

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 38377-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

WADE WILLIAM PIERCE

Appellant.

STATE'S RESPONSE BRIEF

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR
345 W. MAIN STREET, 2ND FLOOR
CHEHALIS, WA 98532
360-740-1240

By:



LORI SMITH, WSBA 27961

Deputy Prosecutor

PM 5-29-09

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STATEMENT OF THE CASE

Except a few factual inaccuracies, which are noted in Respondent's argument below, Appellant's recitation of the facts is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PIERCE'S CrR 7.8 MOTION FOR RELIEF FROM JUDGMENT.

Pierce claims that the trial court abused its discretion when it denied him relief under CrR 7.8. Pierce mischaracterizes some of the facts, and furthermore the trial court did not abuse its discretion when it denied Pierce's motion for a new trial..

A trial court's decision on a CrR 7.8 motion is reviewed for an abuse of discretion. State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). CrR 7.8 "allows for vacation or amendment of a final judgment on certain grounds, including mistake, excusable neglect, newly discovered evidence, and fraud." In re Cadwallader, 155 Wn.2d 867, 879, 123 P.3d 456 (2005). "CrR 7.8(b) requires motions under section (4) and (5) to be brought 'within a reasonable time.'" State v. Zavala-

Reynoso, 127 Wn.App. 119, 122, 110 P.3d 827 (2005). The granting of, or denial of, a new trial is a matter within the trial court's discretion and its decision will be disturbed on appeal only for a clear abuse of discretion, or when it is predicated on an erroneous interpretation of law. State v. Carlson, 61 Wn.App. 865, 812 P.2d 536, *reconsideration denied*, 66 Wn.App. 909, 833 P.2d 463, *review denied*, 120 Wn.2d 1022, 844 P.2d 1017(1991); State v. Copeland, 130 Wn. 2nd 244, 922 P.2d 1304 (1996).

There are five requirements that determine whether newly discovered evidence warrants a new trial: (1) the evidence must be such that results will probably change if a new trial was granted; (2) the evidence must have been discovered since trial; (3) the evidence could not have been discovered before trial by exercising due diligence; (4) the evidence must be material and admissible; and (5) the evidence cannot be merely cumulative or impeaching; the absence of any one of these factors is sufficient to deny a new trial. State v. Elder, 78 Wn.App. 352, 899 P.2d 810, *review denied*, 129 Wn.2d 1013, 917 P.2d 576 (1995)(emphasis added); State v. Letellier, 16 Wn.App. 695, 558 P.2d 838 (1977); State v. Hobbs, 13 Wn.App. 867, 538 P.2d 838 (1975). However, the mere existence of newly discovered evidence which, if offered at trial, would have

been admissible on one theory or another does not alone justify granting a new trial. State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981). Additionally, a motion for a new trial on the grounds of newly discovered evidence is properly denied where the proposed evidence was available at the time of trial. State v. Fairbanks, 25 Wn.2d 686, 171 P.2d 845 (1946). For the reasons set out below, Pierce has not shown that the trial court abused its discretion when it denied Pierce's motion for a new trial.

1. Pierce Makes Factual Assertions that are Not Supported by the Record.

To begin, Respondent takes issue with some of the "factual" assertions made by Pierce in his argument. For example, at page 6 of his brief, Pierce states,

[w]hat the defense did not know, because the police and prosecutor did not reveal it, was that (1) when the defendant's mother called 911 to report the presence of her son, she told the dispatcher that she was not present in her home but was at another location, and (2) that presumably the dispatcher had told the police officers that the defendant's mother was not present at her house when she told them that the defendant was at the house." Citing CP 57-96, 126-127, 128-169 (emphasis added).

Respondent has not been able to decipher Pierce's citations to the Clerk's Papers—none of the page numbers seem to line up with any of the documents in the designation of the clerk's papers.. Be that as it may, Respondent does not recall anything in the record to

support Pierce's accusatory statement that "the police and prosecutor did not reveal" the evidence. Nor is there support for Pierce's assertion that "presumably the dispatcher told the police officers that" Pierce's mother (Mrs. Hildago) was no longer at the scene. The fact is, there is no evidence that the dispatcher told officers where Mrs. Hildago was when she made the call. Indeed, the trial court made a specific finding that "there is no showing that the whereabouts of Ms. Hidalgo were relayed to the detectives, and without that it is irrelevant whether the dispatch center knew where she was, or that it was a different location, or that it was a markedly different location, or that she hadn't returned to that particular spot." AppendixA at 2 (emphasis added). Respondent is not aware of any evidence that support Pierce's allegations regarding the 911 call.

Similarly, Pierce further claims that "any reasonable 911 operator would have relayed this critical evidence to the officers she dispatched to the scene." Brief of Appellant 17. Where this standard of care for a "reasonable 911 operator" argument comes from—other than from a torts case-- Respondent does not know. Nor does Pierce cite any authority for such a proposition. As such, this assertion should be disregarded. A reviewing court will not review an issue raised in passing or unsupported by authority or

persuasive argument. See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

2. Pierce has Not Shown that He Should Have Been Granted A New Trial Due to “Newly Discovered Evidence”

Pierce also claims that he should have been granted a new trial because “all five criteria” for granting a new trial are established in this case. Pierce bases his motion for a new trial on an allegedly exculpatory 911 tape recording—claiming it is “newly discovered evidence.” Pierce’s argument is neither supported by the record or by the trial court’s findings.

To reiterate, to obtain a new trial based upon “newly discovered evidence” the defendant must show (1) the evidence must be such that results will probably change if a new trial was granted; (2) the evidence must have been discovered since trial; (3) the evidence could not have been discovered before trial by exercising due diligence; (4) the evidence must be material and admissible; and (5) the evidence cannot be merely cumulative or impeaching; the absence of any one of these factors is sufficient to deny a new trial. State v. Elder, 78 Wn.App. 352, 899 P.2d 810, *review denied*, 129 Wn.2d 1013, 917 P.2d 576 (1995)(emphasis added).

Pierce cannot meet these criteria because (a) because the “new” evidence (911 tape) would have been hearsay, it likely would not be admissible at trial so the results in this case would not have changed; (b) the evidence could have been discovered before trial with the exercise of due diligence; (c) the evidence would be used only for impeachment purposes. AppendixA 3 (court’s finding that “it is clear that the 911 tape could have been discovered prior to trial”). In other words, the trial court properly denied Pierce’s motion for new trial because Pierce could have discovered the 911 tape prior to trial, but did not use due diligence to find it. Indeed, Pierce’s own statement in his declaration shows that Pierce knew of the 911 tape at trial when he says, “[d]uring trial preparations, I told my then-attorney . . . that I thought it would be helpful to my defense if he obtained 911 dispatch records.” AppendixB 1. Thus, Pierce knew about a 911 tape before his trial. Again, a motion for a new trial on the grounds of newly discovered evidence is properly denied where the proposed evidence was available at the time of trial. State v. Fairbanks, 25 Wn.2d 686, 171 P.2d 845 (1946).

Furthermore, since the 911 tape would have been hearsay, it was likely inadmissible, and likely would have been used only for

impeachment evidence. The court found, “[t]his evidence was of questionable materiality and it was not admissible at trial because it would be hearsay; the 911 tape evidence would have been used for cross examination solely to impeach the testimony and credibility of Detective Smith and Detective Kimsey.” Appendix A 3. But, impeachment is not an appropriate reason for granting a new trial. State v. Hutcheson, 62 Wn.App. 282, 813 P.2d 1283, *reconsideration denied*, 118 Wn.2d 1020, 827 P.2d 1012 (1991)(new trial should not be granted when only purpose of new evidence is to impeach testimony presented at trial).

Additionally, Pierce cannot show that the result of the trial would have been different if he had had the 911 tape. State v. McChesney, 114 Wn. 208, 195 P.221 (1921)(new trial on basis of newly discovered evidence should not be granted where the accused knew of the evidence before trial and simply failed to find the witness or have subpoena issued was lack of due diligence). Pierce’s motion for new trial centered on the missing 911 tape together with his claim that officers knew before going to Pierce’s mother’s house (Mrs. Hildago) that Mrs. Hildago was not present at the property. But there is absolutely no evidence as far as Respondent knows to show that the officers knew where Mrs.

Hildago was when she made the 911 call. In fact, the trial court *expressly* found that there is no evidence that the dispatcher told any of the officers who went to Mrs. Hildago's property, that Mrs. Hildago was not present on her property when she made the 911 call. Appendix A at 2. To quote the court, "[t]he 'new evidence' does not say that Detective Smith or Detective Kimsey were informed of, or knew that Mrs. Hildago was at some other place." Appendix A at 2. The trial court further found that "[t]here is no showing that the whereabouts of Ms. Hidalgo were relayed to the detectives, and without that it is irrelevant whether the dispatch center knew where she was, or that it was a different location, or that it was a markedly different location, or that she hadn't returned to the particular spot."

Pierce claims that "the defendant's affidavit and supporting filing demonstrate that [the 911 tape] was withheld and not available during the trial." Brief of Appellant 18. Clearly, once again, Pierce is cloaking the lack of the 911 tape as something the State "withheld" at trial. This is an accusation of misconduct on the part of the State or the police. But Respondent is not aware of any facts anywhere in the record to support police or prosecutor's misconduct (other than Pierce's self-serving assertions). Appendix

A at 2 (trial court noting that “[t]he only evidence of what trial counsel was told and what he told the defendant comes from the defendant’s self-serving declaration sometime thereafter”). But even if Pierce did not know of the 911 tape until after he was sentenced, due diligence most certainly would have uncovered such evidence before his trial. The trial court agreed: “[i]t is clear that the 911 tape could have been discovered prior to trial and therefore this is not ‘newly discovered evidence.’” “Appendix A at 3.

In sum, the trial court did not abuse its discretion when it denied Pierce’s motion for a new trial. Pierce’s motion did not meet the criteria for granting a motion for a new trial. As found by the trial court, “[o]f the five requirements to be met for granting a new trial, four of them fail.” AppendixA at 3. The trial court only needed one of the previously set-out criteria to deny the motion for a new trial, but the court based its decision on four of the five criteria. Id. Accordingly, the trial court’s ruling denying Pierce’s motion for new trial should be affirmed.

B. THE TRIAL COURT DID NOT ERR WHEN IT IMPOSED THE FIREARMS ENHANCEMENTS BECAUSE THE RULE IN WASHINGTON IS THAT THERE IS NO DOUBLE JEOPARDY VIOLATION WHEN FIREARMS ENHANCEMENTS ARE IMPOSED EVEN WHERE THE USE OF THE WEAPON IS AN ELEMENT OF THE CRIME.

Pierce also claims that the imposition of the firearms enhancements violated double jeopardy because use of a firearm comprised one of the elements of the crimes. But Pierce's argument flies in the face of current law on this topic, as further argued below.

"It is well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is an element of the crime." State v. Nguyen, 134 Wn.App. 863, 866, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053 (2008); *cert. denied*, 129 S.Ct. 644, 172 L.Ed.2d 626 (2008); State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008), *rev. granted*, 165 Wn.2d 1027, 203 P.3d 379 (2009). Indeed, the Nguyen Court "pointed out that the legislative intent behind the firearm enhancement is unmistakable: to impose a longer sentence when a firearm is used in a crime unless an exception applies." State v. Toney, ___ Wn.App. ___, 205 P.3d 944 (2009) *citing Nguyen*, 134 Wn.App. at 868. In other words,

firearm enhancements “do not violate a defendant’s double jeopardy rights where possession or use of a firearm is an element of the underlying offense because the legislature has clearly indicated its intent in the statute that the enhancements shall apply” State v. Esparza, 135 Wn.App. 54, 67, 143 P.3d 612 (2006). Nor do such enhancements violate the rule set out in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Nguyen, 134 Wn.App. at 866-70 (rejecting a Blakely argument under double jeopardy principles); accord, State v. Tessema, 139 Wn.App. 483, 493, 162 P.3d 420 (2007), *review denied*, 163 Wn.2d 1018 (2008); State v. Kelley, 146 Wn.App. 370, 374-375, 189 P.3d 853 (2008)(published in part)(rejecting Blakely claim as to firearms enhancements); State v. Toney, ___ Wn.App. ___, 205 P.3d at 949.

As all of the cases cited above show, “it is well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is an element of the crime.” Nguyen, supra. And the intent of the Legislature when it passed the *Hard Time for Armed Crime Act of 1995* (Initiative 195) could not be more clear: to punish those offenders who use a firearm to commit a crime more harshly than

those who do not use a firearm in commission of a crime. Id. Pierce's argument regarding the sentencing enhancements in this case is contrary to the majority of the law on this issue. Pierce notes this, but states that he is sure the Kelley case will be reversed by the Washington Supreme Court. Brief of Appellant 30. The State disagrees, given the clear mandate of the Legislature when it passed the *Hard Time for Armed Crime Act of 1995*.

The point of the matter is that *at this time* the "well-settled" rule in our State is that there is no double jeopardy violation when a firearm enhancement is imposed-- even when use of the firearm is also an element of the crime—unless an exception applies. Nguyen, supra; Kelley, supra; Toney, supra. This case is not one of those cases where an exception applies, and as of the date of this response, the rule is that there is no double jeopardy violation regarding the firearms enhancements imposed in this case. Id. Accordingly, Pierce's arguments to the contrary are without merit. The enhancements should stand and Pierce's convictions should be affirmed.

CONCLUSION

The trial court did not abuse its discretion when it denied Pierce's motion for new trial based upon "newly discovered evidence." Pierce did not meet four of the five criteria to show that the alleged evidence was "newly discovered." Nor can Pierce show that imposition of the firearm enhancements for the crimes that also have use of a firearm as one of their elements. At this time, the law is clear that the Legislature intended that crimes committed with a firearm should receive an additional penalty --an "enhancement"—pursuant to the *Hard Time For Armed Crime Act*. Accordingly, Pierce's convictions and enhancements should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 29th day of May, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:



LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

FILED
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DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

DECLARATION OF SERVICE BY MAILING

The undersigned declares under penalty of perjury under the laws of the State of Washington that on 5/29/09, a copy of the Response Brief was served upon Appellant/Petitioner by placing a copy of said document in the United States Mail, postage prepaid, addressed to Appellant's attorney as follows:

John A. Hays
1402 Broadway
Suite 103
Longview, WA 98632

Dated this 29th Day of May, 2009, at Chehalis, Washington.

[Signature]

Received & Filed
LEWIS COUNTY, WASH
Superior Court

SEP 12 2008

By Kathy A. Brack, Clerk
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

STATE OF WASHINGTON
Plaintiff,
vs.
WADE WILLIAM PIERCE,
Defendant.

NO. 04-1-00323-1 161

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Lori Smith, Deputy Prosecutor, represented Plaintiff State of Washington and Lance Hester, Attorney at Law, represented Defendant Wade Pierce. Defendant Wade Pierce, through his attorney Lance Hester, moved the Court for an Order Granting a New Trial based upon newly discovered evidence under CrR 7.5 and CrR 7.8. The Court heard the arguments of both parties, read the materials submitted, and denied Pierce's motion, and made the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Defendant claims that documents showing a 911 call are "newly discovered evidence" warranting a new trial;
2. According to the Defendant's own materials, this evidence was discovered on January 11th of 2005, four days after sentencing in this case;

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE: DENIAL OF
MOTION FOR NEW TRIAL

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3. The motion for new trial was filed February 29, 2008, over three years after the Judgment and Sentence was entered in this case;

4. There was no attempt to file a motion for new trial pursuant to RAP 8.3 while this matter was on appeal;

5. The "new evidence" as claimed by the Defendant is that dispatch received a call saying that Mrs. Hildago (the defendant's mother) was at some other place when she made the call;

6. The "new evidence" does not say that Detective Smith or Detective Kimsey were informed of, or knew that Mrs. Hildago was at some other place;

7. There is no showing that the whereabouts of Ms. Hidalgo were relayed to the detectives, and without that it is irrelevant whether the dispatch center knew where she was, or that it was a different location, or that it was a markedly different location, or that she hadn't returned to that particular spot;

8. The findings of fact and conclusions of law clearly show that Judge Hall knew that the defendant's mother (Mrs. Hildago) was not at the location of the search;

9. Judge Hall specifically found that Detective Smith and Detective Kimsey had no contact with her (Mrs. Hildago) prior to locating the vehicle;

10. The only evidence of what trial counsel was told and what he told the defendant comes from the defendant's self-serving declaration sometime thereafter;

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11. It is more likely that trial counsel requested the 911 recording and the recording is destroyed either 30 or 90 days later, as indicated by the communications person who testified here.

Based upon the foregoing Findings of Fact, the Court enters the following

CONCLUSIONS OF LAW

- 1. There is no showing of any diligence whatsoever regarding the 911 tape within a reasonable period of time after its discovery;
- 2. It is clear that the 911 tape could have been discovered prior to trial and therefore this is not "newly discovered evidence";
- 3. This evidence was of questionable materiality and it was not admissible at trial because it would be hearsay;
- 4. The 911 tape evidence would have been used for cross examination solely to impeach the testimony and credibility of Detective Smith and Detective Kimsey;
- 5. The motion for new trial is untimely even if the 911 documentation can be characterized as newly discovered evidence;
- 6. There are five requirements as set out in State v. York, 41 Wn.App. 538, 543 (1985), for granting a new trial, all of which must be shown and a fatal lapse in any one of them means the motion for new trial should be denied;
- 7. Of the five requirements to be met for granting a new trial, four of them fail;

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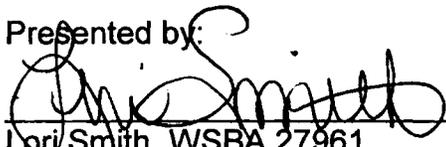
8. There has also been no showing by affidavit as required by the Rule for granting a new trial;

9. The discovery of this "new evidence" would not have changed the result of the trial in this matter; *THE DEFENSE HAS FAILED TO DEMONSTRATE HOW THIS CLAIMED NEW EVIDENCE WOULD ALTER THE DECISION AT THE SUPPRESSION HEARING, EVEN ASSUMING THAT THE DEFENSE HAD SHOWN THAT @ THIS SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED, THE DEFENSE HAS NOT SHOWN HOW THAT WOULD HAVE AFFECTED THE TRIAL, I.E. HOW THE VERDICTS (AND ON WHICH COUNTS) WOULD HAVE BEEN "NOT GUILTY."*
Accordingly, the Motion for New Trial is hereby DENIED.

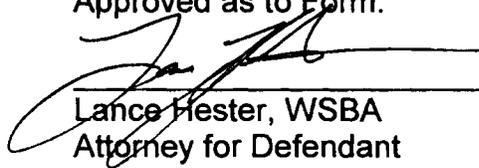
DATED THIS 12 day of September, 2008.



Honorable Nelson E. Hunt
Superior Court Judge

Presented by:


Lori Smith, WSBA 27961
Deputy Prosecutor

Approved as to Form:


Lance Hester, WSBA
Attorney for Defendant

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

STATE OF WASHINGTON)	
)	No. 04-1-00323-1
Plaintiff,)	
)	
vs.)	DECLARATION OF
)	WADE WILLIAM PIERCE
WADE WILLIAM PIERCE,)	
)	
Defendant.)	

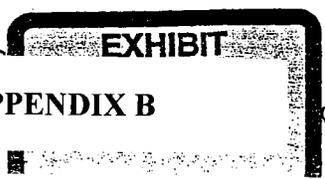
I, Wade William Pierce, hereby declare as follows:

That I am the defendant in the above captioned case.

During trial preparations, I told my then-attorney, Mr. Ken Johnson, that I thought it would be helpful to my defense if he obtained 911 dispatch records. I requested he obtain such records by Subpoena Duces Tecum or by public disclosure request.

When Mr. Johnson responded, he told me that it was impossible to obtain those records because they were already destroyed. He further advised me that he had learned that dispatch records are routinely destroyed after a period of thirty days.

Declaration of Wade William Pierce



APPENDIX B

APPENDIX B

LAW OFFICES OF
MONTE E. HESTER, INC., P.S.
808 SOUTH YAKIMA AVENUE, SUITE 302
TACOMA, WASHINGTON 98405
(253) 272-2157

1 After I was convicted at trial, I asked my mother, Wanita Hidalgo, to try to
2 obtain the same records that I had requested Mr. Johnson obtain.

3 She was able to obtain the records despite the passage of significant time
4 from when the arrest was made and I was convicted at trial.

5 After sentencing on January 7, 2005, I was placed in custody and ultimately
6 transported by the Department of Corrections to the prison facility in Shelton. After
7 sentencing, in large part due to my transport to prison, I had extremely limited
8 access to my trial attorney. Further, at that time I was unaware of time-sensitive
9 deadlines for filing a motion for a new trial; nor was I even aware of the fact that
10 such an opportunity existed as I was unfamiliar with the court rules.
11

12 In short, I was unaware of the records my mother had obtained until a
13 substantial period of time after she obtained them, and I did not know that I was
14 capable of filing a motion for a new trial once I finally did receive them.

15 I hereby declare, under penalty of perjury, under the laws of the State of
16 Washington, that the foregoing is true and correct.

17 SIGNED at W.C.C. SHELTON, Washington, this 8TH
18 day of May, 2008.

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22 Wade William Pierce
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