

No. 49968-1-II

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

STATE OF WASHINGTON,

Appellant,

v.

ALONDRA STEPHANIE TRUJILLO,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen M. Warning

BRIEF OF RESPONDENT

VALERIE MARUSHIGE
Attorney for Respondent

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

TABLE OF CONTENTS

	Page
A. <u>ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
THIS COURT SHOULD DECLINE TO CONSIDER THE APPELLANT’S ARGUMENT BUT IF THIS COURT CONSIDERS THE ARGUMENT IT SHOULD AFFIRM THE TRIAL COURT BECAUSE THE TRIAL COURT PROPERLY FOLLOWED THE LAW IN DISMISSING THE CASE.	2
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<i>Erdmann v. Henderson</i> , 50 Wn.2d 296, 311 P.2d 423 (1957)	2
<i>Jones v. National Bank of Commerce of Seattle</i> , 66 Wn.2d 341, 402 P.2d 673 (1965)	2
<i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wn. App. 706, 846 P.2d 550 (1993)	4
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989)	3
<i>Rutter v. Rutter's Estate</i> , 59 Wn.2d 781, 370 P.2d 862 (1962)	2
<i>State v. Balch</i> , 144 Wn. App. 55, 60, 55 P.3d 1199 (2002)	3
<i>State v. Broadway</i> , 133 Wn.2d 118, 131, 942 P.2d 363 (1997)	3
<i>State v. Dennison</i> , 115 Wn.2d 609, 801 P.2d 193 (1990)	3
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997)	7
<i>State v. Slanaker</i> , 59 Wn. App. 161, 791 P.2d 575, <i>review denied</i> , 115 Wn.2d 1031, 803 P.2d 324 (1990)	4

TABLE OF AUTHORITIES

	Page
<i>State v. Smith</i> , 13 Wn. App. 859, 539 P.2d 101, <i>review denied</i> , 86 Wn.2d 1002 (1975)	5, 6
<i>State v. Warner</i> , 125 Wn.2d 876, 889 P.2d 479 (1995)	7

STATUTES

RCW 4.12.040	3, 7
RCW 4.12.050	3

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Is appellant's assignment of error waived because it is not supported by argument?

2. Should this Court decline to consider appellant's argument that because the trial court dismissed the case based on an erroneous view of the law it abused its discretion where the argument is unsupported by an assignment of error?

3. If this Court considers appellant's argument, should this Court affirm the trial court because it did not abuse its discretion where it properly followed the law in dismissing the case?

B. STATEMENT OF THE CASE

On November 9, 2015, the Prosecuting Attorney of Cowlitz County, State of Washington, charged respondent, Alondra Stephanie Trujillo, with two counts of violation of the uniform controlled substances act and one count of theft in the third degree. CP 5. The same day, the Prosecuting Attorney filed a motion and affidavit of prejudice for removal of the Honorable Gary Bashor from the case. CP 7. On February 25, 2016, Trujillo signed an agreement, confession, and stipulation for entry into drug court. CP 20, 21. She appeared before Judge Bashor and he welcomed her to drug court. 02/25/16 RP 2-5. Trujillo subsequently appeared before Judge Bashor for numerous hearings. 03/03/16 RP 6-8; 03/24/16 RP 9;

04/07/16 RP 10; 04/14/16 RP 11-13; 04/21/16 RP 14; 04/28/16 RP 15;
05/50/16 RP 16-17; 05/26/16 RP 18-20; 06/16/16 RP 22-24; 06/30/16 RP
25; 07/28/16 RP 26.

On December 14, 2016, the Honorable Stephen Warning entered Findings of Fact, Conclusions of Law, and an Order dismissing the case with prejudice. The court concluded that “[t]he only remedy which protects the rights of the defendant is a dismissal.” CP 38. Although the Cowlitz County appearance docket notes a dismissal hearing on December 13, 2016, before Judge Warning, the record does not contain a verbatim report of proceedings for that date.

C. ARGUMENT

THIS COURT SHOULD DECLINE TO CONSIDER THE APPELLANT’S ARGUMENT BUT IF THIS COURT CONSIDERS THE ARGUMENT IT SHOULD AFFIRM THE TRIAL COURT BECAUSE THE TRIAL COURT PROPERLY FOLLOWED THE LAW IN DISMISSING THE CASE.

An assignment of error not argued in the brief is waived. *Erdmann v. Henderson*, 50 Wn.2d 296, 298, 311 P.2d 423 (1957). An appellate court is not at liberty to redraft the assignment of error in a form it believes the appellant may have intended. “The burden of drafting a proper assignment of error rests upon the appellant.” *Jones v. National Bank of Commerce of Seattle*, 66 Wn.2d 341, 346, 402 P.2d 673 (1965). Argument unsupported

by an assignment of error does not present an issue for review. *Rutter v. Rutter's Estate*, 59 Wn.2d 781, 787-88, 370 P.2d 862 (1962).

The appellant's assignment of error states that "[the trial court erred in entering sua sponte an order of dismissal," but appellant does not argue that the court entered the dismissal order "sua sponte." Instead, appellant argues that because the court based its order of dismissal on an erroneous view of the law, the court abused its discretion. Consequently, this Court should decline to consider appellant's argument. If this Court considers appellant's argument, this Court should affirm the trial court because the court properly followed the law in dismissing the case.

Under RCW 4.12.050, any attorney appearing in an action or proceeding in a superior court may file an affidavit of prejudice to change a judge and pursuant to RCW 4.12.040, that judge shall not sit to hear or try the action or proceeding. The Washington Supreme Court determined that an affidavit of prejudice "seasonably filed presents no question of fact or discretion. Prejudice is deemed to be established by the affidavit and the judge to whom it is directed is divested of authority to proceed further into the merits of the action." *State v. Dennison*, 115 Wn.2d 609, 920, 801 P.2d 193 (1990)(citing *LaMon v. Butler*, 112 Wn.2d 193, 201-02, 770 P.2d 1027 (1989).

Unchallenged findings of fact are verities on appeal. *State v. Balch*, 144 Wn. App. 55, 60, 55 P.3d 1199 (2002)(citing *State v. Broadway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997)). Unchallenged conclusions of law become the law of the case and will not be disturbed on appeal. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993)(citing *State v. Slanaker*, 59 Wn. App. 161, 791 P.2d 575, review denied, 115 Wn.2d 1031, 803 P.2d 324 (1990)). Appellant has not challenged any of the trial court's findings of fact or conclusions of law. Brief of Appellant at 1.

The trial court found that on November 9, 2015, the Prosecuting Attorney filed an affidavit of prejudice against Judge Bashor, the presiding judge in the Cowlitz County Drug Court. On February 25, 2015, the defendant entered into the Drug Court program by waiving a number of rights and admitting to facts sufficient to convict her of the charges. The defendant has participated in the program and has been generally successful. Neither party brought the affidavit of prejudice to Judge Bashor's attention. In October 2016, Judge Bashor became aware of the existence of the affidavit of prejudice and has not participated in defendant's case since that time. The Cowlitz County Superior Court does not have the resources to create or conduct a Drug Court program with another judge. CP 38.

The trial court concluded that pursuant to RCW 4.12.040, because Judge Bashor is now aware of the affidavit of prejudice, he may not hear this matter. The Prosecuting Attorney is bound by its affidavit sworn under oath and because of the affidavit, the defendant may not continue to participate in the Drug Court program. The defendant waived her right to a speedy trial to participate in the program. Even a resolution of this matter which precluded any use of her waivers and admissions would still prejudice her right to a speedy trial. The only remedy which protects the defendant's rights is dismissal. This works no harm against the State, as dismissal would be the outcome of a successful completion of the program by the defendant. CP 38.

The trial court's unchallenged findings of fact are verities on appeal and its unchallenged conclusions of law are the law of the case. Consequently, the court's findings and conclusions must not be disturbed on appeal.

Moreover, the appellant's reliance on *State v. Smith*, 13 Wn. App. 859, 539 P.2d 101, *review denied*, 86 Wn.2d 1002 (1975), is misguided. Defendant Smith timely filed an affidavit of prejudice against the trial judge. Therefore, a visiting judge heard the case and granted Smith a deferred sentence and placed him on probation. Smith was later arrested for probation violations. The trial judge held a probation revocation

hearing, revoked Smith's probation, and sentenced him to 15 years. On appeal, Smith argued that the mere existence of an affidavit of prejudice in the court file should have prevented the trial judge from presiding at the revocation hearing. *Smith*, 13 Wn. App at 860-61.

This Court recognized that “[n]ormally, an affidavit of prejudice has the effect of divesting a judge of all authority to proceed further into the merits of the action.” However, this Court held that “defendant’s failure to bring the affidavit of prejudice to the attention of the trial judge at any time prior to or during the revocation hearing constitutes waiver of any rights created by that affidavit.” *Smith*, 13 Wn. App. at 861.

Unlike in *Smith*, where Smith failed to bring his affidavit of prejudice to the trial judge’s attention when the judge presided at the revocation hearing and imposed a sentence of 15 years, Judge Bashor somehow became aware of the affidavit of prejudice and declined to participate any further in Trujillo’s ongoing case, as required under RCW 4.12.404. Citing *State v. Smith*, Judge Warning concluded all decisions by Judge Bashor prior to learning of the affidavit were proper and binding on the parties, but he cannot continue to hear the case because he is now aware of the affidavit of prejudice. Judge Warning found that due to a lack of resources, the court cannot create or conduct a Drug Court program without another judge, and consequently Trujillo, who had been generally

succeeding in the Drug Court program, cannot continue to participate in the program. CP 38.

Contrary to appellant's argument, Judge Warning did not rule that the prosecutor's "affidavit of prejudice had not and could not be waived." Brief of Respondent at 8. Judge Warning observed that "[i]t has been suggested that the prosecutor may selectively waive their Affidavit of Prejudice, precluding Judge Bashor from hearing some portions of the case but allowing him to hear others." He reasoned that such a waiver, which is not contemplated by the statute, "would give a party an inappropriate tactical advantage if they were permitted to exercise such an affidavit sporadically." He therefore concluded that the Prosecuting Attorney filed an affidavit, sworn under oath, and is bound by that affirmation. CP 38.

The trial court's power to dismiss is reviewable only for manifest abuse of discretion. ¹ *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)(citing *State v. Warner*, 125 Wn.2d 876, 882, 889 P.2d 479 (1995)). The record substantiates that Judge Warning did not dismiss the case based on an erroneous view of the law. He properly followed the law in

¹ The appellant appears to assert that Judge Warning dismissed the case under CrR 8.3(b), but it is unclear from the record how this matter came before Judge Warning. There is nothing in the record that substantiates that the dismissal was the result of a motion of the court. Consequently, the cases cited by appellant have no application here. Brief of Appellant 5-6.

dismissing Trujillo's case where Judge Bashor could not proceed in the case pursuant to RCW 4.12.404 because "[p]rejudice is deemed to be established" by the affidavit filed by the prosecutor and he was therefore "divested of authority to proceed further." *Dennison*, 115 Wn.2d at 920.

D. CONCLUSION

For the reasons stated, this Court should affirm the trial court where it did not abuse its discretion in dismissing the case with prejudice, the only remedy which protects Trujillo's rights.

DATED this 23rd day of October, 2017.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Respondent, Alondra Trujillo

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Cowlitz County Prosecutor's Office at appeals@co.cowlitz.wa.us and by U.S. mail to Alondra Stephanie Trujillo, 920 South First Avenue, Kelso, Washington 98626,

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

DATED this 23rd day of October, 2017.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

October 23, 2017 - 11:49 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49968-1
Appellate Court Case Title: State of Washington, Appellant v. Blake Croy and Alondra Trujillo, Respondents
Superior Court Case Number: 15-1-00292-6

The following documents have been uploaded:

- 3-499681_Briefs_20171023114602D2942470_8014.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Trujillo Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- Tom.ladouceur@co.cowlitz.wa.us
- appeals@co.cowlitz.wa.us
- jfreem2@co.pierce.wa.us

Comments:

Sender Name: Valerie Marushige - Email: ddvburns@aol.com

Address:
23619 55TH PL S
KENT, WA, 98032-3307
Phone: 253-520-2637

Note: The Filing Id is 20171023114602D2942470