

NO. 46717-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

RAUL CASTILLO LOPEZ,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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ARGUMENT

THE RECENT DECISION OF THE WASHINGTON SUPREME COURT IN *STATE v. HAMPTON* SUPPORTS APPELLANT'S CONTENTION THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO SUBSTITUTE ATTORNEYS AND RESET THE TRIAL WITHIN THE TIME FOR SPEEDY TRIAL

In the case at bar Appellant argued in his brief and in oral argument that under the decision in *State v. Roth*, 75 Wn.App. 808, 881 P.2d 268 (1994), when determining whether or not to grant a continuance to allow newly retained counsel adequate time to prepare the court should consider four factors. They are:

- (1) whether the court had granted previous continuances at the defendant's request;
- (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;
- (3) whether available counsel is prepared to go to trial; and
- (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

State v. Price, 126 Wn.App. 617, 632, 109 P.3d 27 (2005) (citing *State v. Roth*, 75 Wn.App. at 825).

Appellant then went on to note that in *State v. Hampton*, 182 Wn.App. 805, 332 P.3d 1020 (2014), Division I of the Court of Appeals recognized that in the United States Supreme Court's 2006 decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), the court invalidated the second and fourth *Roth* factors. *State v. Hampton*, 332 P.3d at 1029 (citations omitted).

The Washington Supreme Court has now reversed the decision of the Court of Appeals in *Hampton*, holding as follows:

As explained above, the Court of Appeals' adoption of a four-factor test was based on an erroneous interpretation of *Roth*, which identified and applied only the four factors that applied in the specific factual circumstances of that case. The Court of Appeals now rejects two of those factors based on an erroneous interpretation of *Gonzalez-Lopez*. In light of these issues, we realize it would be helpful to trial courts to provide guidance on what factors can be considered when deciding a motion to continue for the purposes of substituting counsel. We have previously indicated that these decisions require a trial court to "weigh the defendant's right to choose his counsel against the public's interest in the prompt and efficient administration of justice." *Aguirre*, 168 Wn.2d at 365, 229 P.3d 669. As the United States Supreme Court has observed, these situations are highly fact dependent and "[t]here are no mechanical tests" that can be used. *Ungar*, 376 U.S. at 589. Instead, the judge must decide based on "the circumstances present." *Id.*

State v. Hampton, No. 90811-7, 2015 WL 7294538, at 6 (Wn. Nov. 19, 2015)

The court then went on to hold that in deciding whether or not to grant a continuance to allow new counsel to enter a case the court is free to consider some or all of the eleven factors recognized by LaFave. The court held:

Therefore, we hold that trial courts can consider all relevant information, including the 11 factors described in the most recent edition of the LaFave Criminal Procedure treatise:

- (1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar;
- (2) the length of the continuance requested;
- (3) whether the continuance would carry the trial date beyond the period specified in the state speedy trial act;

(4) whether the court had granted previous continuances at the defendant's request;

(5) whether the continuance would seriously inconvenience the witnesses;

(6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;

(7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel;

(8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;

(9) whether there was a "rational basis" for believing that the defendant was seeking to change counsel "primarily for the purpose of delay";

(10) whether the current counsel was prepared to go to trial;

(11) whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

3 Wayne R. LaFave et al., *Criminal Procedure* § 11.4(c) at 718–20 (3d ed.2007). Not all factors will be present in all cases, and thus a trial court need not evaluate every factor in every case, but we will not prohibit a trial court from considering relevant information.

State v. Hampton, No. 90811-7, 2015 WL 7294538, at 6-7 (Wn. Nov. 19, 2015).

A review of each of these factors under the fact of this case shows that ten of the eleven support the conclusion that the trial court abused its discretion when it refused to grant the substitution and short continuance the

defense requested, while the one remaining factor is ambiguous. The following examines the facts as they relate to these factors.

In the case at bar, the defendant became dissatisfied with his court-appointed counsel and quickly sought to obtain funds in order to retain his own attorney. His retained attorney then presented himself before the court, asked for permission to substitute, and then asked for a continuance within the original 60 speedy trial time. Thus, the requested continuance was very short (a couple of weeks), it did not put the case outside speedy trial, and the court had not granted any prior continuances. In addition, a careful review of the motion fails to show that the court even reviewed its calendar for the dates requested, much less that there was any conflict on the proposed dates. Neither did the state argue or the court find that the defendant was making the motion for the purpose of delay.

In addition, current counsel and the court both stated that they were not prepared to go on the date set because they did not have the DNA tested yet. Finally, the prosecutor specifically represented to the court that the complaining witness did not object to the request given the fact that the state did not have its DNA evidence evaluated. The prosecutor stated the following on this point.

MS. O'ROURKE: That's correct. Your Honor would have to find substantial and compelling reasons, and I think in this case and I know that the victim, going along with the state, would definitely want the

DNA results back before trial.

RP 6/19/14 4.

Thus, in this case factors one, two, three, four, five, six, seven, nine, ten and eleven all militate in favor of the continuance. Whether or not the defendant's dissatisfaction with his appointed counsel (factor eight) was supported by "some legitimate cause" is difficult to determine because the court did not examine this issue. Thus, in this case the trial court abused its discretion when it denied substitution of counsel and the short continuance.

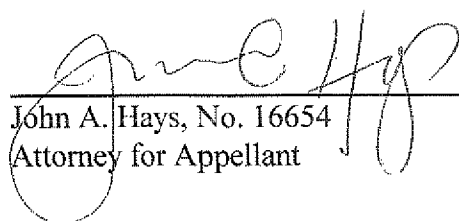
In addition, as was set out in the Opening Brief of Appellant, in this case the first argument from appellant is that a fair reading of the trial court's statements during the motion to continue reveal that the trial court actually only considered one factor in denying the motion: that factor was the court's "unwritten policy" that prohibited all continuances under any circumstances to allow new counsel to enter a case. This failure to consider the facts of this case and apply them to the law is what appellant argues was the abuse of discretion in this case.

CONCLUSION

For the reasons set out in this brief this court should reverse the defendant's conviction and remand for a new trial.

DATED this 3rd day of December, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

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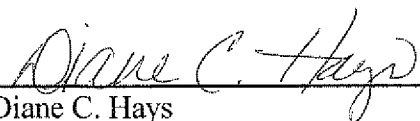
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**AFFIRMATION
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The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 3rd day of December, 2015, at Longview, WA.



Diane C. Hays

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