

No. 64216-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DARRELL JONES,

Appellant.

---

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

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APPELLANT'S REPLY BRIEF

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JAN TRASEN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

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A. ARGUMENT

1. THE TRIAL COURT'S DENIAL OF A CONTINUANCE VIOLATED MR. JONES'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

a. The trial court's refusal to grant a continuance and the court's interference with Mr. Jones's right to call witnesses violated his right to present a defense. Due process demands that a defendant be permitted to present evidence that is relevant and of consequence to his or her theory of the case. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness); State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987); see also Am.Jur.2d , §§ 4, 49, 52. A violation of the right to compel witnesses is presumed prejudicial. Maupin, 128 Wn.2d at 924; State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). It is the prosecution's burden to show that the error was harmless beyond a reasonable doubt. Maupin, 128 Wn.2d at 924; Burri, 87 Wn.2d at 175.

The trial court may not trump a defendant's right to present witnesses in his defense with its own generic concerns about expediency. As the Supreme Court explained in State v. Cadena,

“a myopic insistence on expeditiousness in the face of a justifiable request for a delay can render the right to defend with counsel an empty formality.” Cadena, 74 Wn.2d 185, 189, 443 P.2d 826 (1968), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975).

The trial court’s analysis focused in part upon its displeasure with needing to assign counsel to the defense witness, due to a possible Fifth Amendment issue. 6/24/09 RP 146. Yet there was no evidence that unusual delay would result or that the jury would be unduly inconvenienced. The court’s concern with waiting for additional witnesses or needing to seek assigned counsel ignores its obligation of ensuring that Mr. Jones’s constitutional rights were protected.

b. The defense witness’s testimony was relevant to Mr. Jones’s defense and would have been helpful to the jury.

Since the witness that Mr. Jones sought to call to the stand would have exonerated him, the exclusion of the witness must be examined as a due process violation. Maupin, 128 Wn.2d at 924. The right to present witnesses is limited only to the extent that it does not embrace the right to present irrelevant evidence. Id. at 925. The trial court has the discretion to determine whether

evidence is relevant. However, a defendant's inability to present relevant evidence implicates the fundamental fairness of the proceedings. Id. at 924.

c. Since precluding Mr. Jones's opportunity to call a defense witness was an error that cannot be viewed as harmless, reversal must be granted. Without a continuance, no witness could present this critical information about the jacket to the jury in order to corroborate Mr. Jones's testimony. The error went to the heart of Mr. Jones's defense, and the State cannot demonstrate that the error was harmless beyond a reasonable doubt.

In the alternative, appellate courts normally review evidentiary rulings under the abuse of discretion standard. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Should this Court determine the error is not a constitutional one, it must determine if the trial court abused its discretion in excluding the testimony of Deshawn Mitchell and denying the continuance. An abuse of discretion occurs when the court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id.; State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Mr. Jones's sole defense was unwitting possession. 6/24/09 RP 141, 160; CP 28. By depriving him of the requested continuance, the court deprived Mr. Jones of his ability to present a defense, to challenge the State's allegations, and to cast doubt on the reliability of the State's claims. This deprivation of Mr. Jones's right to present a critical aspect of his defense in a meaningful fashion was not harmless, and requires reversal. Maupin, 128 Wn.2d at 929-30; Rice, 48 Wn. App. at 12 ("Due process demands that a defendant be entitled to present evidence that is relevant and of consequence to his or her theory of the case").

Due to this violation of Mr. Jones's due process rights, his conviction must be reversed and remanded for a new trial.

2. WHERE THE EVIDENCE OF CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE WAS INSUFFICIENT TO CONVICT, REVERSAL IS REQUIRED.

a. The State failed to prove that Mr. Jones possessed a controlled substance, and that his possession was not unwitting.

Mr. Jones was charged with possession of PCP, a controlled substance, in violation of the Uniform Controlled Substances Act. CP 1-4. To find him guilty of this offense, the jury had to conclude

beyond a reasonable doubt that Mr. Jones had the vial of PCP in his custody or control, and that his possession was not unwitting; CP 1.

b. In light of the trial court's recognition that Mr. Jones was entitled to an unwitting possession instruction, no reasonable juror could find Mr. Jones knowingly possessed a controlled substance. It is an affirmative defense to possession of a controlled substance that the possession was unwitting. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004); City of Kennewick v. Day, 142 Wn.2d 1, 11, 11 P.3d 304 (2000). Washington courts have upheld this defense to "ameliorate the harshness of the almost strict liability" afforded to possession of a controlled substance prosecutions. Day, 142 Wn.2d at 11 (quoting State v. Cleppe, 96 Wn.2d 373, 379-80, 635 P.2d 435 (1981)).

A defendant may establish unwitting possession by proving either that he was unaware that he was in possession of a controlled substance, or that he did not know the nature of the substance that he was holding. Day, 142 Wn.2d at 11; State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994); State v. Buford, 93 Wn. App. 149, 151, 967 P.2d 548 (1998) (defendant must present sufficient evidence such that a reasonable juror could find by a preponderance of the evidence that he unwittingly possessed controlled substance in

order to receive jury instruction). Mr. Jones met this threshold, and the trial court, in accordance with Buford, scrutinized the evidence and decided to instruct the jury on unwitting possession. CP 28 (Jury Instruction No. 9). Because the court instructed the jury on unwitting possession after hearing the testimony presented, the trial court believed there was sufficient evidence for a reasonable juror to conclude that Mr. Jones's possession was unwitting. Buford, 93 Wn. App. at 153.

c. Reversal and dismissal are the appropriate remedy.

The absence of proof beyond a reasonable doubt of an element of an offense requires dismissal of the conviction and charge. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Here, the State failed to prove that Mr. Jones was in knowing possession of a controlled substance. Because no rational trier of fact could eliminate all reasonable doubt, Mr. Jones's conviction must be reversed and dismissed.

E. CONCLUSION

Mr. Jones's conviction must be dismissed because his possession of a controlled substance was unwitting. In the alternative, Mr. Jones's conviction must be reversed and remanded

for a new trial because the trial court's denial of a continuance  
violated his constitutional right to present a defense.

DATED this 9<sup>th</sup> day of June, 2010.

Respectfully submitted,



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JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,                    )  
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DARRELL JONES,                            )  
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                                          Appellant.                            )

NO. 64216-2-I

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DIVISION ONE

JUN 09 2010

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DEBORAH DWYER, DPA	(X)	U.S. MAIL
JEREMY LAZOWSKA, DPA	( )	HAND DELIVERY
KING COUNTY PROSECUTOR'S OFFICE	( )	_____
APPELLATE UNIT		
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] DARRELL JONES	(X)	U.S. MAIL
BA: 210016360	( )	HAND DELIVERY
KING COUNTY JAIL - SEATTLE	( )	_____
500 5TH AVE		
SEATTLE, WA 98104		

2010 JUN 09 PM 4:41

**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF JUNE, 2010.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710