

NO. 35903-1-II
Cowlitz Co. Cause NO. 06-1-00657-4

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT ALLEN TUITE

Appellant.

25

BRIEF OF RESPONDENT

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I. ISSUE

- 1. WHERE A CRUCIAL STATE'S WITNESS WAS NOT AVAILABLE ON THE DATE SET FOR TRIAL, DID THE TRIAL COURT PROPERLY GRANT THE STATE'S MOTION FOR A CONTINUANCE?**

II. SHORT ANSWER

- 1. Yes.** The trial court did not abuse its discretion when it granted the State's motion to continue the trial date.

III. PROCEDURAL HISTORY

The State filed an Information charging the Appellant, Scott Allen Tuite, with one count of Violation of the Uniform Controlled Substances Act, one count of Use of Drug Paraphernalia, and one count of Driving While License Suspended or Revoked in the Third Degree. CP 1-2. The case proceeded to a jury trial before the Honorable James Warne. The jury returned a guilty verdict on the Violation of the Uniform Controlled Substances Act charge as well as the Driving While Suspended charge. CP 35. The trial court imposed a standard range sentence of 6 months and a day on the VUCSA charge and 10 days on the DWLS charge. CP 37-49. The defendant filed a Notice of Appeal on February 6, 2007. CP 51.

IV. FACTS

The Respondent agrees with the Appellant's recitation of the facts with the following additions and/or corrections.

On January 18, 2007, case was on for a trial readiness hearing before the Honorable James Stonier. RP 1-4. The Appellant and defense counsel were both present as well as the prosecutor. At this time the State requested a continuance of the trial date that was set for the following day. When asked if he was objecting to it defense counsel stated, "Mr. Tuite is not tickled about anything to do with this case. Um, I could (try) this on February 2nd, if the State and Court could do that." RP 1. When asked specifically if he was objecting, the response was, "Your Honor, Mr. Tuite is not happy."

The prosecutor handling the case stated that one of the State's witnesses was unavailable for the trial date, he was out of town and would not be back until the following week. RP 2. When asked if he could try the case without the witness, the State's response was, "I think it would be difficult. I think he is a material witness." Id. The State went on to explain that the officer was the first (and only) person to have observed the cigarette package containing the drugs below the defendant's motorcycle. Id.

The trial court noted that the arraignment was on October 25th, which controlled the current speedy trial clock. RP 4. Defense counsel's response was, "Well, I could try this Monday, the 22nd and Friday, the 2nd of February." Id. The State agreed this date would work and subsequent to this the judge found good cause granting the continuance and set the trial over to the second of February 2007.

At trial, Appellant brought a motion to dismiss for a violation of his speedy trial rights. RP 4. The court denied the motion to dismiss and both parties indicated they were ready to proceed with trial. RP 5. The State indicated it would call three witnesses: Sergeant Doug Lane of the Kelso Police Department; Officer Dave Shelton of the Kelso Police Department; and Katherine Dunn of the Washington State Crime Lab. RP 6. Officer Shelton was the officer that was unavailable on the first trial setting.

After the State's presentation of its case, Appellant requested a missing witness instruction specifically referring to Officer Shelton. RP 66. Defense counsel went on to explain that Officer Shelton was indeed a very important witness by stating that he located the cigarette package, opened it up, did something with the contents and showed it to the other officer." RP 67.

The State's response was that it was unaware that officer Shelton was not going to be available to testify until after the onset of trial. RP 68. The State went on to say that its initial understanding of this case up until extremely recently was that it really did need Officer Shelton to testify as he was the one that located the package of cigarettes and that he played a crucial role in the chain of custody for the drugs. *Id.* The State indicated it had discovered at the lunchtime break in trial that despite assurances to the contrary, Officer Shelton had not been provided a copy of his subpoena to testify at trial. *Id.* Not knowing that the subpoena had not been delivered to Officer Shelton, the State was under the false assumption, even until lunchtime of the day of trial, that he would be present to testify. *Id.*

V. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED THE STATE'S MOTION TO CONTINUE THE TRIAL DATE.

The trial court may continue a case when required in the administration of justice and the defendant will not be prejudiced in the presentation of the defense. CrR 3.3(h)(2). CrR 3.3(d)(8) allows the court to extend the trial date beyond the 60 or 90-day speedy trial rule on the basis of "unavoidable or unforeseen circumstances beyond the control of the court or the parties."

The granting or denial of a motion to continue is within the discretion of the trial court and is reviewable on appeal only for manifest abuse of discretion. *State v. Adamski*, 111 Wn.2d 574, 57, 761 P.2d 621 (1988). Manifest abuse of discretion exists only when no reasonable person would take the view adopted by the trial court. *State v. Glight*, 89 Wn.2d 38, 40-41, 569 P.2d 1365 (1993).

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretionary manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *MacKay v. MacKay*, 55 (Wn.2d 344, 347 P.2d 1062 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

It is not an abuse of discretion to accommodate the unavailability of an officer. *State v. Grilley*, 67 Wn.App. 795, 840 P.2d 903 (1992). Similarly, continuances may also be granted upon the unavailability of key

witnesses. *State v. Terrovona*, 105 Wn.2d 632, 716 P.2d 295 (1986), *State v. Day*, 51 Wn.App. 544, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988).

Appellant is unable to shoulder the burden of proof in this case. The reasons given by the trial court for granting a continuance of the trial date on January 18, 2007 were well within its discretion. The State detailed to the court the level of Officer Shelton's involvement with the case and indicated that he was material to the State's case. After considering this information, the court made a finding that good cause existed to extend the trial beyond the 90-day limit.

The decision of the Honorable James Stonier was not made on untenable grounds or for untenable reasons. Officer Shelton was the first one to observe the cigarette package containing the illegal drugs located beneath the defendant's motorcycle. This makes him a crucial witness for the State's case not only because of what he observed, but also due to chain of custody purposes. It is more than reasonable for a judge to decide this type of witness is material to a State's case, thus giving a basis to continue the trial date outside of the 90-day period.

The only showing Appellant has made regarding an abuse of discretion is purely related to the events that occurred *after* the judge's initial ruling pertaining to finding good cause for the continuance. What

happens after a court ruling does not affect what was in the court's mind as well as the State's mind with regard to the witness's unavailability and materiality at the time of the motion. Further, the State anticipated calling Officer Shelton and believed him to be a material part of the State's case up until the halfway through the trial day.

This is not a case where the State decided to proceed to trial without Officer Shelton as a tactical decision. To the contrary, the State proceeded to trial expecting Officer Shelton to offer his testimony and did not discover until later that this was not the case. There is nothing in the records to show what happened to cause Officer Shelton's absence from trial and, more importantly, nothing to show how this relates to what the witness's materiality was in the Court's mind at the readiness hearing.

In *State v. Carson*, the Washington Supreme Court concluded that a defendant "effectively waive(s) their right to speedy trial under CrR 3.3 if they do not raise the issue when action could still be taken to avoid a speedy trial violation. 128 Wash.2d 805, 819, 912 P.2d 1016 (1996). In the case at bar, the Appellant accepted a trial date outside of the 90-day period required by CrR 3.3 by proposing a trial date of February 2, 2007.

At the readiness hearing, when asked if appellant was objecting to the State's motion to continue the case, defense counsel stated that Appellant was not pleased but that he could try the case on February 2.

RP 1. When asked again if Appellant was objecting, his counsel indicated that Appellant was not happy. This was not in any way a formal objection with regard to speedy trial rights as opposed to a mere expression of distaste should the court set the trial out. In fact, the defendant never explicitly objected to the continuance at all. Instead, even before the court had made a finding of good cause and decided to continue the trial, defense counsel *again* proposed February 2 as a potential trial date, stating, “Well, I could try this Monday, the 22nd and Friday, the 2nd of February.”

It was only subsequent to this statement that the court found good cause and set the trial dates out to February 2. In twice proposing this date as a potential trial date for this case, Appellant not only failed to object to the setting of the trial outside of the required 90 day period, he in fact accepted the date outside this time period.

VI. CONCLUSION

Appellant’s convictions for Violation of the Uniform Controlled Substances Act and Driving While License Suspended in the Third Degree should be affirmed because the Appellant made no showing that the trial court abused its discretion in granting the State’s motion to continue and setting the trial date outside of the 90-day period. As such, Appellant’s convictions should be affirmed.

Respectfully submitted this 12th day of December 2006.

SUSAN I. BAUR
Prosecuting Attorney

By:

A handwritten signature in cursive script, appearing to read "M. Nisle", written over a horizontal line.

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

STATE OF WASHINGTON,)	NO. 35903-1-II
)	Cowlitz County No.
Appellant,)	06-1-00657-4
)	
vs.)	CERTIFICATE OF
)	MAILING
SCOTT ALLAN TUITE,)	
)	
Respondent.)	
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I, Audrey J. Gilliam, certify and declare:

That on the 8 day of November, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

John A. Hays
Attorney at Law
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Longview, WA 98632

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

Dated this 8 day of October, 2007


Audrey J. Gilliam