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NO. 50557-6

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

LLOYD E. SHAFFER,

Appellant.

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Appeal from Pierce County Superior Court  
Honorable Bryan Chushcoff  
No. 16-1-03809-5

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APPELLANT'S BRIEF

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## **I. INTRODUCTION**

Defendant appeals the sentencing court's refusal to grant an agreed 30-day continuance of his sentencing hearing for the crime of Witness Tampering. Defendant pled guilty to contacting his fiancé during a pending assault charge against her; the assault was dismissed with this plea. Both the prosecution and defense counsel agreed to the continuance, which had only been granted once before. Defense counsel needed an additional 30 days to summon necessary witnesses to take advantage of the Plea Agreement's promise that the defense could argue for exceptional downward sentence, and to put together a sentencing brief. Defense counsel represented several mitigating factors from the non-exclusive list in RCW 9.94A.535(1) especially the need for witnesses to testify that Defendant and his fiancé had recently left decades of involvement with the Aryan Brotherhood, which would explain the nature of their contact with each other. The trial court denied the motion and proceeded with sentencing, violating Defendant's right to an evidentiary hearing under the Real Facts Doctrine and improperly forcing defense counsel's oral argument to be the only "evidence" supporting Defendant. This matter should be remanded for re-sentencing.

## **II. ASSIGNMENTS OF ERROR**

The trial court violated Defendant's due process rights and the Real Facts Doctrine when it refused to continue the sentencing hearing without a valid basis.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Whether the Real Facts Doctrine is violated when a defendant contests material facts at sentencing and is deprived his right to an evidentiary hearing.

Whether the trial court abused its discretion and criminal procedure statute by refusing to continue a sentencing hearing.

### **IV. STATEMENT OF CASE**

Defendant pled guilty to witness tampering on March 21, 2017. The Defendant contacted his fiancé while he was incarcerated for an Assault II-Domestic Violence charge against her. Police were called on the night of September 24, 2016, when Defendant was seen in an altercation with his fiancé on their motorcycle. Witnesses observed that she was drunk, and that Defendant choked her. Defendant maintained he merely put his hands on her shoulders because she was belligerent.

The charge was dismissed by plea agreement to Witness Tampering alone. The plea agreement stated Defendant could argue for an exceptional downward sentence. Defendant had a significant criminal history including 13 priors because of his and his fiancé's long involvement with the Aryan Brotherhood in California. They moved to Washington last year to escape the gang life and make it on their own. They became Christians.

The sentencing issue in this matter for the first time on March 21, 2017 to April 28, 2017. Five weeks later, defense counsel moved to continue only 30 more days because he was having difficulty obtaining an

expert witness who could testify as to the nature of Defendant's involvement in gang life, among other mitigating factors.

No witnesses were present for either the prosecution or the defense, including the victim. Only by luck was the jail chaplain there observing, and said less than five sentences in Defendant's support. VRP 38.

The trial court was not persuaded and pressed defense counsel to articulate what the mitigating factors would be. Understandably, defense counsel was unprepared to formulate all of the developing mitigating factors from an investigation and testimony that had yet to be brought before him or the court. The trial court considered the costs of holding the defendant another 30 days in jail:

THE COURT: If that's what it is really going to be and that's not reasonable, then we shouldn't be doing it in the first place. We are talking about \$90 to \$100 a day for the jail costs to have him here as it is. The jail gets full, and we let other people out. I'm not saying that just because we have \$100 a day or thereabouts for Mr. Shaffer staying here that, therefore, we should hurry justice. We have already granted a five-week continuance for the sentencing hearing, and here we are. What you're telling me is, maybe in 30 days there will be something and maybe there won't be.

It may sound like I'm completely unreasonable here. I think it has been a reasonable time already. As I say, I'm trying to see how does this potential mitigating factor fit into the sentencing scheme? If you are going to say that the victim here -- or who was the victim here because, as I understand it, Mr. Shaffer is no longer charged with assault --

*See VRP 9-10.*

The fact that the continuance was agreed did not persuade the court:

THE COURT: You may have agreed, but I didn't agree.

The court believed that the defense should have known what its argument for sentencing was:

So you are asking me -- you are saying that I'm being unfair to you to ask you to flush out what your argument is going to be. Well, it seems to me that at this point in time, you should have some idea as to where this is going or it is all just guessing, hoping, wishing that maybe something will develop. I'm not going to indulge that. That is why I'm trying to find out how this actually fits into something.

*See* VRP 16.

Defense counsel attempted his best to give an *ad hoc* summary of where he thought an investigation of defendant would lead:

MR. STEINMETZ: I think it does go to the reasons. I think it goes to the ones involving the victim. It think it goes to the ones involving directly to the defendant's conduct. His conduct was mitigated somewhat by his need to have contact of Ms. Ward. Part of that is, the second piece of it, after you understand where he is coming from, having gotten out of the gang life and voluntarily left that, that his connection to society basically is Ms. Ward, and they have an unusually close relationship. Both of them could articulate it, if Ms. Ward was here, the nature of that; therefore, unfortunately, there was contact between the two of them.

*See* VRP 21.

Defense counsel properly noted that if he had an opportunity to draft a memorandum, the court would not have to be in position of guessing what his sentencing argument would be:

I'm trying to remember from that list. Of course, if I had time to write out a sentencing memo to you, you would have it in a much more concise and articulated fashion.

*See* VRP 36.

## V. ARGUMENT

### A. LAW

#### 1. Continuances

RCW 10.46.080 - Continuances.

A continuance may be granted in any case on the ground of the absence of evidence on the motion of the defendant supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it; and also the name and place of residence of the witness or witnesses; and the substance of the evidence expected to be obtained, and if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually given on the trial or offered and overruled as improper the continuance shall not be granted.”

The Supreme Court addressed continuances in *State v. Downing*,

151 Wash.2d 265, 273; 87 P.3d 1169 (2004):

In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Miles*, 77 Wash.2d 593, 597, 464 P.2d 723 (1970). Since 1891, this court has reviewed trial court decisions to grant or deny motions for continuances under an abuse of discretion standard. *State v. Hurd*, 127 Wash.2d 592, 594, 902 P.2d 651 (1995); *Skagit Ry. & Lumber Co. v. Cole*, 2 Wash. 57, 62, 65, 25 P. 1077 (1891).

We will not disturb the trial court's decision unless the appellant or petitioner makes “a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wash.2d 344, 347 P.2d 1062 (1959)).

In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *State v. Eller*, 84 Wash.2d 90, 95; 524 P.2d 242(1974); RCW 10.46.080; CrR 3.3(f).

## 2. Real Facts Doctrine:

RCW 9.94A.530(2) sets forth the “Real Facts Doctrine,” that a sentencing court:

...may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. **Where the defendant disputes material facts,** the court must either not consider the fact or **grant an evidentiary hearing on the point.** [emphasis added.]

The purpose of this limitation is “to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information.” *State v. Herzog*, 112 Wash.2d 419, 431–32, 771 P.2d 739 (1989); Wash. Const. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”) and to prevent *ex parte* contact with the judge, *sua sponte* investigation and research of a judge, and sentencing based on speculative facts. *State v. Grayson*, 154 Wash.2d 333, 340 111 P.3d 1183, 1187 (2005).

Specifically, a trial court must not impose a harsher sentence on a defendant based on presentations that the facts could constitute a more serious crime: [u]nder the real facts doctrine, a trial court may not impose a sentence based on the elements of a more serious crime that the State did not charge or prove. See *State v. Wakefield*, 130 Wash.2d 464, 475–76, 925 P.2d 183 (1996) citing RCW 9.94A.370(2); *State v. Barnes*, 117 Wash.2d 701, 708, 818 P.2d 1088 (1991).

## **B. ANALYSIS**

Here, the trial court abused its discretion when it refused to accept an agreed motion to continue for only 30 days.

### **1. Continuances**

While it is in the trial court's discretion to deny a continuance, this court abused its discretion when (1) it was clearly evident that material evidence and testimony was forthcoming from the defense, (2) the court appeared to base its decision on an improper consideration of jail costs, (3) the continuance was agreed and did not prejudice either party, and (4) the Defendant wanted to address material facts, which requires an evidentiary hearing (*see infra*).

It was manifestly unreasonable for the court to believe that 30 days was an unacceptable amount of time to wait for a defendant who facing years in prison, *especially* when the opposing party agreed to it. A defendant who has plead guilty *especially* deserves an opportunity to be fully heard at sentencing, including the right not have defense counsel forced to give an *ad hoc* representation about issues of material fact. Defense counsel was clearly not prepared to give an accurate summary of the defendant and his fiancé's life with the Aryan Brotherhood, and the impact that had on Defendant's motivations behind contacting her.

The list of mitigating factors for a downward deviation is explicitly a non-exclusive list. RCW 9.94A.535 (1). This represents the legislature's intent to allow defendant's an opportunity to, at the very least, give a presentation of a factor that at least *might* be mitigating. Implicit in that

opportunity is the right to prepare a reasonably complete sentencing brief. Here, defense counsel wanted to explain how the present charge was not just yet another subsequent conviction in Defendant's long criminal history. Something radical had changed in Defendant's life – he left the Aryan Brotherhood and became a Christian in a new state. While all the former charges over a period of twenty years were mostly thefts while with the gang, the present charge was for contacting his fiancé who helped him escape that life. This was not just another theft, it was a unique offense for Defendant; one brought on by his need for support in his new life.

Defense counsel did not even have an opportunity to prepare a sentencing memorandum, and instead had to rely on his own recollection to support Defendant's cause. This violated Defendant's right to an evidentiary hearing, set forth as follows:

**2. Real Facts Doctrine**

The defense contested material facts at this hearing and the court was therefore statutorily obligated to grant an evidentiary hearing on the points.

The nature of the underlying assault, the motive for the contact underlying the witness tampering, the nature and reason for Defendant's prior criminal history, etc., were all material facts that the defense was contesting. The State was permitted to give argument as to these issues without any opportunity for the defense to rebut or challenge them in an entitled evidentiary hearing.

The sentencing judge very well could have “relied on false information” as warned against in *Herzog*, and was clearly undertaking a *sua sponte* investigation as prohibited by *Grayson*. The sentencing court was relying almost entirely on the oral argument of counsel, which is not testimony. Both counsel understandably probably did not foresee that their agreed continuance for a mere 30 days would be denied, and both counsel were denied an opportunity to provide witnesses to the court so the sentence could be based on real facts.

As is evident in the court’s questions and final oral decision, the court clearly “considered the facts” represented by both counsel without an evidentiary hearing, as prohibited by RCW 9.94A.530(2) . The court only had some of the real facts, but refused to give defense counsel the opportunity to present the rest of them.

## VI. CONCLUSION

This matter should be remanded for re-sentencing.

Respectfully submitted this 22nd day of November, 2017.

*/s/ Edward Penoyar*  
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CERTIFICATE OF SERVICE

I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

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Lloyd E. Shaffer, DOC #398957  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

DATED this 22nd day of November, 2017, South Bend, Washington.

/s/ Tamron Clevenger  
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