

NO. 47009-8-II

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

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STATE OF WASHINGTON, Respondent

v.

JASON ADAM HANSON, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01301-9

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

- I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING EITHER OF THE TWO CONTINUANCES IN THIS CASE.**
- II. HANSON WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL**
- III. THE TRIAL COURT DID NOT ERR IN IMPOSING MANDATORY LEGAL FINANCIAL OBLIGATIONS. THE COURT CONSIDERED THE DEFENDANT'S ABILITY TO PAY IN THE FUTURE, DESPITE THE FACT THAT ABILITY TO PAY IS NOT RELEVANT IN THE CASE OF MANDATORY LEGAL FINANCIAL OBLIGATIONS.**

## **STATEMENT OF THE CASE**

The State accepts Mr. Hanson's statement of the case with respect to the testimony that was adduced at trial. The State supplies its own statement of the case with respect to the procedural events that occurred prior to trial.

Hanson was charged, along with a co-defendant, with assault in the second degree. CP 3. He stated his intention to rely on self-defense. RP 11-12. Hanson was arraigned on July 10, 2014. RP 7. Trial was set for September 2, 2014. RP 7. On August 28, 2014, defense counsel moved to continue the September 2<sup>nd</sup> trial date because the discovery materials were voluminous and he had not yet had an opportunity to go through all of the

medical records. RP 8-14. Moreover, defense counsel elected to defer interviewing the victim in this case until after he'd had an opportunity to fully review the medical records. RP 9. The defendant expressed disagreement with his attorney's request, saying that he didn't believe it was important for his attorney to review the victim's medical records. RP 11-12. The court disagreed, and found good cause to continue the trial pursuant to defense counsel's request, and granted the request. RP 12-13. Trial was reset to October 27, 2014. RP 13.

On Monday, October 27, 2014, the parties appeared for trial. RP 30. However, on the previous Thursday evening the State first discovered two additional eyewitnesses who had not yet been contacted by anyone. RP 30-32. Additionally, those two witnesses alluded to a potential third witness who may have witnessed the assault *Id.* Defense counsel sought a continuance so that he could interview these two witnesses and attempt to locate this potential third witness. RP 30-31. The defendant again expressed disagreement with his attorney's request, although he agreed that it would seem important that his attorney be able to interview these witnesses. RP 33. The trial court again found good cause to continue the trial. RP 34-35. The court continued the trial to November 17, 2014. *Id.*

During sentencing, defense counsel asked the trial court to waive "some" of the legal financial obligations because Mr. Hanson was

presently indigent. RP 314. The trial court asked Mr. Hanson whether he was disabled or there was some reason he could not work? Id. Hanson replied “no.” Id. The court then found that the defendant was presently indigent with some ability to pay, and imposed only the mandatory legal financial obligations (which have nothing to do with a defendant’s ability to pay). RP 314, CP 112. The court did not impose a single discretionary LFO. CP 114-15.

## **ARGUMENT**

### **I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING EITHER OF THE TWO CONTINUANCES IN THIS CASE.**

Hanson argues that his right to a speedy trial was violated. That is, he argues that the trial court abused its discretion in granting both of his continuance requests. By abusing its discretion in granting his continuance requests, the trial court improperly stopped the speedy trial clock and invoked an excluded period. Thus, he argues, his trial should not be regarded as having begun on the day 49 of the 60 day time for trial period. Rather, this court should hold that his trial actually began on day 130 of the 60 day time for trial period. Hanson’s contention lacks merit.

Under CrR 3.3 (b) (1) (i), a defendant held in custody pending trial must be brought to trial within 60 days of arraignment. The delay of a trial due to a continuance is excluded from this calculation CrR 3.3 (e) (3).

When the question before the court is the correct application of CrR 3.3, the appellate court reviews the trial court's application of the rule de novo. *State v. Tolles*, 174 Wn.App. 819, 823, 301 P.3d 60 (2013). A trial court's decision to grant a motion to continue, however, is reviewed for abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court abuses its discretion only where it bases its decision on untenable grounds or reasons. *State v. Williams*, 104 Wn.App. 516, 521, 17 P.3d 648 (2001).

Here, because the continuance motions were made by defense counsel, not the State, Hanson has waived his right to challenge the timeliness of his trial under CrR 3.3 (f) (2). *State v. Ollivier*, 178 Wn.2d 813, 824, 312 P.3d 1 (2013), *cert. denied* \_\_\_ U.S. \_\_\_, 135 S.Ct. 72 (2014). It is well settled that a defense attorney can seek a continuance in spite of the contrary wishes of his client if the attorney needs additional time to prepare a case. *State v. Campbell*, 103 Wn.2d 1, 14–15, 691 P.2d 929 (1984). “[U]nder CrR 3.3, counsel has authority to make binding decisions to seek continuances.” *Ollivier* at 824. Even if Hanson had not waived his

right to bring this assignment of error, it would still fail because the trial court did not abuse its discretion.

The trial court noted that this case file was as thick as “a divorce case.” RP 8. Defense counsel noted the seriousness of the charge, and said he needed more time to prepare so that he could be effective in his representation. RP 8-9. It is axiomatic that in a case involving an allegation of substantial bodily injury, the degree and nature of the injury (as evidenced by the medical records) is a critical component of the case. The defendant agreed that the medical evidence is important, but seemed not to care whether his attorney was ready for trial or not. RP 11-12. The court replied “wow.” RP 12. It could be suggested that the defendant was indifferent to his fate, and it could also be suggested that the defendant was being savvy and trying to inject error into the record. In any case, the trial court certainly did not abuse its considerable discretion in granting a continuance, on a *first trial setting*, when faced with a defense attorney who stated that he could not be effective if forced to go to trial on the scheduled trial date.

With respect to the second continuance, the trial court also did not abuse its discretion. The parties came into information on the Thursday before the trial set for the following Monday that was potentially relevant to the case. Because Hanson intended to claim self-defense, the existence

of two, or possibly three, eyewitnesses could have been critical to Hanson's defense. Defense counsel candidly acknowledged that these witnesses could also be potentially harmful to Hanson, but that simply would not justify not investigating the matter. RP 30. As the prosecutor noted in this hearing, Hanson was charged with crime defined as a most serious offense. RP 32-33. Again, because the effectiveness of counsel is a paramount concern, and there is absolutely no evidence that defense counsel was dilatory in any way, Hanson has not shown an abuse of discretion when the trial court granted *his* motion to continue.

Hanson's reliance on *State v. Saunders*, 153 Wn.App. 209, 220 P.3d 1238 (2009), is misplaced. In *Saunders*, the trial court granted at least three continuances without good reason. *Saunders* at 213-15, 221. The defendant himself did not agree to any of the continuances and did not agree to waive his right to a speedy trial, although his attorney agreed to the first continuance. *Id.* The final two continuances were based on the State's motion, and they clearly should not have been granted. They were granted in the face of the State's total lack of preparation to try a very simple case. *Saunders* at 218-19, 221. This case is nothing like *Saunders*.

The defendant waived his right to complain about the two continuances granted by the trial court because he requested them. CrR 3.3 (f) (2); *Ollivier* at 824. Further, the trial court did not abuse its discretion

in granting either of the defendant's two continuance requests. Finally, the defendant has not claimed that his constitutional right to a speedy trial was violated, only his rule-based right. The State, therefore, has not addressed this separate method of claiming a violation of the right to a speedy trial. Hanson's claim fails.

**II. HANSON WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL**

Hanson claims that he received ineffective assistance of counsel when his attorney made the two motions to continue at issue in section I. But he bases this claim on events that occurred *after* the motions to continue. Specifically, he complains that because defense counsel engaged in "extremely limited cross examination" of the radiologist who testified about the results of the victim's CT scan, he obviously didn't need a continuance to review the medical records in this case. Second, he claims that because the mysterious third person (who was seen by witnesses Chris Zwach and Christine Clark smoking a cigarette and watching the assault) was never found, the second continuance sought by defense counsel was also unreasonable. See Brief of Appellant at 16. This claim is meritless.

As noted above, it is well-settled that defense counsel may seek a continuance if he needs to do so to provide effective representation. It is a

classic example of a tactical decision. That the further investigation or preparation may not bear fruit is immaterial.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

*Strickland* at 689.

“Criminal defendants are not guaranteed ‘successful assistance of counsel.’” *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made

by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a “strategy ultimately proved unsuccessful is immaterial.” *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *Grier* at 43.

Current counsel’s use of trial counsel’s supposed poor performance at trial (despite his aggressive cross examination of the victim) is precisely the type of hindsight criticism the authorities above preclude. We, in fact, cannot actually say from this record whether trial defense counsel located this third person or not. It could very well be that trial counsel did, in fact, find this witness, found him to be unfavorable, and elected not to place him on the defendant’s witness list. Defense counsel would have borne no duty, in that case, to alert the State that he’d found the witness. Defendants have no independent duty to investigate crime, and have no duty to disclose witnesses that they do not intend to call as witnesses.

Hanson has not shown that he was denied effective assistance of counsel when his attorney sought two continuances over his objection.

**III. THE TRIAL COURT DID NOT ERR IN IMPOSING MANDATORY LEGAL FINANCIAL OBLIGATIONS. THE COURT CONSIDERED THE DEFENDANT'S ABILITY TO PAY IN THE FUTURE, DESPITE THE FACT THAT ABILITY TO PAY IS NOT RELEVANT IN THE CASE OF MANDATORY LEGAL FINANCIAL OBLIGATIONS.**

At sentencing, defense counsel asked the trial to waive “some of the fees” because the defendant had not worked for several years. RP 314. The trial court asked the defendant whether he was disabled or there was some other reason that he couldn't work. *Id.* The defendant replied “no.” *Id.* This is sufficient to find that the defendant may be able, in the future to pay legal financial obligations, which is precisely what the trial court found. CP 112. The trial court's finding of a defendant's ability to pay, either presently or in the future, is reviewed under the clearly erroneous standard. *State v. Lundy*, 176 Wn.App. 96, 105, 308 P.3d 755, 758 (2013). A finding of fact is clearly erroneous when a review of all of the evidence leads to a firm conclusion that a mistake has been made, even where there is some evidence in the record to support the finding. *Id.* “The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one.” *Lundy* at 106. Here, the trial court's finding of some ability to pay legal financial obligations in the future was not clearly erroneous where the

defendant confirmed that he is not unable to work, and he confirmed (and the trial testimony showed) that he suffers no physical disability.

But it doesn't actually matter what the court found or didn't find with respect to Hanson's ability to pay. The court did not impose any discretionary costs. Rather, the court imposed only *mandatory* legal financial obligations. "This is an important distinction because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account." *Lundy*, at 102, citing *State v. Kuster*, 175 Wn.App. 420, 424, 306 P.3d 1022 (2013).

The legal financial obligations imposed here were restitution (in an amount to be determined), the \$200 criminal filing fee, the \$500 victim assessment, and the \$100 DNA fee. CP 112. Each of these items is a mandatory legal financial obligation. *Lundy* at 102. The trial court is not required to inquire into a defendant's current or future ability to pay these mandatory obligations at the time they are ordered. *Id.* Rather, to comply with constitutional concerns, a defendant may never be *imprisoned* for failing to pay legal financial obligations unless the failure to pay is willful.

*State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). An inability to pay due to indigence would not constitute a willful violation. *Id.*

As Hanson's claim is based entirely on legal financial obligations that are mandatory, it fails.

### CONCLUSION

Hanson's judgment and sentence should be affirmed in all respects.

DATED this 18<sup>th</sup> day of September, 2015.

Respectfully submitted:

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September 18, 2015 - 2:11 PM

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