Supreme Court No. 89361-1

Court of Appeals No. 30231-8-III and No. 30239-3-III

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WASHINGTON STATE SUPREME COURT

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STATE OF WASHINGTON,

Respondent,

vs.

E. TROY HAWKINS,

Petitioner.

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# PETITION FOR REVIEW

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**Rules and Statutes**

## I. IDENTITY OF PETITIONER

The petitioner is Edwin Troy Hawkins, the individual respondent/cross-appellant in the case below.

## II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals, Division III, issued a decision July 16, 2013, reversing the trial court on the issue of whether the trial court erred in granting Mr. Hawkins' motion for a new trial and affirming the trial court's ruling that Mr. Hawkins' right to a speedy trial was not violated. The Court of Appeals entered an order denying Mr. Hawkins' motion for reconsideration on August 22, 2013.

## III. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court acted within its discretion when it granted Mr. Hawkins a new trial based upon newly discovered evidence.

2. When the trial court grants a new trial while an appeal is pending, does the filing of the Mandate operate as the commencement date for speedy trial purposes?

3. Whether the trial court's written ruling granting a motion for a new trial is an order for speedy trial purposes.

4. Whether the State is estopped from arguing that the issuance of the Mandate did not operate as the commencement date for speedy trial purposes.

5. Whether Mr. Hawkins' right to a speedy trial was violated when his new trial was set 154 days after the issuance of the Mandate.

## IV. STATEMENT OF THE CASE

The relevant facts and procedural history are more fully discussed in Appellant's Opening Brief attached at Appendix A. By way of summary, Mr. Hawkins is employed by Sundance Slope, LLC. This case arises from the disappearance and switching of farm equipment.

Mr. Hawkins was charged by Second Amended Information with four counts. (CP 14) Count One was Possession of Stolen Property in the First Degree for the possession of two Air-O-Fan sprayers. Count Two was Attempted Possession of Stolen Property in the First Degree based upon Mr. Hawkins' attempting to pick up a Kubota tractor from a repair shop on June 8, 2007. (CP 15) Count Three was Possession of Stolen Property in the First Degree for Mr. Hawkins' actually picking up the Kubota tractor on June 9, 2007. (CP 16) Count Four was Possession of Stolen Property in the First Degree on October 8, 2007, arising from the seizure of a Landini tractor. (CP 16)

The defense theory at trial was that, without Mr. Hawkins' knowledge, the sprayers had been placed on Sundance Slope property, and the tractors switched with similar tractors owned by the Hawkinses.

Evidence presented at trial and evidence erroneously excluded[1] suggested Mrs. Hawkins' family may have placed the stolen equipment on Sundance Slope property in order to implicate Mr. Hawkins. (CP 179, 245, 247, 365-67, 599-605)

After hearing evidence showing the sprayers and the Landini tractor could have been planted on Sundance Slope property, the jury convicted Mr. Hawkins of only the counts arising out of his possession of the Kubota tractor (Counts Two and Three).

Mr. Hawkins appealed his conviction to the Court of Appeals, Division III. (Court of Appeals No. 28118-3-III) (*Hawkins I*) (cover page appended as Appendix B) On August 25, 2010, while his appeal was pending, Mr. Hawkins filed a Motion for New Trial in the Superior Court based on newly discovered evidence. (CP 1096) The motion was based on information provided by Dale Martin that he had observed someone switching Kubota tractors on Sundance Slope property. (CP 1105)

Oral argument was set on the Motion for New Trial for September 27, 2010. (CP 1096) On September 9, 2010, the Court of Appeals affirmed Mr. Hawkins' conviction. 157 Wn.App. 739, 238 P.3d

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[1]In an earlier appeal, the Court of Appeals held the trial court erred in excluding testimony regarding an ongoing dispute with Mrs. Hawkins' family, but that the error was deemed harmless because there was no evidence connecting Mrs. Hawkins' family to the theft of the Kubota tractor. *State v. Hawkins*, 157 Wn.App. 739, 238 P.3d 1226 (2010) (*Hawkins I*)

1226 (2010) Mr. Hawkins timely filed a Motion for Reconsideration of that ruling at the Court of Appeals. (Appendix C)

While Mr. Hawkins' motion for reconsideration in *Hawkins I* was pending, the trial court granted Mr. Hawkins' Motion for New Trial. Although the trial court asked the State to submit a formal order to be signed by the trial court and filed, the formal order was not entered until August 30, 2011, 154 days after the Court of Appeals issued its Mandate on April 12, 2011. (Appendix D) On July 11, 2011, the trial court set Mr. Hawkins' new trial date for September 13, 2011. (Appendix E)

## V. ARGUMENT

Review should be accepted by the Supreme Court where the decision of the Court of Appeals is in conflict with decisions of the Supreme Court or other appellate courts or if the petition involves a significant question of law under the constitutions of the State of Washington or the United States. RAP 13.4(b).

This case concerns the trial court's discretion and the proper standard of review in determining whether a trial court erred in granting a motion for a new trial. The Court of Appeals' decision conflicts with Washington Supreme Court and Court of Appeals decisions requiring appellate courts to give deference to the credibility determinations of the trial court and with decisions mandating a heightened abuse of discretion

standard where a trial court has granted a motion for new trial. The Court of Appeals' decision also conflicts with decisions limiting the discretion of the trial court in resetting the commencement of time-for-trial.

This case also concerns a defendant's right to speedy trial where the trial court delays entry of a formal order granting a new trial while the matter is on appeal. CrR 3.3 contemplates the accused will be brought promptly before the court and trial will commence while the underlying facts are still fresh. *City of Seattle v. Hilton,* 62 Wn. App. 487, 490-91, 815 P.2d 808 (1991). Yet, the Court of Appeals held CrR 3.3(c)(2) and speedy trial were not violated by a new trial setting eleven months after the trial court granted Mr. Hawkins' motion for new trial and 154 days after the issuance of the Mandate in *Hawkins I.* The Court of Appeals' holding undermines the right to speedy trial by granting trial courts and the State unlimited discretion to delay actions which would reset the commencement date under CrR 3.3(c)(2).

### A. The Court of Appeals failed to apply the heightened standard of abuse of discretion required to overturn an order granting a motion for a new trial.

Although the State assigned error to the trial court's order granting new trial on several grounds, the Court of Appeals addressed only the trial court's determination that the defense could not have discovered Mr. Martin's evidence regarding the Kubota tractor through the exercise of due

diligence. *State v. Hawkins*, No. 30231-8-III, slip op. at 5-6 (*Hawkins II*). The Court of Appeals held the trial court incorrectly applied the law to the evidence when it found this element had been satisfied, based upon the Court of Appeals' own determination that the defense either did ask, or could have asked, Mr. Martin whether he had information about the theft of the Kubota tractor prior to trial. *Id.* at 6-7. This conclusion failed to give deference to the trial court's credibility determination and failed to apply the heightened standard of abuse for discretion that Washington courts are to apply to orders granting motions for new trial.

Trial courts have wide latitude when ruling on motions for a new trial. *State v. Dunivin*, 65 Wn.App. 728, 731, 829 P.2d 799 (1992). An appellate court will not disturb that ruling unless there is a clear abuse of discretion. *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). "[A] much stronger showing of abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial." *State v. Taylor*, 60 Wn.2d 32, 40-41, 371 P.2d 617 (1962).

The Court of Appeals' decision is contrary to the holding of *State v. Marks*, in which the Supreme Court stated, "unless reasons given by the trial court for granting a new trial are based merely upon a disagreement with the jury verdicts, the order of the trial court must be affirmed." 71 Wn.2d 295, 297 427 P.2d 1008 (1967). The *Marks* court affirmed the trial

court, reasoning the trial judge was in a "favored position" to weigh the evidence and, therefore, "'a much higher showing is required to overturn an order granting the new trial than denying a new trial.'" *Id.* at 301-02 (quoting *State v. Taylor*, 60 Wn.2d 32, 42, 371 P.2d 617 (1962)). This is consistent with Washington's requirement that appellate courts must defer to the trial court's determinations on witness credibility and the persuasiveness of evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The Court of Appeals' decision is also contrary to the holding of *Taylor*, in which the Supreme Court provided a strong statement regarding the high level of deference to be given the trial court's decision to order a new trial. 60 Wn. 2d at 39-42. The *Taylor* court observed the trial judge is in a "peculiarly favorable position for determining justly the question of whether or not the defendant had been accorded a fair trial." *Id.* at 39, 40. According to the *Taylor* court, "[t]here is a fundamental difference between the question presented on appeal from an order granting and one denying a new trial." *Id.* at 41. "The question is not whether this court would have decided otherwise in the first instance, but whether the trial court was justified in reaching his conclusion. In that respect, he has very wide discretion." *Id.* at 42.

In granting Mr. Hawkins' motion for a new trial, the trial court determined the defense was unable to discover Mr. Martin's evidence prior to trial through due diligence because it simply had no reason to believe Mr. Martin had such evidence. (*See* CP 1129) The trial court was in a "particularly favorable position" to weigh the affidavits supporting a new trial in the context of Mr. Martin's previous testimony and his relationship to Mr. Hawkins. After presiding over a lengthy trial, the trial court was aware that Mr. Martin was a field man who advised orchardists regarding the use of chemicals; hence, his testimony was focused on sprayers. (*See* CP 1105) As he had no connection to the Kubota tractors at issue, there was no reason to believe he had any information to provide regarding the theft of the Kubota tractor. (*See* CP 1129) On this basis, the trial court reasonably determined that the due diligence element was satisfied. (CP 1129)

The Court of Appeals did not have the benefit of having presided over Mr. Hawkins' first trial or of having heard Mr. Martin's testimony in that proceeding. Nevertheless, the Court of Appeals found it was "difficult to believe that defense counsel did not ask Mr. Martin about other equipment." (*Hawkins II* at 6) This finding fails to defer to the credibility determination of the trial court. The Court of Appeals' conclusion that the absence of any reason to question Mr. Martin does not

explain why the defense could not have discovered Mr. Martin's testimony through reasonable diligence, lacks sufficient evidence and fails to apply the correct standard for reviewing grants of motions for new trial. Because this conflicts with Washington's heightened standard for the review of orders granting motions for new trial, this Court should accept review.

### B. The Court of Appeals' interpretation of CrR 3.3(c)(2) allows trial courts and the State to violate the right to speedy trial by unreasonably delaying actions which would reset commencement.

Mr. Hawkins' appeal raised an issue of first impression concerning the interplay in CrR 3.3(c)(2) between the new trial subsection (iii) and the appellate review subsection (iv).

The right to a speedy trial is a fundamental right. *State v. White*, 23 Wn.App. 438, 440, 597 P.2d 420 (1979). The purpose of CrR 3.3 is to protect the defendant's constitutional right to a speedy trial. *State v. Mack*, 89 Wn.2d 788, 791-92, 576 P.2d 44 (1978). Strict compliance with the speedy trial rule is required. *State v. Teems*, 89 Wn.App. 385, 388, 948 P.2d 1336 (1997).

The Court of Appeals held the trial court's decision granting a new trial did not reset the commencement date because the decision was not a formal order and because any order would have no effect while Mr.

Hawkins' motion for reconsideration remained pending. *Hawkins II*, at 9-10. The Court of Appeals further held that CrR 3.3(d)(2)(iv) did not apply because the Court of Appeals' decision in *Hawkins I* did not result in a new trial. *Hawkins II*, at 10. These holdings allow the State and trial courts to unreasonably delay the resetting of the commencement date whenever a defendant's conviction is affirmed. *Hawkins II*, at 9-10.

Thus, the Court of Appeals' decision left Mr. Hawkins with (1) a trial court decision granting him a new trial that was not effective until the mandate issued, (2) a Court of Appeals decision affirming his conviction, and (3) no obligation on the part of the trial court or the State to either enter an effective order for new trial or take any other action which would reset the commencement date for speedy trial. *Id.* at 9-11. More troubling, the Court of Appeals justifies this holding as being in the best interest of the defendant. *Id.* at 11.

Because the Court of Appeals' decision stands to erode the trial court's and State's obligation to timely reset the commencement date, this Court should grant Mr. Hawkins' petition.

**1. The Superior Court's written ruling granting a new trial was valid for speedy trial purposes.**

The Court of Appeals held that only a formal order triggers recommencement under CrR 3.3(c)(2)(iii). *Hawkins II*, at 9. This is error.

No such requirement exists in the rule or in case law. This interpretation of CrR 3.3(c)(2)(iii) produces the absurd result in this case of having the time for speedy trial recommence over six weeks **after** the trial court set a new trial date, although no order of continuance was entered.

While many cases address whether a specific superior court ruling is an appealable order, those cases must be reviewed in context of the jurisdictional analysis associated with an appeal. In examining these rulings, it is critical to bear in mind that substance controls over form, and the court should look at the content of a document rather than its title. *Rhodes v. D&D Enterprise, Inc.,* 16 Wn.App. 175, 177, 554 P.2d 390 (1976).

A final appealable order is required to meet the jurisdiction requirements of RAP 2.2. For purposes of speedy trial, however, it is the trial court that is calculating time-for-trial based upon its own decision to grant a new trial. *See Steinmetz v. Call Realty, Inc.*, 107 Wn. App. 307, 312, 23 P.3d 1115 (Div. 3, 2001) (holding a letter memorandum was an order for purposes of a motion for reconsideration), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)). The trial court has no need to be concerned about subsequent trial court actions. Should the trial court change its decision, speedy trial simply becomes a moot issue. The same concerns which underlie the requirement

for formal order or judgment in cases addressing appealability do not apply.

Even if the requirements were the same, the Court of Appeals has rejected the language which appears to require a formal caption designating any reviewable decision as an "order" or "judgment." *Steinmetz*, 107 Wn. App. at 312. Instead, the *Steinmetz* court relied upon the unequivocal language of the order stating "judgment is entered in favor of Defendant." *Id.* Similarly, here, the trial court unequivocally stated, "Defendant's motion for new trial is granted." (CP 1127)

Mr. Hawkins filed a formal motion seeking a new trial. The motion was argued and taken under advisement. The Superior Court filed its own Decision on Motion for New Trial which concludes "the Defendant has satisfied the necessary elements for a new trial" and "Defendant's motion for a new trial is granted." (CP 1127) This ruling satisfied CrR 3.3. To hold otherwise would allow trial courts and parties to delay the resetting of the commencement date by simply failing to timely present or file formal orders for new trial. Therefore, if the mandate had already issued, the court's Decision and Memorandum would have been sufficient to trigger the court's duty to ensure Mr. Hawkins was brought to trial within 90 days of the entry of the trial court's decision.

Because the Decision on Motion for New Trial was entered[2] while Mr. Hawkins' motion for reconsideration remained pending, it became effective immediately upon the issuance of the mandate. RAP 7.3(e); CrR 3.3(c)(2)(iii).

### 2. The Court of Appeals' interpretation of "order" as used in CrR 3.3(d)(2)(iii) as only a formal order is inconsistent with the purpose of CrR 3.3(d)(2).

Although the Court of Appeals held the plain terms of CrR 3.3(c)(2)(iii) require a formal order to trigger the time for trial, such an interpretation is contrary to the purpose of CrR 3.3, particularly where the Court of Appeals places no corresponding duty upon the trial court to timely enter a formal order.

When interpreting a court rule, courts should reject an interpretation that fails to accomplish the intent of the rule or that is inconsistent with a logical reading of the rule. *State v. Chhom*, 162 Wn.2d 451, 458-59, 173 P.3d 234 (2007). Courts are to interpret court rules according to the rules of statutory interpretation. *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). Thus, the court should give effect

[2]RAP 7.3(e) did not bar the trial court from entering its Decision on Motion for New Trial because that order did not, and could not, change or modify the rulings being reviewed. *See*, *Leen v. Demopolis*, 62 Wn.App. 473, 484-85, 815 P.2d 269 (1991). The trial court's Decision on Motion for New Trial was based upon newly discovered evidence, while the Court of Appeals was considering the scope of admissible evidence and jury instructions on good faith claim of title.

to the plain meaning of the rule, as determined from the rules as a whole. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). The court may not place a "narrow, literal and technical construction" on one part of the rules, while ignoring other relevant parts. *In re Washington State Bar Ass'n*, 86 Wn.2d 624, 627, 548 P.2d 310 (1976). Rather, the language should be construed consistent with the general purpose of the rule. *Id.*

"[T]he purpose of the time-for-trial rule . . . is to 'provide a *prompt* trial for the defendant once prosecution is initiated.'" *Chhom*, 162 Wn.2d at 469 (quoting *State v. Edwards*, 94 Wn.2d 208, 216, 616 P.2d 620 (1980) (emphasis in original)). A prompt trial reduces the chance of substantial prejudice to the defendant, including lost opportunities to serve sentences concurrently and an impaired ability to prepare for trial. *Id.* The time-for-trial rules further those goals by imposing time constraints which minimize the discretion of the State and the courts. CrR 4.1(a)(1) requires the trial court to arraign the defendant no later than 14 days after the date an information is filed if the defendant is detained or subject to conditions of release. The trial court must set the initial trial date within 15 days of the arraignment. CrR 3.3(d)(1). CrR 4.1(a)(1) and 3.3(d)(1) thus indicate that a reasonable period to wait for a trial setting for

defendants like Mr. Hawkins, who are subject to conditions of release, is 29 days of the receipt of the mandate. (Appendix D; RP 48)

CrR 3.3 includes no statement indicating the expectation of promptness is reduced for subsequent trial settings. Rather, CrR 3.3(d)(2), reinforces the view that CrR 3.3 as a whole anticipates minimal, if any, delay between an event that triggers the resetting of a trial date and the actual resetting:

> (2) Resetting of Trial Date. *When the court determines* that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), *the court shall set* a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(Emphasis added.) CrR 3.3(d)(2) does not call for resetting to happen "after the court determines that the trial date should be reset," but "*[w]hen* the court determines that the trial date should be reset." (Emphasis added.) Nor does the rule recommend that the court "should" set a new date when the need for a new trial setting becomes apparent, but requires that it "shall."

CrR 3.3(e) also emphasizes the responsibility of the trial court to ensure the time-for-trial requirements are met. *See* CrR 3.3(a). Notably, the periods excluded for purposes of the speedy trial calculation are those

which are not subject to discretionary delays by the State and trial court. *See* CrR 3.3(e). The State's discretion over the ultimate trial date is also limited by CrR 3.3(f)'s requirement that the State obtain the permission of the defendant for continuances and other delays, unless the trial court finds the continuance is required in the administration of justice and the defendant will not be prejudiced. CrR 3.3(f).

The Court of Appeals' interpretation of "order" as requiring a formal order without a corresponding duty to timely enter a formal order is contrary to the expectation of CrR 3.3 as a whole that the State and trial court will act to ensure a defendant receives a prompt trial, regardless of whether it is the defendant's initial or subsequent trial. Because the Court of Appeals' decision undermines the defendant's right to a speedy trial following an order granting a new trial, this Court should grant review to clarify and reaffirm the obligations of the State and trial court following the granting of a new trial.

### 3. When the superior court grants a new trial while an appeal is pending, the filing of the mandate operates as the commencement date for speedy trial purposes.

The ultimate responsibility for a speedy trial falls upon the trial court. CrR 3.3; *State v. Malone*, 72 Wn.App. 429, 434, 864 P.2d 990 (1994); *State v. Lemley*, 64 Wn.App. 724, 729, 828 P.2d 587 (1992).

Although the court is ultimately responsible for ensuring compliance with the speedy trial rule, the State is primarily responsible for bringing the defendant to trial within the speedy trial period. *State v. Ross*, 98 Wn.App. 1, 4, 981 P.2d 888 (1999). The Court of Appeals' decision reduces the responsibility of trial courts and the State by imposing no obligation to timely present or file such an order while or immediately after an appeal is pending, while also removing those obligations entirely where the defendant's conviction is affirmed. This is contrary to case law interpreting CrR 3.3.

Washington courts have repeatedly interpreted CrR 3.3(c) and (e) to limit exclusions or the delay of commencement dates where the State has a mechanism in place to bring the defendant before the trial court. *See, e.g.*, *Chhom*, 162 Wn.2d at 462-63, 471 (holding the time for exclusion for detention under former CrRLJ 3.3(g)(5) is limited to time during which a defendant is detained by another county because "[a] defendant's right to a timely trial should not depend on where a city or county *elects* to confine the defendant" (emphasis added)); *State v. George*, 160 Wn.2d 727, 739, 158 P.3d 1169 (2007).

Rule 3.3(c)(2)(iv) anticipates the State and the trial court will act to ensure the defendant's appearance before the trial court occurs shortly after the trial court receives the mandate from the Court of Appeals.

*Hilton*, 62 Wn. App. at 492; *State v. Huffmeyer*, 145 Wn.2d 52, 63, 32 P.3d 996 (2001); *see also*, *State v. Nelson*, 26 Wn. App. 612, 615, 613 P.2d 1203 (Div. 2, 1980) (finding receipt of the mandate puts the trial court on notice that the appellate review process has terminated). If the defendant is not brought before the court within a reasonable time, the court must calculate speedy trial from the date the trial court received the mandate. *Hilton*, 62 Wn. App. at 493. Here, the State delayed Mr. Hawkins' first appearance following the mandate for 90 days.

In *Hilton*, then-Municipal Court Judge Barbara Madsen granted Mr. Hilton's motion to dismiss based on the City's violation of his speedy trial right. *Id.* at 489-90 and n.3. Mr. Hilton had appealed his conviction and was granted a new trial. *Id.* at 488. On May 31, the municipal court received the mandate, but the court did not set Mr. Hilton's arraignment until August 31 — 92 days after it received the mandate for a new trial, which the Court of Appeals found to be excessive. *Id.* at 489, 494.

The *Hilton* court noted the defendant had no duty to bring himself to trial, but that his appearance before the court was dependent upon the actions of the State. 62 Wn. App. at 491. Because the State failed to bring Mr. Hilton before the trial court within a reasonable time after the mandate is issued, the expectation of CrR 3.3(c)(2)(iv) was not met. *Id.* at 493. The *Hilton* court, therefore, held the time-for-trial must commence from

the date the mandate was received. *Id.* at 493. "Otherwise, the prosecution of the new trial could be delayed indefinitely. This result would directly conflict with the public's interest in having criminal matters resolved in a timely manner." *Id.*

Here, the State received a copy of the Mandate when it was issued. Even if the trial court's decision was ineffective under CrR 3.3(c)(2)(iii), at that point the State had an obligation to set Mr. Hawkins' next appearance within a reasonable time. *See Hilton*, 62 Wn. App. at 494. Although the parties and the trial court had discussed that speedy trial would commence when the Mandate was received by the trial court, the State elected to not bring Mr. Hawkins before the court until 90 days after the Mandate was issued. (Appendix D; RP 37-41) As in *Hilton*, the State far exceeded the presumptively reasonable time limits set by CrR 4.1(a)(1), by waiting until the time for speedy trial itself expired before bringing Mr. Hawkins before the trial court. *See* 62 Wn. App. at 489.

The Court of Appeals' holding grants the State and the trial court discretion to delay indefinitely the entry of the court's order and the appearance of the defendant by finding neither CrR3.3(c)(2)(iii) nor (iv) applied until the trial court entered a formal order on August 30, 2011. This is contrary to logic and the purpose of the time-for-trial rule, and contrary to the holdings of *Hilton* and *Chhom*. This Court should accept

review of Mr. Hawkins' petition and correct an interpretation of CrR 3.3(c)(2)(iii) and (iv) that leaves defendants such as Mr. Hawkins to fall through the cracks.

## VI. CONCLUSION

The Court of Appeals' decision on the one hand severely curtailed the discretion of trial courts to weigh the evidence and order new trials, while on the other grants trial courts unlimited discretion to delay entry of those orders. The result is that the rights of defendants to a fair and speedy trial are restricted. This Court should therefore accept review to reaffirm the deference given to trial courts, particularly when they grant motions for new trials, and to clarify the rights of defendants and obligations of the trial courts and State where a new trial is granted.

Respectfully submitted this 18th day of September, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on September 18, 2013, I served a copy of the foregoing document by causing a true and correct copy of said document to be delivered to counsel and the party named below at the addresses shown below in the manner(s) indicated:

| | | |
|---|---|---|
| Eric C. Biggar<br>Douglas County Prosecutor's Office<br>P.O. Box 360<br>Waterville, WA 98858 | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☒<br>☒<br>☐<br>☐<br>☐ |
| E. Troy Hawkins<br>P.O. Box 66<br>Manson, WA 98831<br><br>Served by email per agreement with E. Troy Hawkins | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☐<br>☒<br>☐<br>☐<br>☐ |
| Allen Ressler/Jonathan Barash<br>Ressler & Tesh<br>821 Second Avenue, Suite 2200<br>Seattle, WA 98104 | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☒<br>☒<br>☐<br>☐<br>☐ |

DATED at Spokane, Washington, on September 18, 2013.

Cheryl Hansen

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# Appendix A to Petition for Review

No. 30231-8-III and
No. 30239-3-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Appellant / Cross-Respondent,

vs.

E. TROY HAWKINS,

Respondent / Cross-Appellant.

# RESPONDENT/CROSS-APPELLANT'S AMENDED OPENING BRIEF (Speedy Trial Issue) AND RESPONSE TO STATE'S APPEAL (New Trial)

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**STATUTES AND RULES**

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## I. INTRODUCTION

This matter arises from two consolidated appeals. The first appeal (Case No. 302393) was the State's appeal of the trial court's granting of a new trial. (CP 1290) Mr. Hawkins filed a cross-appeal from that appeal as well as a motion for discretionary review, both challenging the trial court's ruling that Mr. Hawkins' speedy trial rights were not violated (Case No. 302318). (CP 1282; 1294) This Court subsequently granted discretionary review of the speedy trial issue. (CP 1282)

These actions left the parties with a procedurally confusing case. There are two primary issues before the Court. The first concerns whether Mr. Hawkins' speedy trial rights were violated (Mr. Hawkins' cross-appeal and discretionary review). The second concerns the new trial (State's appeal). This brief addresses both issues.

## II. ASSIGNMENT OF ERROR

The trial court erred when it denied Mr. Hawkins' motion to dismiss based on the violation of his speedy trial rights.

## III. ISSUES

1. When the trial court grants a new trial while an appeal is pending, does the filing of the mandate operate as the commencement date for speedy trial purposes?

2. Whether the trial court's written ruling granting a motion for a new trial is an order for speedy trial purposes.

3. Whether the State is estopped from arguing that the issuance of the Mandate did not operate as the commencement date for speedy trial purposes.

4. Whether Mr. Hawkins' right to a speedy trial was violated when his new trial was set 154 days after the issuance of the Mandate.

5. Whether the trial court abused its discretion in granting a new trial.

## IV. STATEMENT OF THE CASE

Mr. Hawkins was convicted of Possession of Stolen Property and Attempted Possession of Stolen Property in Douglas County Superior Court. Mr. Hawkins appealed that conviction to this Court. (Court of Appeals No. 28118-3-III)

On August 25, 2010, while his appeal was pending, Mr. Hawkins filed a Motion for New Trial in the Superior Court based on newly discovered evidence. (CP 1096) Oral argument was set on the Motion for New Trial for September 27, 2010. (CP 1096)

On September 9, 2010, the Court of Appeals affirmed Mr. Hawkins' conviction. 157 Wn.App. 739, 238 P.3d 1226 (2010)

(CP 1133) Mr. Hawkins timely filed a Motion for Reconsideration of that ruling at the Court of Appeals. (Cover Page appended as Appendix "A")

The Superior Court heard argument on Mr. Hawkins' Motion for New Trial on September 27, 2010, took the Motion under advisement and advised the parties that it would get them a written decision. (CP 1329) The State then asked the trial court to set a date for Mr. Hawkins' resentencing. (CP 1331) In response to that request, Mr. Hawkins' trial counsel, Allen Ressler, stated:

> Mr. Ressler: Well, there was a, there was a motion for reconsideration filed in the, in the, in the Court of Appeals on this decision so the mandate hasn't issued yet, so we don't have to have a report date, I don't think, until the mandate issues.

(CP 1331)

The following colloquy took place concerning the impact of the Motion for Reconsideration and the issuance of the Mandate:

> Mr. Ressler: Right. So does the Court intend to do that prior to the issuance of a mandate?
>
> The Court: Probably not if the Court of Appeals has got something under reconsideration, so...
>
> Mr. Ressler: Well, they have a petition-a motion for reconsideration, so I'm not sure why we're setting a date prior to the issuance of the mandate. Normally we would set a, set a surrender date after the issuance of the mandate. So if the Court doesn't need our

presence here for purposes of issuing a written opinion, I don't see why we need a date until the mandate is issued.

The Court: I would think we do, Mr. Edgar [deputy prosecutor], would you?

Mr. Edgar: I'll defer to Chief Deputy-

The Court: Alright.

Mr. Edgar: - prosecutor, Mr. Biggar.

The Court: Alright.

Mr. Biggar: I didn't know they had-I didn't know they had filed for reconsideration.

The Court: No, no, once a mandate-Once they do the motion for reconsideration, they'll issue a mandate and the appeals period's in there and I don't have any idea whether anybody's going to appeal it from there, but once that occurs, then **once the mandate issues, then we'll impose a sentence**.

Mr. Ressler: Thank you, Your Honor.

(CP 1332-1334; emphasis added)

On October 7, 2010, the Superior Court ruled that Mr. Hawkins was entitled to a new trial. The trial court issued a written "Decision on Motion for New Trial" that stated in its conclusion that "Defendant's motion for a new trial is granted." (CP 1127)

On November 2, 2010, the State asked the Superior Court to set Mr. Hawkins' case on the Court's November 15th calendar "for entry of order for new trial, and trial setting." (CP 1244)

On November 8, 2010, the Superior Court noted a hearing for November 15, 2010 for an "order for new trial/trial setting." (CP 1245) On November 15, 2010, the Superior Court continued that hearing to December 2, 2010 because "DPA Biggar requests continuance-State initially didn't provide notice to defense counsel; prosecutor's office will send out notice of new hearing." (CP 1247)

On November 22, 2010, Mr. Hawkins moved to strike the December 2, 2010 hearing to set a trial date because his Motion for Reconsideration was still pending at the Court of Appeals. (CP 1248) A hearing on the motion to strike was held on November 29, 2010. Mr. Hawkins personally appeared at that hearing. (Appendix "B" - Previously filed as Ex. "M" to Motion for Discretionary Review) At that hearing, counsel for Mr. Hawkins argued that the trial court was without authority to schedule a new trial until a mandate was issued. (Appendix "C" - Previously filed as Ex. "F" to Motion for Discretionary Review, 11/29/10 Transcript, RP 37-41) The following colloquy took place:

Mr. Ressler: As I read the rule--I mean I understand Mr. Biggar's concern because the rule says that the--says the time for speedy trial begins running from the entry of the order for--for the entry of the Court's order granting a new trial, that's the new commencement date. But I--Be that as it may, that probably does not take into account the--those situations in which, in which the matter's still pending in the Court of Appeals, and so, so the, the granting of an order of new trial doesn't take into account situations where the case is still in the Court of Appeals. And because this case is still in the Court of Appeals, I don't believe that your granting the motion for new trial actually triggers the speedy trial running because I would, I would, I would--**I can't imagine being able to argue with a straight face that, that the commencement date is anything but the date that the mandate issues by the Court of Appeals.** But, you know, that, that doesn't--it doesn't seem to me to make sense that if you--that the Trial Court doesn't have the discretion to schedule a new trial, and then at the same time argue that the commencement date is, is the, is the Court granting the order--the Court granting the defense motion for a new trial.

So, despite the fact that you granted a motion for a new trial, the commencement date hasn't begun. The commencement date is not the--not that order, but rather it is that, that the Court of Appeals decides to get around to dealing with the, the, I mean, the, the, the defense motion for reconsideration, and hopefully that'll be in the summer time...

...

The Court: Mr. Biggar?

Mr. Biggar: Well, with that concession, Your Honor, I think Counsel's argument does make some sense. **I would take the position that speedy trial, that commencement date of speedy trial does not occur until, I guess, one of two things: One, the mandate is received or until this Court actually formally enters an order granting new trial.** This Court has entered a memorandum of opinion (sic). I think under the rules that's not technically an order for a new trial; I think one would need to be rendered in writing with findings and conclusions.

Mr. Ressler: I'm not going to argue that, that, that whatever it is that--I mean, I don't necessarily agree with that last thing, you know, but I will not, I will not, I will not argue that, that the, that--and I've talked to my client about this and I've told him that this was the position I was taking with the Court. So--and I think it's legally the right decision. I've tried to research this to see if I can find anything that--I think we're in a peculiar situation. I can't find anything that, that tells me the answer to this question, but, but the most sensible answer, I think, is that until the case comes back to the Trial Court from the Court of Appeals, we can't schedule a new trial, and I, and I certainly won't argue that, that the commencement date is the, the date that the Court granted the motion for new trial, whether that be in a formal order, or whether it be in a memorandum decision that the Court issued. But, in any, in any event, it would seem--it

would not be, it would not be appropriate for me to, to talk out of both sides of my mouth.

The Court: Well, the Court agrees that the speedy trial can't begin to run until such time as the Court has the ability to set it for trial, and **the Court doesn't, pursuant to the rules, have the ability to set it for trial at this particular time until it's mandated back.** So, under those circumstances, we won't set it for trial until that occurs. **Speedy trial will not begin to run until such time as the mandate has come back.**

Mr. Ressler: Okay. Thank you, Your Honor.

Mr. Biggar: Thank you.

(Appendix "C," RP 37-41; emphasis added)

On December 6, 2010, the Court of Appeals sent a letter to the State that provided:

> It has come to our attention that a Decision on Motion for New Trial was filed in Douglas County on October 7, 2010. Pursuant to RAP 7.2(e), a motion for permission to file a trial court determination which will change a decision being reviewed by the appellate court must be obtained prior to the formal entry of the trial court decision. A Motion for Reconsideration is pending in the appellate court. Please file such motion within five days, by December 13, 2010.

(Appendix "D") The State did not follow the Court of Appeals' directive to file a motion pursuant to RAP 7.2 for permission to file a formal order. The State took no action in response to this letter.

On April 12, 2011, the Court of Appeals issued the Mandate on this case. (CP 1132) The issuance of the Mandate operated as the commencement date for Mr. Hawkins' speedy trial clock.

On June 21, 2011, the State filed a Notice of Hearing for July 11, 2011 for a trial setting. (CP 1252) This trial setting hearing (not the trial) was set for the 90th day following the issuance of the Mandate. The State's filing of this notice to set a trial date based on the new trial ruling is most curious in light of the State's present position that the court was without authority to do anything pertaining to a new trial until such time as a formal order on the new trial ruling was entered.

On July 11, 2011, counsel and Mr. Hawkins appeared for the trial setting hearing. The following colloquy took place:

> Mr. Biggar: A bit of a backdrop: Mr. Hawkins was previously convicted, appealed to the Court of Appeals, that was affirmed, sought discretionary review with the Supreme Court, that request was denied. In the interim period, defense had brought a motion for a new trial, which the Court, at least from the State's perspective, orally granted, but no written order has been entered. And, again, in the State's perspective, although Judge Hotchkiss did enter a oral-or, excuse me, a written ruling by letter opinion-
>
> The Court: Okay.

Mr. Biggar: In any event, we'd like to go ahead and set a trial date...

I also understand, and I'll let defense Counsel articulate, but that they're maybe challenging speedy trial, based on the issuance of the mandate from the Court of Appeals.

(Appendix "C"; RP 42-43) At the hearing, defense counsel specifically objected to the setting of a trial date and stated that no right to speedy trial was being waived. (Appendix "C"; RP 44) The Superior Court set September 13, 2011 as the new trial date. (Appendix "C"; RP 46) This trial setting was 154 days after the issuance of the Mandate. The Superior Court also ruled that the conditions of release that had been previously set would remain in effect while the case was ongoing. (Appendix "C"; RP 48)

On July 18, 2011, the defense formally objected to the new trial date as being in violation of Mr. Hawkins' speedy trial rights. (CP 1254)

The trial court heard argument on the speedy trial motion on August 8, 2011. At that hearing, the State argued erroneously that the trial court did not have the authority to enter its ruling on the motion for a new trial. (Appendix "C"; RP 56)

On August 11, 2011, the Superior Court filed a written decision on defendant's motion objecting to trial setting pursuant to CrR 3.3(d)(3).

(CP 1273) The Superior Court ruled that it did not have jurisdiction to order a new trial while the appeal was pending and that the new speedy trial commencement date would begin when such an order for new trial was entered.

On August 29, 2011, the trial court entered Findings of Fact, Conclusions of Law and Order Denying Motion to Dismiss. (CP 1276)

On August 30, 2011, the trial court also entered Findings of Fact, Conclusions of Law and Order Granting New Trial. (CP 1279)

On September 15, 2011, Mr. Hawkins timely filed a Notice for Discretionary Review which was granted on November 1, 2011. (CP 1282)

## V. ARGUMENT

### 1. When the Superior Court grants a new trial while an appeal is pending, the filing of the mandate operates as the commencement date for speedy trial purposes.

Mr. Hawkins' appeal was pending when the Superior Court ordered a new trial. The issuance of the Mandate must be treated as the new commencement date.

The right to a speedy trial is a fundamental right. State v. White, 23 Wn.App. 438, 440, 597 P.2d 420 (1979). Strict compliance with the speedy trial rule is required. State v. Teems, 89 Wn.App. 385, 388, 948 P.2d 1336 (1997). When the rule is not strictly followed, the case

must be dismissed with prejudice. State v. Helms, 72 Wn.App. 273, 277, 864 P.2d 23 (1993).

The ultimate responsibility for a speedy trial falls upon the trial court. CrR 3.3; State v. Malone, 72 Wn.App. 429, 434, 864 P.2d 990 (1994); State v. Lemley, 64 Wn.App. 724, 729, 828 P.2d 587 (1992). Although the court is ultimately responsible for ensuring compliance with the speedy trial rule, the State is primarily responsible for bringing the defendant to trial within the speedy trial period. State v. Ross, 98 Wn.App. 1, 4, 981 P.2d 888 (1999).

A defendant who is not in custody has the right to be brought to trial within 90 days of his commencement date. CrR 3.3(b)(2)(i).

The initial commencement date is the date of arraignment. CrR 3.3(c)(1). The resetting of the commencement date is calculated by CrR 3.3(c)(2) which provides in pertinent part:

> (2) *Resetting of commencement date.* On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.
>
> • • •
>
> (iii) *New trial.* The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new

commencement date shall be the date the order is entered.

(iv) *Appellate review or stay.* The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review of stay.

This appeal raises an issue of first impression concerning the interplay in CrR 3.3(c)(2) of the new trial subsection (iii) and the appellate review subsection (iv).

Under the new trial subsection (iii), the new commencement date is the date that a new trial order is entered. It is noteworthy that CrR 3.3 does not require that the Superior Court jump through any specific hoops prior to entering an order for a new trial. Here, the Superior Court filed its own written ruling that granted Mr. Hawkins' motion for a new trial. As discussed below, that written ruling, and the subsequent actions taken in reliance on that ruling, satisfy the rule.

The Superior Court entered its written ruling that granted a new trial on October 7, 2010. (CP 1127) If that ruling was viewed in the abstract and without consideration of any appellate review issues, there is no question that Mr. Hawkins' new commencement date would be October 7, 2010.

On November 2, 2010, in reliance on the Superior Court's order that granted a new trial, the State requested, and the Superior Court granted, the State's motion to set a hearing for November 15, 2010 for entry of an order for a new trial and to set a trial date. (CP 1244, 1245) That hearing date was continued to December 2, 2010 because the State failed to give notice of the hearing to the defense. (CP 1247)

Mr. Hawkins moved to strike the December 2, 2010 trial setting hearing because there was still a Motion for Reconsideration pending at the Court of Appeals. (CP 1248) A hearing on the motion to strike the trial setting was held on November 29, 2010. At that time, Mr. Hawkins was still subject to Conditions of Release and personally appeared at this hearing. (Appendix "B") At that hearing, the State argued that Mr. Hawkins' new commencement date would be set when either the Mandate was filed or when the Superior Court "formally" entered an order granting a new trial.[1] (Appendix "C"; RP 40-41) The Superior Court ruled at that hearing that Mr. Hawkins' speedy trial rights would begin to run when the Mandate was filed. (Appendix "C"; RP 41)

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[1] Despite the fact that the State twice noted hearings for entry of a "formal order", no such order was presented by the State for the Court's consideration until well after Mr. Hawkins filed his motion to dismiss based on the speedy trial violation, and after the State apparently realized it had allowed the speedy trial clock to run out.

The record is clear that the Superior Court and the State agreed that Mr. Hawkins' new commencement date would be triggered by issuance of the Mandate.

The speedy trial rule also provides that a new commencement date will be set upon the defendant's appearance that follows the issuance of the Mandate. Here, the trial court granted a new trial on October 7, 2010. That date did not become the new commencement date due to "appellate review" under CrR 3.3(c)(3)(iv). However, as a result of the Superior Court's order for a new trial, the Superior Court, on the State's request, set a trial setting hearing which resulted in Mr. Hawkins' "appearance" on November 29, 2010. (Appendix "B") By operation of the court rules, the Superior Court's ruling on the new trial and Mr. Hawkins' appearance in Superior Court were effectively held in abeyance until the Mandate was issued on April 12, 2011. By operation of the court rules, the Mandate operated to set Mr. Hawkins' new commencement date as April 12, 2011. This is precisely the analysis asserted and agreed to by the Superior Court and the State on November 29, 2010. (Appendix "C"; RP 39-41)

### 2. The Superior Court's written ruling granting a new trial was valid for speedy trial purposes.

The Superior Court and the State have erroneously applied the requisites of a formal appealable order to the language of CrR 3.3. No such requirement exists in the rule or in case law.

After the Superior Court, in its own writing, granted Mr. Hawkins' motion for a new trial, the State twice set hearings seeking a new trial date. Subsequently, the State takes the position that the Superior Court's written ruling was not valid because it was not a "formal order." If the written ruling for a new trial was not valid, on what basis did the State twice set up hearings to set a new trial date? Additionally, the State's theory that an order granting a new trial must meet the requirements of an appealable order is without legal support and defies logic. The Superior Court's written ruling was valid and binding.

While many cases address whether a specific Superior Court ruling is an appealable order, those cases must be reviewed in context of the jurisdictional analysis associated with an appeal. Again, there is nothing in CrR 3.3 which stands for the proposition that a new commencement date will be triggered only if the court's ruling is an "appealable order." In examining these rulings, it is critical to bear in mind that substance controls over form and the court should look at the content of a document

rather than its title. Rhodes v. D&D Enterprise, Inc., 16 Wn.App. 175, 177, 554 P.2d 390 (1976).

Here, Mr. Hawkins filed a formal motion seeking a new trial. The motion was argued and taken under advisement. The Superior Court filed its own "Decision on Motion for New Trial" which concludes on its fifth page that "the Defendant has satisfied the necessary elements for a new trial" and that "Defendant's motion for a new trial is granted." (CP 1127) This ruling satisfied CrR 3.3.

**3. The State is estopped from arguing that the Mandate does not trigger a commencement date for speedy trial purposes.**

Based on the Superior Court's order granting a new trial, the State twice set hearings for the purpose of obtaining a new trial date. The State also expressed its position that the issuance of the Mandate would be the new commencement date. (Appendix "C") The State is now attempting to sidestep these actions and positions and is estopped from doing so.

A party who accepts the benefits of a judgment, decree, or judicial order is estopped from denying the validity or propriety thereof. 31 C.J.S. Estoppel and Waiver §172 (2011).

It is well established that even though a decree is void as beyond the power of the court to pronounce, a party who procures or gives consent to it is estopped to question its validity where he has obtained a benefit

therefrom. Svatonsky v. Svatonsky, 63 Wn.2d 902, 904, 389 P.2d 663 (1964); Cohen v. Stingl, 51 Wn.2d 866, 870, 322 P.2d 873 (1958).

The State is estopped from arguing that the Mandate does not trigger a commencement date for speedy trial purposes.

**4. The trial court did not need permission of the Court of Appeals to enter its ruling granting a new trial.**

Shortly after the Superior Court ordered a new trial, the Clerk/Administrator of the Court of Appeals sent a letter directing the State to file a motion pursuant to RAP 7.2 for permission to file a formal order. (Appendix "D") This directive appears to have relied on an erroneous conclusion that the order for a new trial "will change a decision being reviewed by the appellate court."

The ruling that granted a new trial did not change a decision being reviewed by the Court of Appeals. The decisions under appellate review at that time were related solely to the scope of admissible evidence of others' conduct in the presentation of a defense and jury instructions on good faith claim of title. (Appendix "E") There was no pending appellate issue concerning a new trial based on newly discovered evidence. Accordingly, the ruling on the motion for a new trial did not, and could not, change or modify the rulings being reviewed, and the Superior Court

did not need permission from the Court of Appeals. See, Leen v. Demopolis, 62 Wn.App. 473, 484-85, 815 P.2d 269 (1991).

As a practical matter, the State ignored this directive and the order for a new trial became effective by operation of law when the Mandate was issued. Assuming the State had timely complied with the directive, the "formal order" for a new trial would still have only become effective upon issuance of the Mandate.

**5. The trial court properly exercised its discretion when it granted a new trial. (Response to State's appeal)**

In its appeal, the State asserts that the trial court abused its discretion in granting Mr. Hawkins' motion for a new trial based on newly discovered evidence. (Amended Brief of Appellant) None of the State's theories are sufficient to meet the high showing needed to reverse an order granting a new trial.

The granting of a motion for a new trial based on newly discovered evidence is within the sound discretion of the trial court, and the ruling on such a motion will not be overturned unless it can be shown that the trial court abused its discretion. State v. Young, 76 Wn.2d 551, 555, 458 P.2d 8 (1969). The test for abuse of discretion in this context is whether it can realistically be said that "no reasonable person would take the position adopted by the trial court." State v. Dawkins, 71 Wn.App. 902, 907, 863

P.2d 124 (1993) (quoting State v. Huelett, 92 Wn.2d 967, 603 P.2d 1258 (1979)).

Appellate courts will rarely control the exercise of discretion of a trial court in granting a new trial on the ground of newly discovered evidence. State v. O'Brien, 66 Wash. 219, 224, 119 P. 609 (1911).

Here, the trial court sat through a lengthy trial and later heard and considered the motion for a new trial. The trial court was familiar with the appropriate legal standards for such a motion and properly exercised its discretion and granted Mr. Hawkins a new trial.

**a. Factual background.**

The jury heard evidence concerning allegedly stolen sprayers, a Landini tractor, and an RLF Kubota 7030 tractor. This evidence was presented to support the State's theory that Mr. Hawkins unlawfully possessed stolen property. The jury heard evidence that the sprayers and the Landini tractor could have been planted on the Sundance Slope property. The jury acquitted Mr. Hawkins on these counts. The jury did not hear any evidence as to how the RLF Kubota 7030 tractor wound up on the Sundance Slope property, which would have resulted in Mr. Hawkins unknowingly delivering a tractor that was not his to Valley Tractor for repair. The newly discovered evidence provided the missing

link that would have allowed the jury to also acquit Mr. Hawkins of the two counts involving the RLF Kubota 7030 tractor.

In ruling on the motion for a new trial, the trial court had the benefit of presiding over a lengthy trial in this case. The trial court was familiar with the underlying facts, the arguments and defenses raised during trial, and the issues raised in post-trial motions and the appeal that was pending at that time.

Unfortunately, this Court does not have the same benefit. Accordingly, the following factual background from the trial is set forth to place the present motion in proper context.

This case arises from the disappearance and switching of Sundance Slope's farm equipment. Mr. Hawkins works for Sundance Slope which operates an orchard business and maintains a fleet of tractors. Two of its tractors were taken and replaced with tractors that had been taken from a former competitor.

At the time of trial, Troy and Britt Hawkins had been married for 19 years. (CP 592) They had five daughters. (CP 594) Upon graduation from college, they moved to Texas where Mr. Hawkins worked in the financial industry and Mrs. Hawkins worked as a school teacher. (CP 799)

Mrs. Hawkins' family has been involved in the orchard business for generations. (CP 800) While living in Texas, Mrs. Hawkins desired to return to Washington to raise her children and to get involved in orcharding. (CP 595) In 2002, Mrs. Hawkins purchased a piece of Washington orchard property. (CP 596) Because the Hawkinses were still in Texas, arrangements were made to have Mrs. Hawkins' father, Doug England, and her uncle, Len England, operate the orchard. Her father, Doug England, also managed a local apple packing cooperative by the name of Manson Growers. (CP 597)

The Hawkinses left Texas and moved to Manson in 2004. (CP 598) Mr. Hawkins had no prior involvement in the orchard industry. (CP 804) In 2004, the Hawkinses worked their own orchard and three other orchards they were leasing and marketed their apples that season through Manson Growers. (CP 598) The Hawkinses stopped marketing their apples through Manson Growers during the 2006 season because of conflicts with the Englands. (CP 598)

The trial court excluded evidence of the conflict between the Hawkinses and the Englands. (CP 599-605) Had this evidence been admitted, the jury would have heard that the Hawkinses sold their apples and purchased their chemicals through Manson Growers, the local apple packing cooperative run by Mrs. Hawkins' father, Doug England.

(RP 592) During the 2006 growing season, Mr. Hawkins discovered that Manson Growers was overcharging its members for chemicals. Mr. Hawkins confronted the Englands on this overcharging in front of the Manson Growers Board of Directors. (Supp. CP ____, Memorandum in Support of New Trial) Shortly thereafter, Sundance Slope (the Hawkinses' business) terminated its relationship with Manson Growers, causing the cooperative to suffer a substantial loss of business. (Supp. CP ____, Memorandum in Support of New Trial) Because of these events, the relationship between the Hawkinses and Englands became mutually hostile. (Supp. CP ____, Memorandum in Support of New Trial) This hostility between the families was widely known in the community, including among the State's witnesses in this case.

By 2006, the Hawkinses were working a total of seven orchards in Chelan and Douglas Counties. (CP 811, 812) At harvest time, they had over 80 people working in their orchards. (CP 806)

**Sundance Slope Equipment.**

The operation of multiple orchards required considerable equipment, including a fleet of tractors. When the Hawkinses bought their first orchard, there was some equipment that came with the purchase. (CP 808) When they subsequently purchased the property that included

their home, there was additional equipment acquired as part of that sale. (CP 808)

The Hawkinses acquired additional used equipment, which was generally acquired at auctions. (CP 609) They stored their equipment at two shops on their home property. (CP 609)

**RLF Columbia Land Holdings.**

Two orchards, the Beebe Ranch Orchard and the Twin W Orchard, played roles in this case. These orchards were purchased by RLF Columbia Land Holdings[2] in 2001. (CP 265) RLF leased the orchards to the Zirkle Fruit Company until 2006. (CP 267) Zirkle Fruit employed Robert Morrison as its orchard manager. (CP 195) Mr. Morrison's wife was employed at Manson Growers. (CP 194) At the end of the 2005 season, the lease between Zirkle Fruit and RLF was terminated. (CP 196) Mr. Morrison was unemployed for several months, but was subsequently hired by RLF to keep an eye on the orchards. (CP 157)

**Hawkins Inspection of the RLF Equipment.**

When the lease between RLF and Zirkle Fruit for the Beebe Ranch and Twin W property was terminated in late 2005, RLF offered the lease

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[2] Throughout the course of trial, this company was variously referred to as RLF, RLH and RLF Columbia Landholdings. It will be collectively referred to as RLF in this brief.

for the 2006 season to other orchardists. (CP 174) Sundance Slope was potentially interested in leasing one or both of these properties. (CP 174) Sundance Slope eventually leased a portion of the Twin W Orchard. (CP 177)

Mr. Hawkins was also in discussions with RLF to lease the Beebe Ranch Orchard for the 2006 season. (CP 234) During those discussions, Mr. Hawkins and Alvin Anderson, an experienced orchard manager and mechanic who assisted Mr. Hawkins with orchard decisions (CP 616), inspected the Beebe Ranch equipment that would be included with the lease. (CP 235) This included a Kubota 7030 tractor and a Landini tractor. (CP 235) Mr. Hawkins and Mr. Anderson inspected the Kubota 7030 tractor and determined it did not function at all in four-wheel drive. (CP 238, 828) The problems with the four-wheel drive operation of the Kubota 7030 tractor were also documented in emails between Mr. Hawkins and RLF. (CP 311) Ultimately, the Hawkinses did not lease the Beebe Ranch Orchard. (CP 825)

**The Air-O-Fan Sprayers.**

Two Air-O-Fan sprayers were used by Zirkle Fruit in 2004 when it worked the Twin W Orchard. (CP 741) The sprayers were unique as they had been modified to add multiple spray nozzles from the original factory settings. (CP 743) Zirkle Fruit determined these sprayers were not

adequate for what they were doing as they did not get sufficient penetration into the trees. (CP 743) Zirkle Fruit replaced these sprayers with new sprayers. (CP 744) Zirkle Fruit never used the Air-O-Fan sprayers again. (CP 744)

When Sundance Slope was considering whether to lease any of the RLF orchards, Mr. Hawkins had the opportunity to inspect one of the old Air-O-Fan sprayers with Dale Martin, a field man for GS Long Company in Yakima. (CP 819)[3] As a field man, Mr. Martin's job was to walk the orchards and make recommendations to the owners, including Mr. Hawkins, as to chemicals that should be used. (CP 741) When Mr. Hawkins and Mr. Martin inspected the old Air-O-Fan sprayers, they concluded that they were obsolete and would never be used in Mr. Hawkins' orchard. (CP 822)

**The Theft of RLF's Equipment.**

At the end of the 2005 season, RLF stored its equipment at both the Beebe Ranch and the Twin W Orchard. (CP 159) This equipment included the Kubota 7030 tractor ("RLF Kubota 7030 tractor"), the

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[3] Mr. Martin later provided the Declaration that resulted in the trial court granting a new trial.

Landini tractor ("RLF Landini tractor"), and the two Air-O-Fan sprayers, which Mr. Hawkins had previously inspected. (CP 159)

Mr. Morrison testified that on April 2, 2006, this equipment was missing. (CP 162) Mr. Morrison reported the theft to RLF. (CP 164) Several weeks later, Mr. Morrison reported the thefts to the Douglas County Sheriff's Office and provided an appraisal list that had been previously prepared by Valley Tractor which included the make and model of the equipment. (CP 166) Mr. Morrison added serial numbers to the appraisal list. (CP 167) This list contained the RLF Kubota 7030 tractor, the RLF Landini tractor, and the RLF Air-O-Fan sprayers. (CP 167)

**The Hawkins 7030 Kubota Tractor.**

Sundance Slope's fleet of tractors also included a Kubota 7030 tractor ("Hawkins Kubota 7030 tractor") and a Landini tractor ("Hawkins Landini tractor"). (CP 809)

The Hawkins Kubota 7030 tractor was purchased by Mr. Hawkins during the summer of 2005. (CP 613, 699) This tractor had been for sale in Mattawa and was checked out by Mr. Hawkins and Alvin Anderson. Mr. Hawkins, with Mr. Anderson's assistance, purchased the used Hawkins Kubota 7030 tractor for $3,000 or $3,300. (CP 613, 695) At the

time of the purchase, Mr. Hawkins did not record or check the serial number. (CP 933)

The Hawkins Kubota 7030 tractor was brought to the Hawkinses' property and used during the 2005 growing season. (CP 617, 699) During the 2005 growing season, the Hawkins Kubota 7030 experienced mechanical problems and would stick in gear. (CP 617) Mr. Anderson was able to make the necessary repairs. The Hawkins Kubota 7030 tractor was stored in the Hawkins' shop at the conclusion of the 2005 growing season. (CP 701)

A year later, at the close of the 2006 growing season, all of the Sundance Slope equipment was winterized and stored in the Hawkins' shop. (CP 775) Julio Juraz testified that he was the mechanic that winterized the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor at the end of the 2006 season. (CP 775) Mr. Juraz testified that during the 2006 season, there was an incident when the key to the Hawkins Kubota 7030 went missing. (CP 777) Two or three days later, the Hawkins Kubota 7030 tractor was found in the middle of the road, far away from where it had been parked. It had run out of diesel fuel. (CP 778) A fair inference from this is that someone had taken the key and attempted to drive away the tractor, but ran out of fuel.

**The Hawkins Landini Tractor.**

In the summer of 2005, Mrs. Hawkins became aware of a used Landini tractor that was for sale. (CP 633) Mrs. Hawkins asked the seller to contact her mechanic, Mr. Anderson. (CP 634) The seller brought the Landini tractor to Mr. Anderson's shop for inspection. (CP 702) Mr. Anderson identified repair work that was needed. (CP 703) The seller made some of the repairs and brought the tractor back to Mr. Anderson's shop a second time. (CP 703) It was again rejected due to mechanical problems. (CP 703) The seller made additional repairs which finally satisfied Mr. Anderson. (CP 705) The Hawkinses purchased the Landini 6550 tractor for $3,600. (CP 705-708)

Mr. Anderson testified that he saw **both** the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor used in the field during the 2005 **and** 2006 seasons and at the Hawkins shop at the start of the 2007 season. (CP 708)

**The Investigation into the Missing RLF Equipment.**

Mr. Morrison reported the theft of the RLF equipment, including the RLF Kubota 7030 tractor, the RLF Landini tractor, and the two sprayers in April of 2006.

Mr. Morrison testified that in August of 2006, he received a phone call from Len England, Mrs. Hawkins' uncle, advising him that he knew

where the RLF sprayers were and that he had pictures of them. (CP 179, 245) Len England gave Mr. Morrison several photos of the sprayers that had been taken at night. (CP 179, 367) Mr. Morrison testified that Len England did not tell him who took the pictures. (CP 245) In fact, Mr. Morrison testified that he did not discuss with Len England who took the pictures. (CP 245) Len England told Mr. Morrison not to tell the police that he learned of the missing sprayers from him. (CP 247) Mr. Morrison testified that Len England told him that the sprayers could be found on some orchard property that was being leased by Sundance Slope. (CP 245)

Mr. Morrison contacted the Douglas County Sheriff's Office and reported the information that he had been given by Len England. (CP 365) He made his report to Deputy Scott Allen. (CP 366) At first, Mr. Morrison refused to give Deputy Allen the name of the person who took the photos. (CP 366) He eventually identified Len England as the source of the photos and the information concerning the location of the sprayers. (CP 366)

When Mr. Morrison told Deputy Allen that the photos and sprayer information had come from Len England, Deputy Allen knew that Mrs. Hawkins was a member of the England family. (CP 365) He was also aware that one of the Englands, Dale England, was a Chelan County

Detective. (CP 365) Deputy Allen testified there was a dispute in the England family and that he did not want Detective England involved in this investigation as it was a conflict of interest. (CP 365) At this point, the court sustained an objection by the State that precluded further testimony concerning the dispute between the Hawkins and England families. (CP 365)

Deputy Allen used the information that came from Len England to obtain a search warrant for the sprayers that was executed on September 5, 2006. (CP 329-331) Despite the fact that the photos and information provided by Len England were set forth in the search warrant affidavit, law enforcement never interviewed Len England concerning how he knew the location of the sprayers, how he knew they belonged to RLF, or why the photos were taken at night. (CP 367)

The sprayers were found near a burned out trailer in a remote area on property that Sundance Slope had leased at the time. (CP 679) Deputy Allen called Mr. Hawkins when he seized the sprayers. (CP 332) Mr. Hawkins arrived at the search location and advised Deputy Allen that he did not know who owned the sprayers and that he did not know they were on his leased property. (CP 333-334) No charges were filed at that time.

During the investigation and execution of the sprayer search warrant, Deputy Allen was advised that Don and Gloria Bailey had information pertinent to the investigation. (CP 362) The Baileys lived adjacent to where the sprayers were recovered. In fact, when the search warrant was executed, law enforcement needed to get permission from the Baileys to cross their property. (CP 675)

Gloria Bailey testified at trial that sometime between a week to ten days prior to the execution of the sprayer search warrant, at approximately 12:30 am or 1:30 am, she saw a small blue pickup truck, a Ford Ranger, with a loaded trailer travel down her road to the area where the sprayers were later found. (CP 675) After the truck was out of sight for 20-30 minutes, Mrs. Bailey became nervous and walked out of her house to investigate. (CP 677, 682) When she saw the truck coming back up her road, she turned on her outside lights. (CP 678) When her lights came on, the driver accelerated rapidly and the now-empty trailer was bouncing all over the place. (CP 678) Mrs. Bailey had been to the location where the sprayers were found a week or two earlier and there was nothing there other than a burned out trailer. (CP 679) No equipment was there at that time. (CP 679) Neither Deputy Allen nor any law enforcement officer contacted the Baileys or investigated this related suspicious activity.

(CP 362) Deputy Allen testified that it was a mistake to not follow up on the Bailey report. (CP 383)

Mr. Morrison owns a blue Ford Ranger. (CP 249) During this time, Mr. Morrison's wife was employed at Manson Growers. (CP 194) Doug England was the manager of Manson Growers and Mr. Hawkins' father-in-law. (CP 194)

Due to the recovery of the missing sprayers, the criminal investigation continued. (CP 326) On October 24, 2006, two Chelan County officers arrived at the Hawkins home and asked for permission to inspect their orchard equipment. (CP 376, 632) Mrs. Hawkins granted permission and opened up her shop to allow access for the officers. (CP 632) When the police arrived, they had a copy of the appraisal list with serial numbers of the missing RLF equipment that had been provided by Mr. Morrison. (CP 840) On that day, the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor were both in the Hawkins shop. (CP 632) Officer Randy Lake spent between sixty and ninety minutes inspecting all of the Hawkins equipment. (CP 632) This inspection included the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor. (CP 632) Law enforcement checked every piece of equipment, lifting every hood of every tractor. (CP 842) Deputy Lake wrote down serial numbers. (CP 842)

After inspecting all of the Hawkins equipment, the officers reported that there was nothing to suggest that any of the missing RLF equipment was at Sundance Slope. (CP 376) There were no tractors with missing or ground-off serial numbers. (CP 463) They did not write a report or save the serial numbers that were recorded. (CP 459)

It is undisputed that as of October 24, 2006, the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor were at the Hawkins shop. There were no problems with serial numbers nor was any RLF equipment at the Hawkins' shop.

**The Shop Burglary.**

On October 25, 2006, the day following law enforcement's search, the Hawkins shop was burglarized. (CP 629, 838) During the burglary, a large tool box and an expandable file that contained equipment records, bills of sale, and tractor part numbers were taken. (CP 838, 663) This break-in and theft were reported to Chelan County. (CP 629) The Hawkinses filed an insurance claim for the shop burglary. (CP 700)

**The Start of the 2007 Growing Season.**

In the Spring of 2007, Mr. Hawkins pulled the Kubota 7030 and Landini tractors out of Sundance Slope storage and began getting the equipment ready for the upcoming season. The tractors were parked outside of the shop. The tractors started up and appeared to have no

operational problems. (CP 848) Unbeknownst to Mr. Hawkins, someone switched the Hawkins Kubota and Landini tractors with the RLF Kubota and Landini tractors.

Not realizing the switch, Mr. Hawkins tried to move the Kubota 7030 tractor, but it would not start. (CP 846) He called Mr. Anderson to perform repairs. (CP 846) Mr. Anderson recalled that he had replaced the battery and battery cables on the Hawkins Kubota 7030 tractor at the end of the 2006 season. (CP 710) The Kubota tractor that would not start at the beginning of the 2007 season had an old battery and old battery cables. (CP 710, 847) Mr. Anderson wondered if someone had changed the batteries. (CP 710) Mr. Anderson further noticed that the Kubota tractor he was working on did not have the attachments for a bin trailer that had been on the Hawkins Kubota 7030 tractor at the end of the 2006 growing season. (CP 710) When later shown photos from the investigation, Mr. Anderson also noticed that the Kubota tractor he was working on had lights. (CP 722) The Hawkins Kubota 7030 tractor did not have lights. (CP 722) At trial, Mr. Anderson testified that the tractor he worked on at the start of the 2007 season was not the same tractor that he and Mr. Hawkins had purchased in Mattawa and that he had attempted to repair at the end of the 2006 season. (CP 724)

Mr. Anderson continued to work on this tractor and concluded it had significant problems with its four-wheel drive system. (CP 711) This seemed odd to Mr. Anderson as the Hawkins Kubota 7030 tractor had never had four-wheel drive problems. (CP 711) Mr. Anderson did not have time to make the four-wheel drive repairs and told Mr. Hawkins that the tractor should be taken to the dealer, Valley Tractor, to be repaired. (CP 712, 848)

Because the Kubota tractor would not start and the four-wheel drive was not working, Mr. Hawkins followed Mr. Anderson's advice and took the tractor to Valley Tractor on April 3, 2007. (CP 620, 395, 418) These problems were puzzling as the Hawkins Kubota 7030 tractor did not have any starting or four-wheel drive problems when it was winterized, placed into storage at the end of the 2006 season, and brought out of the shop and parked in the loading area at the start of the 2007 season. (CP 848) However, Mr. Hawkins did not have any notion that the tractor he delivered to Valley Tractor was not his. (CP 848)

Mr. Hawkins had previously taken equipment to Valley Tractor for repairs. (CP 849) He knew that his receipts always contained the serial number of the equipment he brought in. (CP 849) Valley Tractor employees testified that anyone who brings in a tractor knows that they

will always receive a receipt containing the equipment's serial number. (CP 426)

The Valley Tractor mechanics determined that the cause of the four-wheel drive problem on the Kubota 7030 tractor was a blown clutch pack. (CP 398) In performing this diagnosis, the mechanics noticed that the serial number of the tractor had been ground off and the ID plate was missing. (CP 400, 421)[4] The mechanics also determined that the Kubota tractor that Mr. Hawkins brought in belonged to Twin W Orchard based upon work they had previously done on the tractor. (CP 407, 413) Valley Tractor told Mr. Hawkins that it would need to order parts. (CP 399) Meanwhile, Valley Tractor contacted the Douglas County Sheriff's Office and reported that it had a tractor with ground off and missing serial numbers. (CP 340) Deputy Bill Black responded and took a number of photos showing grind marks where the serial numbers had been. (CP 343) Deputy Black asked Valley Tractor to notify him when Mr. Hawkins returned to pick up the tractor. (CP 345)

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[4] In October of 2006, Chelan County officers had inspected the Hawkins' 7030 tractor and the Hawkins' Landini tractor. (CP 632) Neither of these tractors had ground off or missing serial numbers. (CP 463)

On June 7, 2007, Valley Tractor advised Mrs. Hawkins that the Kubota tractor was ready to be picked up. (CP 625) Mr. Hawkins drove his truck and trailer to pick up the tractor the next day. (CP 852) Upon his arrival, a Valley Tractor employee attempted to start the tractor, but it would not start. (CP 852) After the Valley Tractor employee could not start the tractor, Mr. Hawkins started to drive away. (CP 853) As he started to leave, a law enforcement officer knocked on his window and arrested him. (CP 854) Mr. Hawkins' truck and trailer remained at Valley Tractor. Mr. Hawkins was not told why he was being arrested. (CP 854) He was taken to jail and held for three to four hours before his wife posted bail. (CP 627, 855) He was not given any paperwork by the arresting officer or the jail regarding the charge that was the basis for his arrest. (CP 855) Mr. Hawkins had no idea why he had been arrested.[5]

After his release from jail and having not been advised of the basis for his arrest, Mr. Hawkins returned the following morning to Valley Tractor to pick up his truck and trailer and the Kubota tractor he believed

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[5] Mr. Hawkins was arrested by Deputy Brandon Long who had been sent by dispatch to Valley Tractor to make a probable cause arrest of Mr. Hawkins. (CP 491) Deputy Long prepared a report that stated he arrested Mr. Hawkins for possession of stolen property but said nothing about the basis of the charge being a tractor. (CP 493) Despite what was in his report, he testified at trial that he told Mr. Hawkins he was under arrest for possession of a tractor. (CP 491) Mr. Hawkins testified consistent with Deputy Long's report that he had not been told his arrest involved a tractor. (CP 857)

he owned. (CP 856) Mr. Hawkins put the pickup he drove and the tractor on his trailer and headed back to his shop in Manson. (CP 861) On his way home, he was stopped by a Chelan County Sheriff in downtown Chelan. (CP 861) Mr. Hawkins learned during that stop that the tractor he was hauling might have been the subject of a dispute and the reason he was arrested the day before. (CP 862) Mr. Hawkins was not detained from this stop. (CP 862)

After he returned home and was unloading the tractor, he was again contacted by Officer Lake, one of the officers who had previously inspected the Hawkins equipment on October 24, 2006 and determined there was no stolen machinery, nor any machinery with ground off or missing serial numbers, in the Hawkins' shops. Officer Lake assisted Mr. Hawkins in unloading the tractor and departed the scene. (CP 842, 863)

On June 11, 2007, a search warrant for the Kubota tractor was executed and the tractor was recovered from the Sundance Slope shop. (CP 349) To obtain information for the warrant covering the Hawkins residence, Deputy Allen testified that he spoke with Detective Dale England from Chelan County. (CP 379) The tractor was located where Officer Lake and Mr. Hawkins had left it. Mr. Hawkins was arrested again that day. (CP 865)

**Illegal Search and Seizure of Kubota 2550 Tractor.**[6]

On October 23, 2006, Robert Morrison contacted Chelan County Deputy Jeremy Mathena and reported seeing an allegedly stolen RLF Kubota 2550 tractor in Manson. (Supp. CP ____, Motion to Suppress)

While Deputy Mathena was in route to the location to investigate, he received a call from Chelan County Detective Dale England. (Supp. CP ____, Motion to Suppress) Detective England had called Deputy Mathena to offer his unsolicited assistance in locating the allegedly stolen tractor. (Supp. CP ____, Motion to Suppress)

The allegedly stolen tractor, a Kubota 2550, was on property leased by Sundance Slope. (Supp. CP ____, Motion to Suppress) Mr. Morrison had advised Deputy Mathena that he had entered onto the Sundance Slope property to confirm the serial number of the tractor. (Supp. CP ____, Motion to Suppress)

Deputy Mathena arrived at the Sundance Slope property and entered without a warrant. (Supp. CP ____, Motion to Suppress) He drove between a house and a shop on a private driveway and passed a "No Trespassing" sign. (Supp. CP ____, Motion to Suppress) Deputy

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[6] This discussion concerns evidence presented at trial concerning a Kubota 2550 tractor which is separate and different from the Hawkins Kubota 7030.

Mathena circled around the shop and exited his vehicle to inspect the tractor. (Supp. CP ____, Motion to Suppress) He located the tractor's serial number and confirmed it was the same serial number that Mr. Morrison had reported as stolen. (Supp. CP ____, Motion to Suppress) Deputy Mathena photographed the tractor and released it to Mr. Morrison who drove it away. (Supp. CP ____, Motion to Suppress)

Deputy Mathena surmised that the tractor was driven by Mr. Morrison to property owned by Manson Growers, a company run by Mr. Hawkins' father-in-law, Doug England. (Supp. CP ____, Motion to Suppress)

**Illegal Stop and Search of Landini Tractor.**

On September 11, 2007, Douglas County Deputy Dean Schlaman received a call from Detective Dale England that he had seen the allegedly stolen RLF Landini tractor being towed by one of the Hawkins distinctive Dodge flatbed pickups. (Supp. CP ____, Motion to Suppress) Detective Dale England is one of Mrs. Hawkins' uncles. Detective England told Deputy Schlaman that the truck was headed to Douglas County. (Supp. CP ____, Motion to Suppress; CP 546) Detective England asked Detective Schlaman to stop the pickup that was transporting the Landini tractor. (CP 547) Detective England had the list of stolen equipment from RLF. (CP 548)

Deputy Schlaman, at Detective England's request, stopped the vehicle and conducted a "Terry stop". Deputy Schlaman, by his own admission, acknowledged that the driver had not committed a driving infraction. (Supp. CP ____, Motion to Suppress) Deputy Schlaman was unable to communicate with the driver due to a language barrier and thus was unable to obtain the driver's consent to search. (Supp. CP ____, Motion to Suppress; CP 548) Deputy Schlaman, nevertheless, physically got up on the trailer and inspected the tractor for identifying numbers. (Supp. CP ____, Motion to Suppress; CP 548) Detective England arrived shortly thereafter and assisted in looking for serial numbers on the tractor. (Supp. CP ____, Motion to Suppress) There were no missing serial numbers on the Landini tractor. (CP 550)

At a different time, Detective Schlaman received another call from Detective England that he had information about a serial number being ground off a tractor. (CP 552) Detective England gave Detective Schlaman the name of the person who allegedly ground off the serial number. (CP 552) Detective Schlaman contacted the person, who denied any knowledge of the allegations. (CP 553)

In October of 2007, Detective Schlaman learned that Mr. Morrison had found a stolen tractor on orchard property leased by Sundance Slope. This was the same orchard where the sprayers had been found. (CP 535)

On October 8, 2007, another search warrant was executed for the recovery of the Landini tractor from an orchard being leased by Sundance Slope. (CP 867) The Landini tractor described in the search warrant had special hydraulic equipment. (CP 868) The Landini that was seized that day had no special hydraulic equipment. (CP 868) Following the seizure of the Landini 6550 tractor, Mr. Hawkins did not have a Landini 6550 in his fleet. (CP 869)

**Motion to Suppress Illegal Searches and Seizures.**

Prior to trial, the defense filed a motion to suppress the warrantless search and seizure of the Kubota 2550 tractor and the illegal stop and search of the Landini tractor. (Supp. CP ____, Motion to Suppress)

In response to the suppression motion, the State filed a Response that stated:

> III. STIPULATIONS BY THE STATE
>
> 3.1 Kubota 2550. The State stipulates that it will not introduce evidence at trial relating to the alleged possession by defendant of the Kubota 2550 on October 23, 2006, and the search and seizure of the Kubota 2550 by Deputy Jeremy Mathena on that date.
>
> 3.2 Landini 6550. The State stipulates that it will not introduce evidence relating to the "Terry stop" by Detective Dean Schlaman of an employee of defendant on September 11, 2007, and his subsequent search of the Landini 6550 during the stop.

On February 27, 2009, the trial court granted the motion to suppress. (CP 1153)

**The Charges Against Mr. Hawkins.**

Mr. Hawkins was charged by Second Amended Information with four counts. (CP 14) Count One was Possession of Stolen Property in the First Degree for the two Air-O-Fan sprayers. Count Two was Attempted Possession of Stolen Property in the First Degree based upon Mr. Hawkins' actions on June 8, 2007, at Valley Tractor of showing up to pick up the Kubota tractor. (CP 15) Count Three was Possession of Stolen Property in the First Degree for Mr. Hawkins' actions on June 9, 2007, when he actually picked up the Kubota tractor at Valley Tractor. (CP 16) Count Four was Possession of Stolen Property in the First Degree on October 8, 2007, arising from the seizure of the Landini tractor. (CP 16)

Prior to trial, the State filed a motion in limine seeking to preclude the defense from presenting evidence concerning the Englands' involvement in this case. (CP 1203-1240) As aptly stated by Mr. Hawkins' counsel:

> **Mr. Ressler:** ... the England's have their fingerprints on almost every aspect of this; every single item of property that was found has England fingerprints on it. ... The question would be: ... why is it that the England's are involved in every aspect of this case? They find the

sprayers. They hand pictures of the sprayers to Morrison, Morrison then calls the police. Dale England calls the police to tell them that he knows who - - there was a serial number on the 7030 that apparently was obliterated. Dale England calls the Douglas County police to tell them that he knows who did that, and gives the information to one of the detectives, and the detective goes and talks to this person, and the person knows nothing of it, and Dale England is involved in that aspect.

Dale England knows why it is, when it is and where it is that one tractor's being moved from one place to another, that one of Mr. Hawkins' employees is driving a tractor, so their fingerprints are on every single aspect of this case and I think the jury is entitled to know that they are involved in every aspect of this case. We don't know who took this property, and we don't know why a 7030 that doesn't belong to Mr. Hawkins ends up on his property, and we don't know who took his 7030, but what we do know is that Dale England knows something about where the sprayers are and how they were located and where they moved, and Len England - - excuse me, Dale England knows a whole lot about that particular part of the case, as well. Who took the serial number off the tractor and when and where the tractor was and how it is it was being moved.

The evidence will show that the England's are related to Mr. Hawkins. Doug England is his wife's father, Dale England is her uncle, Len England is her uncle. That there has been a dispute within this family for some period of time. Dale England is a police officer or was a police officer. He's since been removed from the force because of dishonesty, which is odd information that we have. And though I'm not going to claim or say or even present any evidence that they were involved, that they stole this equipment, I think the jury's entitled to know that when Len England finds the sprayers and takes pictures of them, and there's no one else who's ever seen them there up until the time that he does, and there's people that are down there everyday and he's the first person to see them there, the jury's entitled to know that he has a motive to implicate

> Mr. Hawkins in this crime. He has a motive to implicate him, and that it's not a simple act of an honest person discovering lost property and reporting it to the person who lost the property. There's something more to it than that. And I think that I should be able to present those circumstances to the jury so in order to explain that Len England has got some motive, besides being an honest citizen, to involve himself in all of this and to be reporting it, and the jury can conclude that maybe he had some additional involvement beyond simply finding it and taking a picture.

(Supp. CP 1232-1234)

The trial court initially reserved ruling on the State's motion in limine. (CP 1214) The court later ruled "...if you're going to blame it on someone else, you have to have evidence someone else did it." (CP 133-134) In response, defense counsel argued:

> **Mr. Ressler:** I think I'm allowed to introduce evidence that there's this financial strife between their family and his family and that they are the people who are making all these calls about the missing sprayers, the missing Landini's and the missing whatever, and that's it. I'm not going to say that they hate me or they hate him or anything of the sort. I'm going to say that they suffered a financial loss as a result of him pulling out of Manson Growers and that, I mean, the fact is is that they took the picture or got the picture. The fact is is that Dale England calls about the Landini, and the fact is is that, I mean, Len -- Dale England calls about the 7030 and who scraped off the number. So they are involved and there is a financial problem between the two.

(CP 135)

The trial court ultimately ruled that the evidence concerning the Englands and Robert Morrison was not admissible. (CP 136)

Following trial, the jury returned verdicts of not guilty as to Count One (Air-O-Fan sprayers); guilty as to Count Two (attempt to pick up the Kubota tractor); guilty as to Count Three (picking up the Kubota tractor); and not guilty as to Count Four (possession of the Landini tractor). (CP 18-21)

It is difficult to reconcile the State's theory that all four pieces of the RLF equipment were stolen during the weekend of March 31, 2006 from the Twin W Ranch, and that all four pieces of equipment were found on Sundance Slope property, yet the jury could find Mr. Hawkins guilty of the charges arising from the Kubota tractor and not guilty of the charges arising from the sprayers and the Landini tractor.

On May 5, 2009, Mr. Hawkins was sentenced. (CP 22) A timely Notice of Appeal was filed on May 20, 2009. (CP 32)

**b. Motion for a new trial based on newly discovered evidence.**

The basis for the motion for a new trial was newly discovered evidence. Mr. Dale Martin was a "field man" for GS Lawn Company, a vendor of agricultural chemicals. At trial, he testified that in 2006 and 2007, he provided field services for 40-50 orchard businesses, including

Sundance Slope Orchards. Mr. Martin inspected orchards regularly to make recommendations for insect control and fertilizer application. Mr. Martin was familiar with the Air-O-Fan sprayers that were the subject of the criminal charge against Mr. Hawkins. Mr. Martin stated he was at the Twin W Orchard with Mr. Hawkins in late winter of 2006. Mr. Hawkins was considering leasing that orchard. They saw the sprayers at the Twin W property, but Mr. Martin told Mr. Hawkins they were "junk" and should not be used. Mr. Martin later saw the same sprayers at the Sandcastle Orchard, in autumn of 2006. He testified he never saw the sprayers used by Sundance. Mr. Martin said he would have known if Sundance used the sprayers because he was the person who calibrated spraying equipment for the orchard.

Mr. Martin has continued to provide field services for Sundance Slope. In July of 2010, Mr. Martin and Mr. Hawkins were discussing Mr. Martin's recommendations for the orchard. During the conversation, Mr. Martin stated there was something he wanted to discuss, although he did not know whether it was significant. Mr. Martin then described seeing the flatbed truck with the Kubota tractor in 2007. Mr. Hawkins called his attorney a few days later. (CP 1105, 1109)

The motion for new trial was based primarily on the Declaration from Dale Martin. (CP 1105) Mr. Martin stated that he was at the

Sundance Slope equipment loading area in the spring of 2007 to pick up a fertilizer spreader. He observed a white flatbed truck arrive, loaded with a large orange Kubota tractor. The driver unloaded the Kubota tractor. A short time later, he observed the truck depart the area carrying a large orange Kubota tractor. The driver was not an employee of Sundance Slope. (CP 1105)

Mr. Martin explains that this event did not stand out in his mind at the time because it is common for orchard equipment to be moved during the growing season. When he testified at trial about the sprayers, Mr. Martin was not aware of the charges involving the Kubota tractor. (CP 1105) When he was interviewed prior to trial by Mr. Hawkins' attorney, Mr. Martin did not mention the Kubota tractor because he did not know it was relevant to the case, and the 2007 event did not stand out in his mind. Mr. Martin explained that the white truck and Kubota tractor came to mind in the spring of 2010 when he was again at Sundance Slope working on a fertilizer spreader. He states he was able to identify 2007 as the year he witnessed the original event because it was around the time he had an issue with Mr. Hawkins concerning a fertilizer spreader. (CP 1105) Sundance Slope had left fertilizer in a spreader over the winter, thus necessitating additional work in the spring to clean up the equipment

so it would function. Mr. Martin had communicated his annoyance to Mr. Hawkins at the time. (CP 1105)

Mr. Hawkins filed his motion for a new trial on August 25, 2010. (CP 1096) The motion was argued to the trial court on September 27, 2010. (RP 3-9/27/10 transcript) Although the trial court took the matter under advisement, it did state preliminarily:

> I think the testimony of Mr. Martin is relevant. I think the testimony of Mr. Martin is as relevant as the testimony of Gloria Bailey...

Mrs. Bailey was the neighbor who witnessed a small blue Ford pickup drop off equipment on her property in the middle of the night. (CP 765) Mr. Morrison drove a small blue Ford pickup. (CP 249)

On October 7, 2010, the trial court granted Mr. Hawkins' motion for a new trial. (CP 1127) After the State realized it had allowed the speedy trial clock to run, it set out on a path to have the trial court's written ruling transformed into a "formal order". This resulted in the trial court's written ruling being memorialized on August 30, 2011. (CP 1150) In both the ruling and the Order, the trial court ruled:

- Mr. Hawkins had met his burden of demonstrating that he was entitled to a new trial;
- Mr. Martin's testimony could impact the outcome of the trial;
- The new evidence was discovered since the first trial;

- The new evidence is material;
- The new evidence is separate and distinct, supports Mr. Hawkins' position, and is not merely cumulative or impeaching.

(CP 1152)

**c. Mr. Hawkins' motion for a new trial was timely filed.**

In the Amended Brief of Appellant, the State raises for the first time that Mr. Hawkins' motion for a new trial was not timely. This argument was waived by the State, is factually and legally wrong, and disingenuous at best.

In the State's brief, it asserts "defendant's motion for new trial was not timely under ER [sic]7.5 or ER [sic]7.8."[7] The State asserts that Mr. Hawkins' motion is untimely as it was subject to a one year time bar. (Amended Brief of Appellant, p. 11)

Mr. Hawkins filed his motion for a new trial on August 25, 2010. (CP 1096) On filing that motion, Mr. Hawkins stated:

> A motion for a new trial based on newly discovered evidence may be made more than one year after judgment if the defendant acted with reasonable

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[7] The State repeatedly refers to ER 7.5 and ER 7.8. Mr. Hawkins has assumed that the State intended to reference CrR 7.5 and CrR 7.8.

> diligence in discovering the evidence and filing the motion. RCW 10.73.090, 100.[8]

(CP 1101)

In support of the motion for a new trial, Mr. Hawkins submitted the Declaration of Dale Martin. (CP 1105) During the spring of 2010, Mr. Martin was at Sundance Slope working on a fertilizer spreader. On that day, he recalled that, in the spring of 2007, he had observed a white flatbed truck arrive at the orchard's equipment loading area. The truck was carrying a large orange Kubota tractor. Mr. Martin saw the driver

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[8] RCW 10.73.090 provides in pertinent part:

> (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
>
> (2) For purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
>
> (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
>
> (a) The date it is filed with the clerk of the trial court;
>
> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; ...

RCW 10.73.100 provides in pertinent part:

> The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
>
> (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion; ...

unload the Kubota tractor. A short time later, Mr. Martin saw the truck leave the property loaded with an orange Kubota tractor. Mr. Martin said no one else was present at the time. He also said that he was familiar with Sundance Slope employees, and the driver of the white flatbed truck was not Mr. Hawkins or one of Sundown Slope's employees. (CP 1106)

Mr. Hawkins[9] declared that in July of 2010, he had a conversation with Mr. Martin, and Mr. Martin mentioned there was something he wanted to talk about. Mr. Martin said he was not sure if it was important. Mr. Martin described seeing a flatbed truck unload a large Kubota tractor at Sundance Slope in the spring of 2007. Mr. Martin told Mr. Hawkins that the truck then departed with the same style Kubota tractor on its flatbed. Mr. Martin told Mr. Hawkins that he knew this was in 2007 because it was around the time that Mr. Hawkins had an incident concerning fertilizer left in a spreader over the preceding winter. In the spring of 2007, the fertilizer had hardened and had to be removed before the spreader could be used. (CP 1109-10)

Within four or five days of having this conversation with Mr. Martin, Mr. Hawkins contacted his attorney. (CP 1110) The motion for a new trial was filed a short time later. (CP 1096)

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[9] Mr. Hawkins also filed a Declaration in support of his motion for new trial. (CP 1109)

The State filed a brief in response to the motion for a new trial on September 23, 2010. (CP 1111) Mr. Hawkins filed a reply brief in support of his motion. (CP 1116) The trial court heard oral argument on the motion for a new trial on September 27, 2010. (CP 1302) At no time during the course of this briefing or oral argument did the State ever make any reference to Mr. Hawkins' motion for a new trial being untimely. Accordingly, the State has waived this issue.

Despite this waiver, the motion was not untimely. RCW 10.73.100 provides that the one year limitation for a collateral attack does not apply to motions based on newly discovered evidence if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion. RCW 10.73.100(1).

Here, Mr. Hawkins learned of this new evidence by means of a conversation he had with Mr. Martin during July of 2010. Within four to five days, Mr. Hawkins brought this information to his attorney's attention. On August 25, 2010, the motion for a new trial was filed. The actions taken by Mr. Hawkins and on his behalf establish due diligence. The trial court properly ruled that Mr. Hawkins established due diligence. The motion was not untimely.

### d. The trial court properly exercised its discretion in granting a new trial.

The trial court has wide latitude when ruling on motions for a new trial. State v. Dunivin, 65 Wn.App. 728, 731, 829 P.2d 799 (1992). The granting or denial of a new trial is a matter primarily within the discretion of the trial court. An appellate court will not disturb that ruling unless there is a clear abuse of discretion. State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

When considering whether newly discovered evidence will probably change the trial outcome, so as to warrant a new trial, "the trial court considers the credibility, significance and cogency of the proffered evidence." State v. Larson, 160 Wn.App. 577, 587, 249 P.3d 669 (2011) review denied 172 Wn.2d 1002 (2011).

If any one of the grounds considered by the trial court in determining whether to grant a motion for a new trial on the basis of newly discovered evidence is absent, the trial court may refuse to grant a new trial. State v. Hutcheson, 62 Wn.App. 282, 297, 813 P.2d 1283 (1991). Accordingly, even if one of the grounds is missing, the trial court still has broad discretion to grant the new trial.

An abuse of discretion in granting a new trial exists when the trial court acted on untenable grounds or for untenable reasons. State v. McCarty, 90 Wn.App. 195, 200, 950 P.2d 992 (1998).

A much stronger showing of abuse of discretion is required to set aside an order granting a new trial than for an order denying a new trial. State v. Dawkins, supra. State v. Cummings, 31 Wn.App. 427, 430, 642 P.2d 415 (1982); State v. Marks, 71 Wn.2d 295, 427 P.2d 1108 (1967); State v. Taylor, 60 Wn.2d 32, 39, 371 P.2d 617 (1962).

The trial court properly recognized that Mr. Martin's testimony provided the missing link to the explanation of how Mr. Hawkins' tractors had been switched. This explanation had the same impact as the testimony from the Baileys that resulted in acquittals on the other counts.

**e. The trial court properly ruled that Mr. Hawkins exercised due diligence.**

The State also takes issue with the trial court's conclusion that Mr. Hawkins acted with due diligence in filing the motion for a new trial. (Amended Brief of Appellant, p. 23)

After sitting through the trial, reviewing all of the appellate and post-trial briefing and argument, the trial court stated:

> c. The Court concludes that there was no reason for defendant or his attorney had any reason to believe that Mr. Martin may have observed what he did the spring of 2007. If

> the defendant was not aware of this occurrence there would be no reason to ask anyone about it.

(CP 1281)

The State disagrees with the trial court's conclusion. However, this disagreement is not a proper basis to show an abuse of discretion and that no reasonable jurist would have ruled in the same manner as the trial court did here.

Trial counsel for Mr. Hawkins cannot be faulted for not having interviewed Mr. Martin about the subject of tractors being moved about. Mr. Martin was the chemical supplier. His testimony was offered to establish that the sprayers had been found on an orchard. Mr. Hawkins had been told by Mr. Martin that the sprayers were worthless. The sprayers were not useful to Mr. Hawkins. The importance of this testimony was to negate the State's claim that Mr. Hawkins had some motive to steal these sprayers and also to attempt to convince the jury that perhaps somebody else had actually placed these sprayers onto Sundance Slope's property with an aim toward making somebody believe that Mr. Hawkins was the person who did it. In that light, the defense presented testimony of Gloria Bailey about the nefarious activities that occurred in the middle of the night.

There was no reason to question Mr. Martin about whether he had seen any strange happenings at the orchard involving any of the Kubota tractors.

With the new testimony from Mr. Martin concerning the swapping of the Kubota tractors, Mr. Hawkins will be able to explain how he wound up taking a tractor that was not his for repair to Valley Tractor. Mr. Martin's testimony provided the missing link to Mr. Hawkins being able to successfully defend this charge.

The State has also presented a number of other theories to support its argument that the trial court abused its discretion in granting Mr. Hawkins a new trial. These arguments are without merit.

The State contends that the trial court applied the wrong legal standard in granting the new trial. Specifically, the State relies upon a specific portion of the ruling that is belied by the balance of the decision. (Amended Brief of Appellant, p. 19)

In both the trial court's initial ruling and its subsequent order, the trial court properly set out that the standard requires the defendant to demonstrate: "...that the evidence 1) will probably change the outcome of the case if a new trial is granted...." (CP 1280, 1127) After setting forth the applicable standard, the court states its conclusion: "...the defendant has met this burden." (CP 1280) In a follow up comment, the trial court

states: "The court believes that this testimony could have an impact on the jury's decision." (CP 1280) Apparently, the State is troubled by the fact that the trial court stated that the new evidence "could have" as opposed as the correct statement of the standard (as already set forth by the trial court) and the fact that the trial court concluded the standard had been met. At best, this is a scrivener's error and cannot be used to unwind the entire ruling.

The State also argues that the trial court erred in finding that "the State concedes that the evidence is material to the issue." (CP 1281) While the State now claims that it did not concede this area, the trial court's finding is clearly supported by the record.

At the time of oral argument on the motion for a new trial, the trial court determined that this new evidence was relevant. (RP 3, Sept. 9, 2010 transcript)

The State also complains that the trial court's determination that the new evidence was not cumulative also constitutes an abuse of discretion. (Amended Brief of Appellant, p. 28) Again, the trial court expressly entered its ruling that the new evidence was not cumulative or impeaching. (CP 1281)

The newly discovered evidence was anything but cumulative. There were three distinct seizures of equipment at issue during the trial: The two Air-O-Fan sprayers, the Landini tractor, and the Kubota 7030.

Mr. Hawkins presented testimony from a neighbor to one of Sundance Slope's properties, Gloria Bailey (an independent witness) who testified about some suspicious goings on regarding the Air-O-Fan sprayers. Mr. Hawkins was acquitted of that charge.

Mr. Hawkins also presented evidence that a Landini tractor was inspected and cleared by the police (an adverse witness) just weeks before an identical stolen one was found on Sundance Slope's property. This also demonstrated something suspicious regarding the Landini tractor, given its sudden shift from legal to illegal. Mr. Hawkins was also acquitted of that charge.

Both of the charges which resulted in acquittals arose from situations where Mr. Hawkins was confronted with impartial or even hostile witnesses who aided the defense in establishing some suspicious activity surrounding the discovery of stolen equipment. No such independent evidence was available for the Kubota 7030 at trial. Mr. Hawkins had witnesses who were directly employed by him testify to the fact that he owned a Kubota 7030 of his own, but there was nothing

from an independent witness (such as Mr. Martin) to suggest something directly seen or observed regarding the Kubota 7030.

The newly discovered evidence related solely to the Kubota 7030 and the suspicious activities with the Kubota 7030. It is not cumulative.

The newly discovered evidence helped establish that the Hawkins' Kubota 7030 had been seen being swapped out with another Kubota tractor prior to the discovery of the stolen one. This fact would have absolutely had a strong likelihood of changing the outcome of the second trial.

The Court of Appeals' decision in the underlying case, State v. Hawkins, brings this into sharp focus. The Court of Appeals found that the trial court had erred by not allowing motive testimony for the planting of evidence that:

> [E]xcluding evidence of Hawkins-England hostility did not affect the verdicts involving the RLF Kubota tractor. There was no showing that specific people had set up Mr. Hawkins on those counts, and thus no basis for admitting evidence of motive to do so.

State v. Hawkins, supra at 753.

In other words, the Court of Appeals recognized that the motive evidence would have only been material to the two pieces of evidence (the sprayers and the Landini tractor) of which there was evidence of shady

involvement by the England family. Since there was no independent evidence of any suspicious flatbed trucks moving the Kubota tractor about surreptitiously (as there was with the Air-O-Fan sprayers), the motive evidence would not have helped. This goes to demonstrate the extent to which the proffered evidence would have aided the defense. This is significant given the Court of Appeals' decision, which would require the court to allow motive evidence to be presented in the event that a new trial is ordered.

## VI. CONCLUSION

This Court should affirm the order granting a new trial and reverse the ruling that denied Mr. Hawkins' motion to dismiss based on the violation of his right to a speedy trial.

DATED this 23rd day of May, 2012.

CARL E. HUEBER, WSBA #12453
WINSTON & CASHATT, LAWYERS
Attorneys for E. Troy Hawkins

CERTIFICATE OF SERVICE

The undersigned certifies and declares under penalty of perjury under the laws of the State of Washington as follows: That on May 24, 2012, I served the foregoing document on all counsel and on E. Troy Hawkins by causing a true and correct copy of said document to be delivered to them at the addresses shown below in the manner(s) indicated:

| | | |
|---|---|---|
| Eric C. Biggar<br>Douglas County Prosecutor's Office<br>P.O. Box 360<br>Waterville, WA 98858 | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☑<br>☐<br>☐<br>☐<br>☐ |
| E. Troy Hawkins<br>P.O. Box 66<br>Manson, WA 98831<br>Served via email per agreement with E. Troy Hawkins | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☐<br>☑<br>☐<br>☐<br>☐ |
| Allen Ressler/Jonathan Barash<br>Ressler & Tesh<br>821 Second Avenue, Suite 2200<br>Seattle, WA 98104 | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☑<br>☐<br>☐<br>☐<br>☐ |

DATED at Spokane, Washington, on May 24, 2012.

Cheryl Hansen

317831

# Appendix A

No. 281183

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WASHINGTON STATE COURT OF APPEALS
DIVISION III

---

STATE OF WASHINGTON,

Respondent,

vs.

EDWIN TROY HAWKINS,

Appellant.

---

**MOTION FOR RECONSIDERATION**

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Attorneys for Appellant

# Appendix B

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF DOUGLAS

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Plaintiff,<br><br>vs.<br><br>E. TROY HAWKINS,<br><br>Defendant. | No. 07-1-00210-7<br><br>DECLARATION OF EDWIN TROY HAWKINS |

EDWIN TROY HAWKINS, hereby makes the following declaration:

1. I am the defendant in this action. I am familiar with the facts, circumstances, and record of my case.

2. On November 15, 2010, the State filed a Notice of Hearing for December 6, 2010 for the purpose of setting a trial date and entry of an order of motion for a new trial. My attorney, Allen Ressler, provided me with a copy of that Notice. (Copy attached)

3. In response, Mr. Ressler filed a motion to strike Mr. Biggar's motion which was set for November 29, 2010. (Copy attached)

4. A hearing was held by the trial court on Mr. Ressler's motion to strike on November 29, 2010. I was present in the courtroom for this hearing. The trial judge and

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EXHIBIT
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M

Mr. Biggar were also present in the courtroom. My attorney participated via a speaker phone. I was seated directly behind Mr. Biggar in the spectator section of the courtroom along with four or five other persons. During the hearing, I heard Mr. Biggar make a comment to the judge that I was not present in the courtroom. When Mr. Biggar made this statement, he only looked to his left at the table normally used by the defendant and his counsel. Had he turned all the way around, he would have seen me sitting directly behind him. The trial judge did not look up when Mr. Biggar made his statement.

5. I also appeared and personally attended the hearing on July 11, 2011 which had been noted by Mr. Biggar for the setting of a trial date. (Copy attached)

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

DATED this 28 day of September, 2011, at Mansion, Washington.

Edwin Troy Hawkins

EDWIN TROY HAWKINS

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# Appendix C

# Court of Appeals, Division III No.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR DOUGLAS COUNTY

| | | |
|---|---|---|
| STATE OF WASHINGTON, Respondent, | ) | No. 07-1-00210-7 |
| vs. | ) | |
| EDWIN TROY HAWKINS, Appellant. | ) | |

VARIOUS HEARINGS
THE HONORABLE JOHN HOTCHKISS
(Pages 1 -72)

APPEARANCES:

FOR THE PLAINTIFF:
ERIC BIGGAR, DPA
W. GORDON EDGAR, DPA
Douglas County Prosecuting Attorney's Office
P. O. Box 360
Waterville, WA 98858

FOR THE DEFENDANT:
ALLEN RESSLER
JONATHAN BARASH
Ressler & Tesh, PLLC
821 - 2nd Avenue, Suite 2200
Seattle, WA 98104-1540



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EXHIBIT
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MR. BIGGAR: Your Honor, I think Counsel is correct that the Court has limited authority to act on certain motions and what the Court can do when the matter is pending in the Court of Appeals. I did have a chance to talk with Mr. Ressler on Thursday or Friday of last week, and so my -- the one concern that I have is speedy trial. And if, if Counsel can assert, on behalf of his client, who I notice is not present and will ask the Court to inquire whether or not his presence is being waived, but if --

MR. RESSLER: (inaudible over Counsel) waive his presence.

MR. BIGGAR: Okay --

MR. RESSLER: As I read the rule -- I mean I understand Mr. Biggar's concern because the rule says that the -- says the time for speedy trial begins running from the entry of the order for -- for the entry of the Court's order granting a new trial, that's the new commencement date. But I -- Be that as it may, that probably does not take into account the -- those situations in which, in which the matter's still pending in the Court of



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Appeals, and so, so the, the granting of an order of new trial doesn't take into account situations where the case is still in the Court of Appeals. And because this case is still in the Court of Appeals, I don't believe that your granting the motion for new trial actually triggers the speedy trial running because I would, I would, I would -- I can't imagine being able to argue with a straight face that, that the commencement date is anything but the date that the mandate issues by the Court of Appeals. But, you know, that, that doesn't -- it doesn't seem to me to make sense that if you -- that the Trial Court doesn't have the discretion to schedule a new trial, and then at the same time argue that the commencement date is, is the, is the Court granting the order -- the Court granting the defense motion for a new trial.

So, despite the fact that you granted a motion for a new trial, the commencement date hasn't begun. The commencement date is not the -- not that order, but rather whenever it is that, that the Court of Appeals decides to get around to dealing with the, the, I mean, the, the, the defense motion for reconsideration, and



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hopefully that'll be in the summertime. So I don't have to come up that slippery road up there to you.

THE COURT: Oh, shoot, you've had a lot worse weather in the Seattle area than we have up here.

MR. RESSLER: Yeah, I know, except that I wasn't here, I was in New York.

THE COURT: Oh. And a whole lot more people to deal with. Alright.

MR. RESSLER: Yeah, that's true.

THE COURT: Mr. Biggar?

MR. BIGGAR: Well, with that concession, Your Honor, I think Counsel's argument does make some sense. I would take the position that speedy trial, that commencement date of speedy trial does not occur until, I guess, one of two things: One, the mandate is received or until this Court actually formally enters an order granting new trial. This Court has entered a memorandum of opinion (sic). I think under the rules that's not technically an order for new trial; I think one would need to be rendered in writing with findings and conclusions.

MR. RESSLER: I am not going to argue that, that,



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that whatever it is that -- I mean, I don't necessarily agree with that last thing, you know, but I will not, I will not, I will not argue that, that the, that -- and I've talked to my client about this and I've told him that this was the position I was taking with the Court. So -- And I think it's legally the right decision. I've tried to research this to see if I can find anything that -- I think we're in a peculiar situation. I can't find anything that, that tells me the answer to this question, but, but the most sensible answer, I think, is that until the case comes back to the Trial Court from the Court of Appeals, we can't schedule a new trial, and I, and I certainly won't argue that, that the commencement date is the, the date that the Court granted the motion for new trial, whether that be in a formal order, or whether it be in a memorandum decision that the Court issued. But, in any, in any event, it would seem -- it would not be, it would not be appropriate for me to, to talk out of both sides of my mouth.

THE COURT: Well, the Court agrees that the speedy trial can't begin to run until such time as the Court has



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the ability to set it for trial, and the Court doesn't, pursuant to the rules, have the ability to set it for trial at this particular time until it's mandated back. So, under those circumstances, we won't set it for trial until that occurs. Speedy trial will not begin to run until such time as the mandate has come back.

MR. RESSLER: Okay. Thank you, Your Honor.

MR. BIGGAR: Thank you.

THE COURT: Thank you. The Court's going to hang up now, Mr. Ressler.

MR. RESSLER: Thanks.

THE COURT: Thank you.

(END OF HEARING - 9:10:12 a.m.)



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# Appendix D

*Renee S. Townsley*
*Clerk/Administrator*

*(509) 456-3082*
*TDD #1-800-833-6388*

*The Court of Appeals*
*of the*
*State of Washington*
*Division III*

*500 N Cedar ST*
*Spokane, WA 99201-1905*

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*http://www.courts.wa.gov/courts*

December 6, 2010

Eric C. Biggar
Douglas County Prosecutors Office
PO Box 360
Waterville, WA 98858-0360

CASE # 281183
State of Washington v. Edwin Troy Hawkins
DOUGLAS COUNTY SUPERIOR COURT No. 071002107

Counsel:

It has come to our attention that a Decision on Motion for New Trial was filed in Douglas County on October 7, 2010. Pursuant to RAP 7.2(e), a motion for permission to file a trial court determination which will change a decision being reviewed by the appellate court must be obtained prior to the formal entry of the trial court decision. A Motion for Reconsideration is pending in the appellate court. Please file such motion within five days, by December 13, 2010.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:jcs

c: Carl Edward Hueber
Winston & Cashatt
601 W Riverside Ave Ste 1900
Spokane, WA 99201-0695

c: Judge John Hotchkiss

# Appendix E

No. 281183

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

EDWIN TROY HAWKINS,

Appellant.



# APPELLANT'S OPENING BRIEF

CARL E. HUEBER
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Attorneys for Appellant

## A. Assignments of Error.

1. The trial court prevented Mr. Hawkins from presenting a complete defense when it refused to allow evidence of the Englands' and Robert Morrison's motive and involvement in the theft and switching of the farm equipment.

2. The trial court violated Mr. Hawkins' right to due process by not instructing the jury on the statutory defense of good faith claim of title and that the State has the burden of proving the non-existence of that defense beyond a reasonable doubt.

3. Mr. Hawkins was denied his right to effective assistance of counsel by his counsel's failure to propose a good faith claim of title instruction.

## B. Issues.

1. Whether the trial court's refusal to allow Mr. Hawkins to present evidence of the Englands' and Robert Morrison's motive and involvement in the theft and switching of the farm equipment violated his right to present a complete defense.

2. Whether the trial court's failure to instruct the jury on the statutory defense of good faith claim of title and that the State has the burden of proving the non-existence of that defense beyond a reasonable doubt violated Mr. Hawkins' right to due process.

3. Whether defense counsel's failure to propose a good faith claim of title instruction violated Mr. Hawkins' right to effective assistance of counsel.

**C. Statement of the Case.**

This case arises from the disappearance and switching of Sundance Slope's farm equipment. Mr. Hawkins works for Sundance Slope which operates an orchard business and maintains a fleet of tractors. Two of its tractors were taken and replaced with tractors that had been taken from a former competitor. The defense was precluded from presenting evidence that established that third parties had the motive and were responsible for switching this equipment.

Troy and Brit Hawkins have been married for 19 years. (RP 587) They have five daughters. (RP 589) They graduated from Brigham Young University together. (RP 588) Upon graduation, they moved to Texas where Mr. Hawkins worked in the financial industry and Mrs. Hawkins worked as a school teacher. (RP 796)

Mrs. Hawkins' family has been involved in the orchard business for generations. (RP 795) While living in Texas, Mrs. Hawkins desired to return to Washington to raise her children and to get involved in orcharding. (RP 593) In 2002, Mrs. Hawkins purchased a piece of

# Appendix B to Petition for Review

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF DOUGLAS

| | |
|---|---|
| STATE OF WASHINGTON,<br>Plaintiff,<br>v.<br>E. TROY HAWKINS,<br>Defendant. | No. 07-1-00210-7<br>NOTICE OF APPEAL<br>TO COURT OF APPEALS |

Defendant, E. Troy Hawkins, seeks review by the designated appellate court of the Judgment and Sentence entered in this matter on May 5, 2009.

A copy of the Judgment and Sentence is attached to this notice.

DATED this 19 day of May, 2009.

Allen M. Ressler, WSBA #5330
Jonathan S. Barash, WSBA 36878
Attorneys for Defendant
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# Appendix C to Petition for Review

No. 30231-8-III
Consolidated with No. 30239-3-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Appellant/Cross-Respondent,

vs.

E. TROY HAWKINS,

Respondent/Cross-Appellant.

# RESPONDENT/CROSS-APPELLANT'S MOTION FOR RECONSIDERATION

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Attorneys for E. Troy Hawkins

On July 16, 2013, this court filed an unpublished decision reversing the trial court's order granting a new trial and affirming the trial court's denial of the motion to dismiss. (Appendix A) In reversing the trial court's order granting a new trial, this court determined the new evidence did not merit a new trial because the evidence before the trial court did not satisfy the third *Williams* factor. *See State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). According to this court, the defense did not show the new evidence could not have been discovered before trial by the exercise of due diligence because: (1) this court believed that defense counsel must have asked Mr. Martin about the Kubota tractors prior to trial; and (2) there is no evidence that defense counsel could not have asked Mr. Martin about the Kubota tractors. This decision fails to give sufficient deference to the trial court's findings regarding due diligence by the defense and appears to require a showing that the new evidence could not have been discovered before trial.

### 1. A stronger showing of abuse of discretion is required than a misapplication of the law to the evidence.

This court did not follow the heightened standard of abuse of discretion that is required to reverse the granting of a motion for new trial. This court cited *State v. Marks*, 71 Wn.2d 295, 427 P.2d 1008 (1967), *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971), *State*

*v. Rundquist*, 79 Wn. App. 786, 905 P.2d 922 (1995), *State v. Taylor*, 60 Wn.2d 32, 371 P.2d 617 (1962), to support its lack of deference to the trial court's factual determination that the newly discovered evidence could not have been produced at trial with reasonable diligence. In doing so, this court ignored the higher standard of manifest abuse of discretion required under settled Washington law, including some of the cases it claimed to rely upon.

*Carroll* and *Rundquist* are distinguishable in that the appellate courts were not reviewing orders granting a new trial. In *Carroll*, the appellate court considered whether the trial court had abused its discretion in denying an application to open 189 superior court mental illness cases that contained private information about the individual subjects of the files. 79 Wn.2d at 15-16, 26. Thus, whether the trial court abused its discretion was determined by comparing the public and private interests at stake, as well as the weight of the reasons for and against disclosure. *Id.* at 26.

In *Rundquist*, the Court of Appeals reviewed the *sua sponte* dismissal of a case, and not the granting of a new trial. 79 Wn. App. at 793. Because the trial court had dismissed the case before the State had rested its case, the *Rundquist* court interpreted the facts most favorably to

the State, treating the dismissal as equivalent to a motion to dismiss for insufficiency of evidence. *Id.*

This court's decision is contrary to the holding of *Marks*, in which the Supreme Court stated "unless reasons given by the trial court for granting a new trial are based merely upon a disagreement with the jury verdicts, the order of the trial court must be affirmed." 71 Wn.2d at 297. The *Marks* court affirmed the trial court, reasoning that the trial judge was in a "favored position" to weigh the evidence, and that therefore "'a much higher showing is required to overturn an order granting the new trial than denying a new trial.'" *Id.* at 301-02 (quoting *State v. Taylor*, 60 Wn.2d 32, 42, 371 P.2d 617 (1962)). This is consistent with Washington's requirement that appellate courts must defer to the trial court's determinations on witness credibility and the persuasiveness of evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

This court's decision is also contrary to the holding of *Taylor*, in which the Supreme Court provided a strong statement regarding the high level of deference to be given the trial court's decision to order a new trial. 60 Wn. 2d at 39-42. The *Taylor* court reasoned "a much stronger showing of abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial," and observed the trial judge is in a "peculiarly favorable position for determining justly the

question of whether or not the defendant had been accorded a fair trial." *Id.* at 39, 40. According to the *Taylor* court there "[t]here is a fundamental difference between the question presented on appeal from an order granting and one denying a new trial." *Id.* at 41. "The question is not whether this court would have decided otherwise in the first instance, but whether the trial court was justified in reaching his conclusion. In that respect, he has very wide discretion." *Id.* at 42.

This court gave insufficient deference to the trial court's determination that the defense was unable to discover Mr. Martin's evidence prior to trial through due diligence because it simply had no reason to believe Mr. Martin had such evidence. (*See* CP 1129) The trial court was in a "particularly favorable position" to weigh the affidavits supporting a new trial in the context of Mr. Martin's previous testimony and his relationship to Mr. Hawkins. After presiding over a lengthy trial, the trial court was aware that Mr. Martin was a field man who advised orchardists regarding the use of chemicals, thus his testimony regarding sprayers. (*See* CP 1105) As he had no connection to the Kubota tractors at issue, there was no reason to believe he had any information to provide regarding the theft of the Kubota tractor. (*See* CP 1129) On this basis, the trial court reasonably determined that the due diligence element was satisfied. (CP 1129)

This court does not have the benefit of having presided over Mr. Hawkins' first trial and of having heard Mr. Martin's testimony in that proceeding. Nevertheless, this court found that it was "difficult to believe that defense counsel did not ask Mr. Martin about other equipment." (*State v. Hawkins*, No. 30239-3-III, slip op. at 6) This finding fails to defer to the credibility determination of the trial court. This court's conclusion that the absence of any reason to question Mr. Martin does not explain why the defense could not have discovered Mr. Martin's testimony through reasonable diligence, therefore, lacks sufficient evidence and fails to apply the correct standard for reviewing grants of motions for new trial.

**2. The trial court considered whether Mr. Martin's testimony could have been presented at trial through reasonable diligence.**

This court held the trial court incorrectly applied the law to the evidence because the trial court did not rule Mr. Hawkins could not have discovered Mr. Martin's evidence. CrR 7.5(3) and *Williams* do not require that discovery of the evidence be impossible; they require only that it could not have been discovered with reasonable diligence. Contrary to this court's finding, the trial court explicitly found that the evidence was not discovered prior to trial and that the defense did exercise the level of diligence required by CrR7.5(3) to discover it. (CP 1129) Under

Washington law, this is sufficient to justify a new trial and is a correct application of the law to the facts.

This court's interpretation of the showing required to satisfy the third *Williams* factor is analogous to the position of the State in *State v. Slanaker,* 58 Wn. App. 161, 166-67, 791 P.2d 575 (1990), where the State argued that because certain witnesses were known to the defendant before trial, any evidence from the witnesses could not be newly discovered. The Court of Appeals rejected this interpretation, looking instead to whether the unavailable witnesses could be located for trial with the exercise of due diligence. *Id.* Knowing who the witness was and what his likely testimony might be did not preclude a finding that the evidence was newly discovered where the defendant could not produce that evidence through reasonable diligence. *Id.*

The cases relied upon by this court as "similar showings" do not support this court's application of the third *Williams* factor, as in each case the evidence was known, or reasonably should have been known, to the appellant at the time of trial. In *In re Jones*, 41 Wn.2d 764, 774 (1953), the Supreme Court considered whether an affidavit by a physician presented by the appellant concerning his own treatment and mental condition was newly discovered evidence. Unlike Mr. Martin's observation of the movement of the Kubota tractor, the appellant in *Jones*

clearly had knowledge of the affiant's likely testimony or, at the very least, had reason to believe the affiant may have relevant information. *See id.*

Likewise in *Gross v. Department of Labor & Industries*, 177 Wash. 675, 676, 33 P.2d 376 (1934), the newly discovered evidence consisted of the testimony of four witnesses, each of whom had had interaction with the plaintiff concerning the injuries at issue. Again, unlike Mr. Martin's testimony, the plaintiff was clearly aware prior to trial that each of the witnesses had relevant knowledge. *See id.* And in *Nicholas v. Security State Bank*, 132 Wash. 239, 243, 231 P. 805 (1925), the new evidence consisted of letters which the defendant actually had in its possession at the time of trial.

In *State v. Vance*, 29 Wash. 435, 488, 70 P.34 (1902), facts in the records established the defense knew or should have known persons present at the hotel where an altercation and murder took place could have evidence material to the defense. Here, the trial court who had heard Mr. Martin's previous testimony at trial, specifically "[could not] see where the Defendant or his attorney had any reason to believe that Mr. Martin may have observed what he did." (CP 1129) Whereas in *Vance*, the court found "[t]here was nothing to prevent the appellant's attorney from interviewing [the new witnesses]". *Vance*, 29 Wash. at 488-89. And in

*State v. Barry*, 25 Wn. App. 751, 759-60, 611 P.2d 1262 (1980), the evidence was not only known to the defense at the time of trial, but was also found to be cumulative and insufficient to alter the results of the first trial.

The facts of this case are much more similar to those of *State v. Savaria*, 82 Wn. App. 832, 839, 919 P.2d 1263 (1996), *disapproved on other grounds by State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003). There, the newly discovered evidence at issue was the telephone records of the alleged victim and her father who had testified at trial. *Id.* at 836, 837. The State argued the telephone records were not newly discovered evidence because they could have been discovered before trial. *Id.* at 837. This court found, however, that the defense could not have found the records through reasonable diligence because it had no knowledge that the victim would testify at trial regarding a call to her father. *Id.* at 838. Just as is the case here, the defense did not lack due diligence because it was not aware that the victim's telephone records would contain relevant evidence and therefore had no reason to look into them. *See id.* The *Savaria* court, therefore, reversed the denial of new trial. *Id.* at 838-39.

Although in this case, the State argued Mr. Martin's observation "could have and should have been discovered prior to trial," the trial court explicitly found the defense could not have predicted that Mr. Martin

would be able to testify as to the movement of Kubota tractors. (CP 1128-29) Directly contrary to the cases relied upon by this court, the trial court concluded that as there was no reason for the defense to believe Mr. Martin had observed what he did, there was no reason to ask Mr. Martin if he had seen anyone moving a Kubota tractor on the Sundance property. (CP 1129)

The trial court then expressly found "Defendant has shown the necessary due diligence", that is, the trial court found the absence of any reason to suspect Mr. Martin had observed what he did, explained both why the defense did not question Mr. Martin and why it **could not** through reasonable diligence learn of Mr. Martin's observation prior to trial. (CP 1129) Because the trial court found the defense did meet the level of due diligence required to procure Mr. Martin's testimony for trial, his testimony as to the Kubota tractors was newly discovered evidence for purposes of CrR 7.5. This is a correct application of the law to the facts and was not an abuse of discretion under any standard.

### 3. Conclusion

This court substituted its view of the facts for that of the trial court when it reversed the trial court's granting of the motion for new trial. This is contrary to Washington law setting the standard of review for grants of motions for new trial and the traditional deference appellate courts are to

give trial courts in making factual determinations. The trial court concluded the defense could not have discovered Mr. Martin's testimony through due diligence because there simply no reason to believe Mr. Martin had any evidence regarding the theft of the Kubota tractor. This is a correct application of the law to the facts of this case. Mr. Hawkins, therefore, asks this court to withdraw its decision in this matter and reconsider his appeal.

DATED this 31st day of July, 2013.

CARL E. HUEBER, WSBA #12453
COLLETTE C. LELAND, WSBA #40686
WINSTON & CASHATT

Attorneys for E. Troy Hawkins

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on July 31, 2013, I served a copy of the foregoing document by causing a true and correct copy of said document to be delivered to counsel and the party named below at the addresses shown below in the manner(s) indicated:

| | | |
|---|---|---|
| Eric C. Biggar<br>Douglas County Prosecutor's Office<br>P.O. Box 360<br>Waterville, WA 98858 | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☒<br>☒<br>☐<br>☐<br>☐ |
| E. Troy Hawkins<br>P.O. Box 66<br>Manson, WA 98831<br><br>Served by email per agreement with E. Troy Hawkins | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☐<br>☒<br>☐<br>☐<br>☐ |
| Allen Ressler/Jonathan Barash<br>Ressler & Tesh<br>821 Second Avenue, Suite 2200<br>Seattle, WA 98104 | VIA REGULAR MAIL<br>VIA EMAIL<br>HAND DELIVERED<br>BY FACSIMILE<br>VIA FEDERAL EXPRESS | ☒<br>☒<br>☐<br>☐<br>☐ |

DATED at Spokane, Washington, on July 31, 2013.

Cheryl Hansen

435966

# Appendix A

**FILED**
**JULY 16, 2013**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | No. 30231-8-III |
| Appellant, | ) | Consolidated with |
| | ) | No. 30239-3-III |
| v. | ) | |
| | ) | |
| EDWIN TROY HAWKINS, | ) | UNPUBLISHED OPINION |
| | ) | |
| Respondent. And Cross-Appellant. | ) | |

KORSMO, C. J. — While this case was previously before this court, the superior court granted a motion for a new trial. A written order granting the new trial eventually was entered and the State appealed. Meanwhile, Mr. Hawkins was granted review of the trial court's ruling that the CrR 3.3 time for trial period had not expired before the State's appeal was taken. We conclude that Mr. Hawkins did not present newly discovered evidence and reverse the order granting a new trial; we affirm the denial of the motion to dismiss.

## FACTS

The facts underlying the case are discussed in the previous opinion, *State v. Hawkins*, 157 Wn. App. 739, 238 P.3d 1226 (2010). Briefly stated, charges of possession

of stolen property and attempted possession of stolen property were filed after a family dispute led to allegations that Mr. Hawkins's orchard operation was using equipment that did not belong to him. The defense theory of the case was that members of his wife's family had framed Mr. Hawkins because of disputes between the two families. The jury acquitted on two counts, but convicted on one count of possession of stolen property and one count of attempted possession of stolen property relating to a Kubota tractor. *Id.* at 746.

In addressing one of Mr. Hawkins's claims, this court concluded that it was error to limit Britt Hawkins's testimony about the reason relations with her family were strained. However, we concluded that the error was harmless because it addressed the two counts on which the jury acquitted. *Id.* at 752-53. We noted that there was no evidence connecting her family to the tractor counts and no evidence that anyone had framed Mr. Hawkins on those counts. *Id.* at 753.

Dale Martin testified for the defense at trial. He had worked in the area for many years and had provided field services for some of the land that Mr. Hawkins was now farming. He testified concerning some sprayers; the jury ultimately acquitted Mr. Hawkins on the charge relating to the sprayers. In the spring of 2010, while the case was pending in this court, Mr. Martin told Mr. Hawkins about an incident that he said had occurred in the spring of 2007:

> In spring 2007 I was at the Sundance Slope orchard to pick up a fertilizer spreader. At that time I observed a white flatbed truck arrive at the orchard's equipment loading area. The truck was carrying a large orange Kubota tractor. I saw the driver unload the Kubota. A short time later I saw the truck leave the property loaded with an orange Kubota. No one else was present at the time. I knew Troy Hawkins and was familiar with his employees. The driver was not Hawkins and was not one of the employees. This event did not stand out in my mind because it is common to see orchard equipment moved around during the growing season.

Clerk's Papers (CP) at 1106.

Armed with this information, Mr. Hawkins filed a motion for a new trial in superior court. This court issued its opinion on September 9, 2010, affirming the two convictions; Mr. Hawkins moved to reconsider. The superior court heard argument September 27 and issued a letter decision on October 7 granting a new trial. In the course of its analysis, the superior court indicated that it was difficult to believe that Mr. Martin was unaware of the allegations concerning the Kubota tractor during the trial, but believed his declaration needed to be taken at face value. The court also was uncertain that the testimony would have changed the trial, but concluded that it "could have an impact on the jury's decision." CP at 1280.

The prosecutor sought to have the trial court enter an order on the new trial ruling and noted hearings for November 15 and December 2. The former date was stricken for lack of timely notice and the second one was stricken at defense request because reconsideration was still pending in this court; the defense argued that the court lacked authority to enter the order while the case was pending in this court. This court sent a

letter directing that a motion for permission to enter the new trial order be filed in the Court of Appeals pursuant to RAP 7.2(e). No action was taken.

This court denied reconsideration on December 8, 2010. After a petition for review was denied, this court issued its mandate April 12, 2011. The State noted a trial setting hearing for July 11. The defense objected to the setting of a trial date and maintained that it was not waiving timely trial under CrR 3.3. The court on July 11 set the matter for trial on September 13. On July 18, the defense formally objected that the new trial date was in violation of CrR 3.3.

The trial court entered a written decision denying the motion to dismiss on August 11, concluding that CrR 3.3(c)(2)(iii) controlled the setting of a trial date. An order, accompanied by findings of fact, denied the motion to dismiss on August 29. The court entered the order granting the new trial, also accompanied by appropriate findings, the next day. The State filed a notice of appeal from that ruling on September 15. The defense filed both a cross appeal and a motion for discretionary review of the CrR 3.3 ruling. This court granted discretionary review and consolidated Mr. Hawkins's case with the State's appeal.

## ANALYSIS

The parties each present one issue, which we address in the order the appeals were taken. The trial court erred in ruling that there was newly discovered evidence justifying

a new trial, but correctly concluded that the time for trial did not expire during the pendency of the prior appeal.

*New Trial Ruling*

The State challenges the new trial order on several grounds. We find one of those arguments dispositive and address only that aspect of the ruling.

A trial court's decision to grant a new trial is reviewed for abuse of discretion. *State v. Marks*, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused when a court uses an incorrect legal standard in making a discretionary decision. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). "The question is not whether this court would have decided otherwise in the first instance, but whether the trial judge was justified in reaching his conclusion." *State v. Taylor*, 60 Wn.2d 32, 42, 371 P.2d 617 (1962).

To grant a new trial for "newly discovered evidence" under CrR 7.5, a trial court must apply a five factor test:

> A new trial will not be granted on that ground unless the moving party demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the 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). "The absence of any one of the five factors is grounds for the denial of a new trial." *Id.* at 223.

The State argues that four of the five *Williams* factors—all but factor (2)—do not support the trial court's ruling. While some of those arguments have apparent merit, we do not reach them in light of the failure to establish the third *Williams* factor.[1]

The third requirement is an explanation why the evidence could not have been produced at trial. Mr. Hawkins argues that this requirement was met by evidence that Mr. Martin only remembered the incident three years later. However, he never produced any evidence that he had sought information from Mr. Martin about the Kubota tractor prior to the time it was volunteered by Mr. Martin. Since the defense presented testimony about a similar incident[2] involving the sprayers at trial, and also used Mr. Martin to testify about the sprayers, it is difficult to believe that defense counsel did not ask Mr. Martin about the other equipment. Even more importantly, there is no indication that it could not have done so.

Similar showings have failed to satisfy this factor. *E.g.*, *In re Jones*, 41 Wn.2d 764, 774, 252 P.2d 284 (1953) (affidavits from treating doctor); *Gross v. Dep't of Labor & Indus.*, 177 Wash. 675, 677, 33 P.2d 376 (1934) (affidavits from four witnesses, one of whom had testified at hearing); *Nicholas v. Sec. State Bank*, 132 Wash. 239, 243, 231 P.

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[1] As noted earlier, the trial court seemed somewhat concerned about the credibility of Mr. Martin's information and appeared to state the wrong standard for granting relief, two matters that reflect upon the first *Williams* factor. The materiality of this information also is questionable in light of the fact that it was not expressly linked to Mrs. Hawkins's family.

[2] *Hawkins*, 157 Wn. App. at 743.

805 (1925) (letter in possession at time of trial was not newly discovered); *State v. Vance*, 29 Wash. 435, 488-89, 70 P. 34 (1902) (witnesses known at time of trial); *State v. Barry*, 25 Wn. App. 751, 760, 611 P.2d 1262 (1980) (witnesses known, but not called, at time of hearing).

The trial court's written ruling more or less acknowledged that the defense could have found this information earlier: "had the right question been asked to Mr. Martin prior to trial that this evidence could have been secured and introduced." CP at 1129. Instead, the court excused counsel's failure to inquire given the theory of the case. While this is a reasonable explanation for why the defense did not discover the evidence, it is not an explanation for why the defense could not have discovered the evidence. Under *Williams*, it was the latter standard that needed to be satisfied. The defense did not do so here.

The trial court incorrectly applied the law to this evidence. That constitutes an abuse of discretion. *Rundquist*, 79 Wn. App. at 793. Accordingly, we reverse the order granting a new trial.

*Time for Trial*

Mr. Hawkins argued unsuccessfully to the trial court that his right to a timely trial under CrR 3.3 had expired, thus requiring dismissal of the case. We disagree with that assessment and affirm the trial court's ruling on this matter.[3]

"The application of the speedy trial rule to a particular set of facts is a question of law subject to de novo review." *State v. Raschka*, 124 Wn. App. 103, 108, 100 P.3d 339 (2004). This court reviews the denial of a CrR 3.3 motion to dismiss for abuse of discretion. *City of Seattle v. Guay*, 150 Wn.2d 288, 295, 76 P.3d 231 (2003). Court rules are reviewed de novo just like statutes. *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). Rules that are clear on their face do not need interpretation. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001).

CrR 3.3 provides that a defendant shall be brought to trial within 60 days of arraignment if held in custody on the charge for which he was arraigned, or within 90 days of arraignment if released on that charge. CrR 3.3(b)(1)(i), (2)(i). CrR 3.3(c)(2) provides a list of events which result in a resetting of the commencement date. The entry of an order granting a new trial resets the commencement date to the date of the order. CrR 3.3(c)(2)(iii). The acceptance of review by an appellate court resets the

[3] In so doing, we do not address the issue, not raised by the parties, of the effect of our reversal of the new trial order on an actual CrR 3.3 violation.

commencement date to the date of the defendant's first trial court appearance following the superior court clerk's receipt of the mandate. CrR 3.3(c)(2)(iv).

The parties draw their arguments around the latter two noted subsections of CrR 3.3. In relevant part, they provide:

> (2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.
>
> . . . .
>
> (iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.
>
> (iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

CrR 3.3(c)

Mr. Hawkins argues that the trial court's October decision started the new trial period either when it issued or when the mandate issued in April. His arguments fail on several grounds. First, the trial court's October decision was identified by the trial judge to be just that—a decision and not an order. The judge expressly told counsel that the attorneys would be responsible for preparing the order. By the plain terms of subsection (iii), there was no operative document to trigger a new commencement date; only an "order" commences the time for trial period.

Second, the October decision could not have been effective while the original judgment was on appeal. RAP 7.2(e) states the applicable principle: a trial court has authority to make a decision on a postjudgment motion within its authority, but can only enter an order that changes the ruling under review after receiving permission from the appellate court. This court had the original judgment and sentence under review and since the trial court's decision would alter that judgment by setting a new trial, RAP 7.2(e) was applicable. Although this court had news of the October ruling and requested that a RAP 7.2(e) motion be filed, neither party did so. Thus, even if the October ruling had been an order, it could not be effective while this court had jurisdiction over the judgment.

CrR 3.3(c)(2)(iii) did not become applicable to this case until the written order granting the new trial was entered on August 30. Accordingly, the trial court correctly denied the motion to dismiss. The only provision of CrR 3.3 that could arguably have applied to this case up to that point was CrR 3.3(c)(2)(iv).[4] That provision was inapplicable because this court affirmed the judgment. As the appellate decision did not result in a need for a new trial—or any other trial court proceeding— the provisions of subsection (iv) were irrelevant. The outcome of the appeal simply permitted the original judgment and sentence to be served.

[4] If it had been applicable, there was no violation since the defendant's next appearance in court following the mandate was the July trial setting hearing.

These issues thereafter resolved themselves in a manner consistent with the best interests of the parties.[5] Having won a new trial, the defense was understandably in no hurry to schedule the new trial until its original appeal had run its course. The prosecutor equally understandably sought to push the matter forward in order to pursue its appeal of the new trial ruling.

The trial court correctly denied the CrR 3.3 motion and we affirm that ruling. The order granting the new trial is reversed and the original judgment is therefore reinstated.

Reversed in part and affirmed in part.

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.

Korsmo, C.J.

WE CONCUR:

Brown, J.

Kulik, J.

[5] Both parties were zealously represented at trial and on appeal by counsel who displayed the professionalism that is the hallmark of the finest members of the profession.

# Appendix D to Petition for Review

# COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br>Respondent, | ) | **MANDATE** |
| v. | ) | No. 28118-3-III |
| EDWIN TROY HAWKINS,<br>Appellant. | ) | Douglas County No. 07-1-00210-7 |

The State of Washington to: The Superior Court of the State of Washington,
in and for **Douglas** County

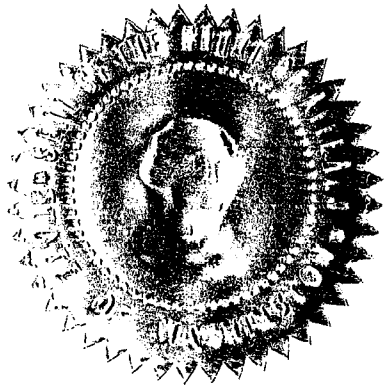
This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on **September 9, 2010** became the decision terminating review of this court in the above-entitled case on **March 30, 2011**. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at **Spokane**, this **12th** day of **April, 2011.**

Renee S Townsley

Clerk of the Court of Appeals, State of Washington
Division III

cc: Edwin Troy Hawkins
Carl E. Hueber
Eric C. Biggar
Hon. John Hotchkiss
Department of Corrections



# Appendix E to Petition for Review

FILED

(1) JUL 11 2011

JUANITA S. KOCH
DOUGLAS COUNTY CLERK
WATERVILLE, WASH.
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON
FOR DOUGLAS COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

EDWIN HAWKINS

Defendant.

NO. 07-1-00210-7

ORDER SETTING TRIAL AND HEARING DATES

The Court hereby ORDERS the following trial and hearing dates:

| | Date | Time | State's Brief Due | Defendant's Brief Due |
|---|---|---|---|---|
| [X] Omnibus Hearing | | | | |
| [ ] 3.5/3.6 Hearing | | | | |
| [X] Readiness Hearing | 8/29/11 | 9:00 | | |
| [X] Trial | 9/~~20~~13/11 | 9:00 | | |
| [ ] _____ (Other) | | | | |

The estimated length of trial is 4 days/weeks.

The proper commencement date is 7/11/11.

The defendant's speedy trial expiration date is 10/10/11.

DATED: July 11, 2011

Judge

I hereby acknowledge receipt of a copy of this Order Setting Trial and Hearing Dates. I understand that my failure to object to the date set for trial within ten (10) days after today will waive any objection that the above trial date fails to comply with CrR 3.3.

DATED: _____

Defendant

Defendant's Lawyer, WSBA # 36278
as to form only

STEVEN
DOUGLAS COUNTY PR
P.O. BOX 360, WATERVILLE, WA 98858
509/745-8535 • FAX 509/745-8670

0-000001253

ORDER SETTING TRIAL AND HEARING DATES (7/02)