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Court of Appeals
Division II
State of Washington
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NO. 50557-6

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

STATE OF WASHINGTON, RESPONDENT

v.

LLOYD E. SHAFFER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 16-1-03809-5

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly exercised its discretion in denying the defendant's second motion to continue sentencing when the defendant had already been granted a four week continuance?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 26, 2016, the State charged Lloyd Shaffer, hereinafter referred to as "the defendant" with one count of domestic violence assault in the second degree. CP 3. On January 26, 2017, the State filed a third amended information adding one count of tampering with a witness (count II) and two counts of violation of a no contact order (counts III and IV). CP 25-27.

On March 21, 2017, the defendant pleaded guilty to one count of tampering with a witness (count II) and two counts of violation of a no contact order (counts III and IV). CP 32-41, 1 RP 12-13.¹ On April 28, 2017, the court sentenced the defendant to the low end of the standard

¹ The record contains two volumes of report of proceedings reflecting two separate dates. They will be referred to as the following:

1 RP for 03-21-17

2 RP for 04-28-17

range on count II, which is 51 months in custody, to be served concurrently to 364 days in custody on counts III and IV, consecutive to count II and concurrent to each other for a total of 52 months in custody. RP 48-49. CP 55-73.

Defendant timely filed a Notice of Appeal. CP 74.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY THE DEFENDANT'S SECOND MOTION TO CONTINUE SENTENCING AS THE DEFENDANT HAD ALREADY BEEN GRANTED A FOUR WEEK CONTINUANCE.

A sentence within the standard sentence range shall not be appealed. RCW 9.94A.585. This concept arises from the idea that so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as to the length of the sentence. *State v. Williams*, 149 Wn.2d 143, 146-147, 65 P.3d 1214 (2003). However, a party can still challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. *State v. Mail*, 121 Wn.2d 707, 712, 854, P.2d 1042 (1993). Hence, appellate review is still available for the correction of legal errors or abuses of discretion in what sentence applies.

State v. Williams, 149 Wn.2d at 147. In this case, the defendant argues the court abused its discretion in denying a continuance so the defendant could prepare a memorandum in support of an exceptional downward sentence. *See* Brief of Appellant at 9.

In a criminal case, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). In exercising discretion to grant or deny a continuance, the court may consider many factors, including surprise, diligence, redundancy, due process, materiality, and the maintenance of orderly procedure. *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974). An abuse of discretion is found when a trial judge's decision is based on "manifestly unreasonable or untenable grounds, or for untenable reasons." *State v. Gentry*, 183 Wn.2d 749, 761, 356 P.3d 714 (2015) (quoting *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999)). The defendant must also establish that he was prejudiced by the trial court's denial of a continuance. *State v. Herzog*, 69 Wn. App 521, 524, 849 P.2d 1235 (1993). However, in determining a proper sentence, the trial court is vested with broad discretion and can make whatever investigation it deems necessary or desirable. *State v. Russell*, 31 Wn. App. 646, 648, 644 P.2d 704 (1982).

The facts here are similar to *State v. Rahier*, 37 Wn. App. 571, 576, 681 P.2d 1299 (1984). In *Rahier*, during sentencing the defendant, his attorney, and the State all spoke at length. On appeal the defendant argued he was denied his right to allocution because he was denied a continuance. *Id.* The defendant there wanted a continuance in order to give himself more time to research penalties and research prejudice of the trial judge as grounds for a new trial. *Id.* However, he did not challenge that the sentence he received was contrary to law or the sentencing court was not fully informed. *Id.* This Court rejected the defendant's argument. *Id.*

Here, the trial court did not abuse its discretion in denying defendant's motion for a second continuance of his sentencing hearing. On March 21st, 2017, the trial court granted defendant's motion to continue sentencing 38 days to April 28th 2017, in order to put together a mitigating sentencing memorandum. 1RP 13-14. Nearly five weeks later on April 21st, 2017, defense counsel requested an additional 30 day continuance because they were unable to obtain the information they wanted to present in his sentencing memorandum. 2RP 9. The court discussed with defense counsel at length the reasons for requesting another continuance including, but not limited to, what information they were hoping to present, why they were unable to obtain that information, how much additional time he needed as well as how the information they were hoping to gather would

be pertinent to a sentencing memorandum. 2RP 8-22. Defense counsel stated that he wanted to hire an investigator to obtain information about the defendant's former gang membership as a white supremacist to present a mitigating factor. 2RP 15. When asked by the court whether that gang affiliation had anything to do with the convictions for which he was being sentenced, defense counsel acknowledged that they did not. 2RP 15.

THE COURT: It has nothing to do with the incident itself?

MR. STEINMETZ: No.

...

THE COURT: Nonetheless, I'm not hearing anything that would make a difference here. If you are asking me that you want an investigator to document Mr. Shaffer's social or criminal – or both – history so that we can show that he has had a difficult time breaking away from the gang, I don't see where all of that ties into this because I don't know that anything about the assault or the witness tampering or that violation of the court's order to not have contact with the victim while this thing is pending has anything to do with gang activity.

MR. STEINMETZ: It doesn't.

THE COURT: So what is this going to tell me?

MR. STEINMETZ: It is the fact that he has moved away from that gang that is creating some of the difficulties that he is facing in his life that led to this incident.

2RP 14-15.

The court did not find that to be a compelling reason to grant a second continuance and denied the motion to continue stating the following:

Why I'm asking you these things is – in some sense, it is like an offer of proof. I'm trying to ascertain what exactly it is that you are trying to accomplish here. If what you are trying to accomplish isn't going to have any impact because it doesn't fit into the mitigating circumstances that the court is to consider under RCW 9.94A.535, then it is just that much more reason not to continue this hearing.

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 to 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.

If it fits into something that I can see that makes some kind of sense to me, well, then I'm a lot more likely to grant the continuance. I'm not sensing that... I have asked you what your argument is. I'm not trying to prejudge you. I'm trying to assess for myself what is a – whether a continuance should be granted. If so, for how long? I'm not convinced that any continuance should be granted at all. My order is and my ruling is, I'm not continuing this hearing, and we're going to proceed right now.

2RP 16-17, 24

The defendant cannot show any prejudice resulting from the denial of his motion to continue. The extensive record from sentencing regarding

defendant's motion to continue indicates that defense counsel was prepared for sentencing without additional information from a private investigator, so a continuance was not necessary. It clear from the record that this information would have not had any impact on sentencing. The court took the information regarding the gang information and explained how it did not fit into any of the mitigating factors to consider for an exceptional downward sentence. 2RP 18-20. Clearly, a continuance was not necessary where the court was not convinced the defendant's former gang affiliation which had nothing to do with the convictions were a mitigating factor. As such, the court acted well within its discretion to deny the defendant's motion for a continuance.

Defendant claims that trial court should have granted a continuance based on the "real facts doctrine." Brief of Appellant at 6. The "real facts" doctrine is embodied in the Sentencing Reform Act of 1981, and requires a sentencing court to "consider only the actual crime of which the defendant has been convicted, his or her criminal history, and the circumstances surrounding the crime." *State v. Cannon*, 130 Wn.2d 313, 331, 922 P.2d 1293 (1996); citing *State v. Houf*, 120 Wn.2d 327, 333, 841 P.2d 42 (1992). Specifically, defendant claims the information regarding his former gang affiliation was a contested material fact at sentencing so "the court was therefore statutorily obligated to grant an evidentiary

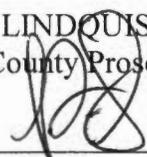
hearing on the points”. Brief of Appellant at 8. This claim fails as there is nothing in the record to suggest that the court considered matters outside the record during sentencing. The information regarding the defendant’s former gang affiliation was neither contested nor material to the sentencing hearing. The State did not contest the information and defense counsel even acknowledged that it had nothing to do with the conviction or crime itself. 2RP 15. As such, the defendant’s use of the real facts doctrine is inapposite and this Court should dismiss this claim.

D. CONCLUSION.

The trial court properly exercised its discretion to deny the defendant’s second motion to continue sentencing as the defendant had already been granted a four week continuance and the information he sought to introduce would not have impacted his sentence. As such, this Court should dismiss his claims and affirm his convictions.

DATED: April 16, 2018.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/16/18 

Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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