Wilson was driving a car with the same dealer license plate from Affordable Motors that was on the Cadillac

at the time of Wilson's arrest. 2RP 5-6; Supp. CP (Sub. No. 31, Affidavit of Jeniece LaCross, filed 12/23/11). Counsel argued that, although the report did not indicate the make and model of the car, the evidence undermined the basis of the State's case, because Steele had testified that Wilson did not test drive any vehicle prior to August 20. 2RP 6. Since the State's case rested on Steele's testimony, new evidence that he was not a credible witness could affect the verdict. 2RP 11.

The court denied the motion for a new trial. It found that because it was within Wilson's knowledge that he had been involved in the traffic stop, the evidence could have been discovered prior to trial. 2RP 13. The court also found that the new evidence was not material, because the traffic incident report did not indicate that Wilson was driving the Cadillac. 2RP 13-14.

The court imposed a standard range sentence of 48 months, and Wilson filed this timely appeal. CP 208, 218.

C. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO GRANT WILSON'S MOTION FOR A CONTINUANCE VIOLATED HIS RIGHTS TO A FAIR TRIAL AND TO PRESENT A DEFENSE.

Under CrR 3.3(f)(2), the court may continue a trial when "required in the administration of justice and the defendant will not be substantially

prejudiced in the presentation of his or her defense.” A trial judge’s failure to grant a continuance may deprive a defendant of a fair trial. State v. Purdom, 106 Wn.2d 745, 748, 725 P.2d 622 (1986). While a court’s decision to grant or deny a motion for continuance is a matter of discretion, that discretion is not absolute. State v. Watson, 69 Wn.2d 645, 650, 419 P.2d 789 (1966). It is the duty of the appellate court to reverse the ruling when a fair trial has been denied. Id.

In determining whether to grant a continuance the trial court may consider various factors, including diligence on the part of the moving party, due process, materiality, and the need for orderly procedure. State v. Downing, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004) (citing State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; CrR 3.3(f)).

Here, trial counsel acted with diligence in attempting to secure the presence of the material witnesses. She informed the court that the defense investigator had been trying to contact them since Wilson provided their names. 1RP 3-4.

Second, Wilson’s right to due process weighed in favor of granting the continuance. “One of the most basic constitutional protections afforded a criminal defendant is the right to have witnesses appear in this behalf.” Watson, 69 Wn.2d at 651; see also U.S. Const. amend. VI; Wash. Const. art. I, § 22; Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L. Ed. 2d

934 (1965); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). And counsel must be given adequate time to prepare the defense. State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950). Denial of a request for a continuance may violate the defendant's right to present a defense if the denial prevents the defendant from producing a material witness. Downing, 151 Wn.2d at 275.

Here, defense counsel informed the court that she had not had time to locate witnesses Wilson identified as possessing information material to the defense. Although the trial court opined that this was a straight-forward case with a focused fact pattern², Wilson nonetheless had a due process right to present his version of events to the jury, and the court's refusal to grant a continuance interfered with that right. See Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.")

The right to compel witnesses is limited to those witnesses who are material to the defense, and materiality is established where there is a colorable need for the person to be summoned. State v. Smith, 101 Wn.2d

² IRP 11.

36, 41-42, 677 P.2d 100 (1984). Here, the State's case depended on testimony from Steele that Wilson test drove the Cadillac on the afternoon of August 20, 2011, and failed to return the car as required before closing that day. Testimony from witnesses that Wilson was driving that very car, with permission, prior to August 20 would undermine the heart of the State's case. The possible impact of this evidence on the trial was enormous, and the witnesses defense counsel needed time to locate were clearly material to the defense.

Finally, while the trial court seemed primarily concerned with the timing of the requested continuance³, there is no indication that the need for orderly procedure outweighed Wilson's right to present a defense. As the Washington Supreme Court has noted,

While efficient and expeditious administration is, of course, a most worth-while objective, the defendant's rights must not be overlooked in the process through overemphasis upon efficiency and conservation of the time of the court.

Watson, 69 Wn.2d at 651. The State did not indicate that its witnesses would be unavailable if a continuance were granted, only that it might be inconvenient for the witness traveling from Spokane to reschedule. IRP 5. Given that the motion was made before jury selection, no testimony was scheduled to be presented that day, and no previous continuances had been

³ IRP 11.

required, the requested continuance would not have so disrupted the proceedings as to outweigh Wilson's right to present a defense.

Where the defense is prejudiced by improper denial of a continuance, the defendant is entitled to a new trial. Watson, 69 Wn.2d at 651. Wilson was clearly prejudiced by the court's ruling. The requested continuance would have allowed his attorney to interview witnesses identified by Wilson as material to the case, whom counsel had previously been unable to contact. His conviction must be reversed and the case remanded for a new trial.

2. THE COURT ERRED IN DENYING WILSON'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

Under CrR 7.5(a)(3), the court may grant the defendant's motion for a new trial on the basis of "[n]ewly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial[.]" A new trial should be granted where the defendant shows the newly discovered evidence (1) will probably change the result of the trial, (2) was discovered since trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981).

A trial court's decision on a motion for new trial is reviewed for abuse of discretion. State v. Roche, 114 Wn. App. 424, 435, 59 P.3d 682

(2002). A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. Id. The denial of a new trial is entitled to less deference by a reviewing court than a decision to grant a new trial. State v. Slanaker, 58 Wn. App. 161, 163, 791 P.2d 575 (1990); State v. Briggs, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989).

The incident report regarding the traffic stop on August 18, 2011, was newly discovered evidence that counsel could not have discovered before trial with the exercise of diligence. Although the traffic stop was within Wilson's knowledge, since he was there, he did not remember the incident until after trial when his memory was jogged while talking to the person who had been with him. CP 201. Neither Wilson nor the other witness had mentioned the traffic stop to counsel or the defense investigator before trial, and thus counsel did not know an incident report existed or that she should try to obtain a copy. Id.

Furthermore, this evidence was material and would probably have changed the result of the trial. The incident report indicates that the car Wilson was driving during the traffic stop on August 18, 2011, had the same license plate as the car he was convicted of possessing on August 23, 2011. Supp. CP (Sub. No. 31 at 1-2). While the trial court felt the new evidence was not material because there was no indication of the make and model of the car Wilson was driving during the traffic stop, it

overlooked the significance of this evidence. See 2RP 3. At trial, Steele had insisted that Wilson took the Cadillac on August 20 and that Wilson had not been to the car lot any earlier than that date. 1RP 80-81. With new evidence clearly contradicting Steele's testimony, along with the evidence that Wilson said he had permission to drive the Cadillac and asked the arresting officer to call the car lot to verify this⁴, the jury would likely have a reasonable doubt as to the truthfulness of Steele's testimony and thus the State's case.

Finally, although the new evidence would clearly be used to impeach Steele's testimony, a new trial is nonetheless warranted. Impeaching evidence warrants a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense. State v. Savaria, 82 Wn. App. 832, 838, 919 P.2d 1263(1996), overruled on other grounds by State v. C.G., 150 Wn.2d 604 (2003). In Savaria, the defendant was convicted of felony harassment and intimidating a witness, where the only evidence of a threat came from the alleged victim and was denied by the defendant. Because the victim's credibility was crucial to the State's case, new evidence that she did not call her father after the alleged threat, as she claimed, warranted a new trial. Id.

⁴ 1RP 41-42, 44.

Here, as in Savaria, Steele's credibility is crucial to the State's case. The only evidence the State presented that the Cadillac was stolen or that Wilson could have known it was stolen came from Steele. Wilson denied any such knowledge when he was arrested. New evidence that seriously challenges Steele's credibility not only impeaches him, it devastates the State's case.

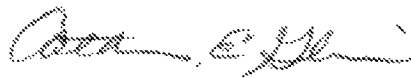
The newly discovered evidence of Wilson's traffic stop was material, was not merely cumulative or impeaching, and probably would have changed the outcome of trial. The trial court's denial of the motion for new trial was unreasonable and must be reversed.

D. CONCLUSION

The trial court's refusal to grant a continuance denied Wilson a fair trial and the ability to present a complete defense. Moreover, newly discovered evidence warranted a new trial. Wilson's conviction should be reversed and the case remanded for a new trial.

DATED this 29th day of December, 2012.

Respectfully submitted,



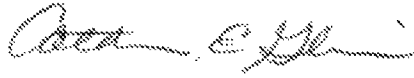
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Certification of Service

Today I delivered copies of the Supplemental Designation of Clerk's Papers and Brief of Appellant in *State v. Daniel Craig Wilson*, Cause No. 42989-6-II, via US Mail to:

Daniel Craig Wilson DOC# 955852
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
December 29, 2012

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