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

STATE OF WASHINGTON, Respondent

v.

OLEG VLADIMIROVIC FABYANCHUK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02285-3

BRIEF OF RESPONDENT

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IDENTITY OF RESPONDENT

The State of Washington, plaintiff in the trial court, is the respondent herein. Oleg Vladimirovic Fabyanchuk is the defendant in the trial court and petitioner herein. The Superior Court of Clark County is the trial court below.

RESPONSE TO ASSIGNMENT OF ERROR

- I. **The trial court abused its discretion in failing to grant Appellant's reasonable and necessary request for a continuance of the trial date.**

STATEMENT OF THE CASE

The State filed an Information charging Mr. Fabyanchuk with four counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree in violation of RCW 9.68A.070(1), one count of Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree in violation of RCW 9.68A.050(1)(a), and one count of Internet viewing of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree in violation of RCW 9.68A.075(1), (3). Supp. CP ____ (Information).

On November 1, 2017, Mr. David McDonald filed a notice of appearance as defense counsel for Mr. Fabyanchuk and the matter proceeded to arraignment the following day. CP 12. Mr. Fabyanchuk

entered a not guilty plea to all counts, and the matter was set for trial for January 29, 2018. Supp. CP _____. (Clerk's Minutes 11/2/17). The matter was set for trial initially, but continued multiple times at the request of both parties. In November 2018, defense counsel moved for a continuance. CP 1-5. The trial court granted the continuance and reset trial for April 22, 2019. CP 6, 11. The reason for this continuance was so that defense counsel could seek and obtain full advice on the immigration consequences of the charges Mr. Fabyanchuk is facing. CP 18-19. On November 5, 2018, Mr. Fabyanchuk's immigration file was requested from the U.S. government by immigration counsel. CP 16. Immigration counsel believes this immigration file contains necessary information to fully advise Mr. Fabyanchuk on the immigration consequences of a potential guilty plea. *Id.* The U.S. government shut down from December 22, 2018 to January 25, 2019. *Id.* As of April 2, 2019, immigration counsel for Mr. Fabyanchuk had not yet received the immigration file from the U.S. government and does not believe he can give full advice to Mr. Fabyanchuk. *Id.*

On April 2, 2019, defense counsel filed a motion to continue the trial date that was set for April 22, 2019, arguing that without the necessary information having been received from the U.S. government he was unable to fully advise Mr. Fabyanchuk on the immigration

consequences of his criminal case. CP 12-13. The trial court heard argument on the motion to continue on April 12, 2019; the motion was not objected to by the State. CP 28. The trial court denied Mr. Fabyanchuk's motion to continue and maintained the April 22, 2019 trial date, also setting a review date of April 18, 2019. CP 28. Mr. Fabyanchuk then filed an emergency motion for stay of proceedings in this Court on April 15, 2019, which was granted soon after its filing. *See* Emergency Motion for Stay of Proceedings. Mr. Fabyanchuk subsequently filed a motion for discretionary review of the trial court's denial of his motion to continue the trial date on April 29, 2019. This Court granted discretionary review.

ARGUMENT

Mr. Fabyanchuk argues the trial court erred in denying his motion to continue the trial date. The State agrees with Mr. Fabyanchuk that the trial court erred in denying his motion to continue the trial date.

Accordingly, the matter should be remanded and a new trial date should be set.

CrR 3.3(f) provides that a continuance may be granted as follows:

(1) *Written Agreement.* Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) *Motion by Court or a Party.* On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and

the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f). The decision of whether to grant or deny a motion to continue the trial date rests within the sound discretion of the trial court. *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975). A trial court abuses its discretion when its decision is made for untenable reasons or is based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court should consider various factors in deciding a motion to continue, such as “diligence, materiality, due process, a need for an orderly procedure and the possible impact on the result of the trial.” *State v. Kelly*, 32 Wn.App. 112, 114, 645 P.2d 1146 (1982) (citing *State v. Eller*, 84 Wn.2d 90, 524 P.2d 242 (1974)). In such an instance, a trial court abuses its discretion in denying a motion to continue if the defendant was prejudiced or if the result of the trial would have been different had the motion been granted. *Id.* (citing *Eller*, 84 Wn.2d at 90 and *State v. Turner*, 16 Wn.App. 292, 555 P.2d 1382 (1976)). In the context of continuances, it may be improper and therefore an abuse of discretion to fail to grant a continuance if that failure will deprive the defendant of a fair trial and due process of the law. *See State v. Purdom*,

106 Wn.2d 745, 748, 725 P.2d 622 (1986) (citing *Williams*, 84 Wn.2d at 855 and *State v. Cadena*, 74 Wn.2d 185, 443 P.2d 826 (1968)). On review, the Court should examine the totality of the circumstances to determine if a motion to continue was properly denied. *See Kelly*, 32 Wn.App. at 114 (citing *Eller, supra*).

In this instance, the continuance requested was necessary for Mr. Fabyanchuk to obtain necessary advice on the immigration consequences of the charges involved in his case and in an offer of settlement. Defense counsel has an obligation to a defendant to provide effective assistance in defending a criminal case, and that includes effective advice on the immigration consequences of a guilty plea. *See In re Yung-Cheng Tsai*, 183 Wn.2d 91, 99-100, 351 P.3d 138 (2015). The federal statutes are complex when it comes to immigration consequences and oftentimes consulting with an immigration attorney is necessary to provide effective assistance. A defendant may face deportation if he or she is convicted of a crime involving moral turpitude or of an aggravated felony. 9 FAM 302.3-2(B)(1); INA 212(a)(2)(A)(i)(I); 8 USCA sec 1227(a)(2)(A)(iii). However, there are exceptions that prevent certain defendants from being deported even if they are convicted of a crime of moral turpitude. 9 FAM 302.3-2(B)(1)(b). While the federal statutes for possession of child pornography are aggravated felonies, a conviction for which is a deportable offense,

Washington's statute has not been found to be comparable by any case law counsel has been able to find after a diligent search. *See* 8 USCA sec 1101(43); *see also Armijo v. Mukasey*, 266 Fed.Appx. 511 (2008) (finding California's child pornography statute did constitute an aggravated felony for immigration purposes); *but see Salmoran v. Attorney General of United States*, 909 F.3d 73 (3d 2018) (finding New Jersey's child pornography statute did not constitute an aggravated felony for immigration purposes). It appears to remain an open question at this time whether Washington's possession of depictions statutes are legally comparable to the federal counterpart and thus whether Mr. Fabyanchuk, if convicted of the crimes as charged, or potentially as offered, would face removal proceedings. *See Taylor v. United States*, 495 U.S. 575, 600-02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (finding a state conviction that is comparable to an aggravated felony is a deportable offense under federal law). Thus it is reasonable that Mr. Fabyanchuk and his counsel would want to consult an immigration attorney to more thoroughly understand the issues facing him and whether there is a situation in which he could avoid deportation through resolving his case short of trial. It is also understandable that the immigration attorney would want whatever information the U.S. government has on Mr. Fabyanchuk before giving such advice. For these reasons, the State agrees that Mr. Fabyanchuk had a

reasonable basis and good cause for a continuance when he requested a continuance on April 12, 2019.

In *Purdom*, defense counsel learned of the State's decision to amend the information on a Friday preceding a Monday trial date. *Purdom*, 106 Wn.2d at 749. In asking for a continuance, defense counsel explained that he was prepared to answer the original charge and needed an opportunity to consider how to meet the new charge. *Id.* The trial court denied the request for a continuance. *Id.* at 747. On review, the Supreme Court agreed and found the trial court's denial of defense's motion to continue was improper. *Id.* at 749. The Court found the defendant had to be given the opportunity to prepare to meet the actual charge against him. *Id.* Thus inherently finding the trial court abused its discretion in failing to grant defense's request for a continuance, the Supreme Court remanded the matter for a new trial. *Id.*

Each case presents different facts and circumstances and there is no "mechanical test[] for deciding when a denial of a continuance is violative of due process." *Cadena*, 74 Wn.2d at 189. Whether a denial of a continuance violates a defendant's right to due process must be determined based on the circumstances of each individual case. *Id.*

In looking at Mr. Fabyanchuk's case, his attorney asked for a continuance so that he could provide effective assistance of counsel and

ensure that he had obtained appropriate and accurate legal advice on the immigration consequences of the charges and options available to Mr. Fabyanchuk prior to going to trial. Defense counsel has a duty to his or her clients to provide effective advice on the immigration consequences of a criminal case. *Yung-Cheng Tsai*, 183 Wn.2d at 99-100. Defense counsel also has a duty to his or her clients to provide effective advice on the general consequences of pleading guilty or proceeding to trial. *See State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010) (holding “[e]ffective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial.”). A defendant has a constitutional right to effective assistance of counsel and ineffective assistance of counsel is a basis for reversal of a conviction whether that ineffective assistance is received during trial or prior to trial. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus this continuance motion that was denied by the Clark County Superior Court did involve Mr. Fabyanchuk’s constitutional rights to a fair trial and to due process of law. Even though constitutional rights are of concern and are at issue, the standard of review is still abuse of discretion. *See State v. Welker*, 37 Wn.App. 628, 638, 683 P.2d 1110 (1984) (holding the denial of a motion to continue is reviewed under an abuse of discretion standard even though Sixth Amendment rights are at

issue). Yet even under an abuse of discretion standard, a trial court's decision will be disturbed if the defendant was prejudiced, and that this issue involves Mr. Fabyanchuk's constitutional rights informs on the question of prejudice. *See id.* (citing *State v. Barker*, 35 Wn.App. 388, 667 P.2d 108 (1983)).

Mr. Fabyanchuk would have been prejudiced by having to go to trial without having had full and effective advice on the immigration consequences of a guilty plea versus proceeding to trial. No one could have foreseen the U.S. government's shut down and thus the unexpected delay in obtaining the necessary documentation from the U.S. government should have been taken into consideration by the trial court in considering Mr. Fabyanchuk's request for a continuance. In addition, despite both the Court's and the State's desire for speedy resolutions to its cases, the State has a strong interest in trying cases once and to that end in preventing appeal issues from arising. For that reason, the State did not object to Mr. Fabyanchuk's motion to continue as the State understands immigration consequences are a subject upon which defense counsel has a special duty to inform and advise clients, and about which Mr. Fabyanchuk has the right to receive informed advice. Based on the affidavits provided to the trial court, it appears defense counsel worked with due diligence to obtain the necessary information to be able to adequately advise Mr. Fabyanchuk

regarding the immigration consequences of the charges, yet due to no fault of his own, had not yet been able to obtain the necessary information to adequately advise his client. For these reasons, the State did not object to Mr. Fabyanchuk's motion to continue and believes there was good cause for a continuance and that one was required in the administration of justice.

The Superior Court's order denying the defendant's motion to continue all but guarantees a successful direct appeal or personal restraint petition for ineffective assistance of counsel for failure to obtain and give proper and adequate immigration advice to Mr. Fabyanchuk. The order denying the motion to continue prejudiced not just Mr. Fabyanchuk, but will act to prejudice the State if Mr. Fabyanchuk were to have successfully appealed or collaterally attacked his conviction due to the failure to grant his motion to continue. For these reasons, the trial court's order denying the motion to continue was an abuse of discretion and the order should be reversed.

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CONCLUSION

The Superior Court abused its discretion in denying Mr. Fabyanchuk's motion to continue as the denial of the motion to continue prejudiced him. This Court should reverse the trial court's denial of his motion to continue and remand with direction to grant the motion to continue and reset the trial date.

DATED this 10 day of September, 2019.

Respectfully submitted:

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