

Court of Appeals No. 42509-2-II

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

MICHAEL SMITH,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 10-1-03382-5
The Honorable John Hickman, Presiding Judge**

**Sheri Arnold, WSBA No. 18760
Attorney for Appellant
P.O. Box 7718
Tacoma, Washington 98417
(253) 759-5940**

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENT OF ERROR.....	1
II. ISSUES PRESENTED	
1. Was the September 16, 2010, order continuing the time for Mr. Smith’s trial valid where Mr. Smith objected to it and did not sign it?.....	1
2. Did the trial court abuse its discretion in entering the September 16, 2010 order continuing Mr. Smith trial under CrR 3.3(f)(1) where Mr. Smith did not sign the order?.....	1
III. STATEMENT OF THE CASE	
A. Factual Background.....	1
B. Procedural Background.....	6
IV. ARGUMENT	
Mr. Smith’s right to a speedy trial was violated where his trial was continued over his objection and without his signature on the order.....	11
<i>a. The trial court abused its discretion in entering the September 16, 2010 order continuing Mr. Smith’s trial under CrR 3.3(f)(1) where Mr. Smith did not sign the orders.....</i>	<i>12</i>
<i>b. Mr. Smith’s right to speedy trial was violated where his trial date was improperly continued beyond the 60 day time for trial.....</i>	<i>13</i>
VI. CONCLUSION.....	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Grandmaster Sheng-Yen Lu v. King County, 110 Wn.App. 92,
38 P.3d 1040 (2002).....12

State v. Adamski, 111 Wn.2d 574, 761 P.2d 621 (1988).....14

State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004).....12

State v. Kindsvogel, 149 Wn.2d 477, 69 P.3d 870 (2003).....14

Other Authorities

CrR 3.3.....12, 13

I. ASSIGNMENT OF ERROR

Mr. Smith's right to a speedy trial was violated.

II. ISSUES PRESENTED

1. Was the September 16, 2010, order continuing the time for Mr. Smith's trial valid where Mr. Smith objected to it and did not sign it?
2. Did the trial court abuse its discretion in entering the September 16, 2010 order continuing Mr. Smith's trial under CrR 3.3(f)(1) where Mr. Smith did not sign the order?

III. STATEMENT OF THE CASE

A. Factual Background

In August of 2010, Mr. Rusty Parrot, Mr. William Edmiston, and Ms. Lois Hopkins lived in a trailer in Lakewood. RP 148-149, 212-215. Mr. Parrott owned the trailer, Ms. Hopkins is Mr. Parrott's cousin, and Mr. Edmiston was Ms. Hopkins' boyfriend. RP 149, 215. Mr. Cody Davis is Ms. Hopkins' son and had been living in the trailer with the others but was kicked out of the trailer shortly before August 10, 2010. RP 150, 216-217.

On the evening of August 8, 2010, Mr. Edmiston and Mr. Parrott were watching TV when they heard a car pull up outside the trailer. RP 153. Mr. Edmiston saw Mr. Davis get out of the car. RP 154. Mr. Edmiston believed Mr. Davis might want to start trouble so he locked the

front and back doors to the trailer. RP 153-154. Mr. Davis approached the door to the trailer saying that he wanted to “get his stuff.” RP 154. Mr. Edmiston responded that there was nothing for Mr. Cody to get. RP 154.

Mr. Davis and the men with him began trying to kick down the doors to the trailer. RP 154. Eventually, Mr. Davis and the three other men forced open a door and entered the trailer. RP 154, 158, 223. A “big guy” grabbed Mr. Edmiston and forced Mr. Parrott to the floor in the hallway of the trailer. RP 156. One of the men demanded that Mr. Parrott and Mr. Edmiston “give them the gold.” RP 156, 161.

The “big guy” didn’t have a mask on but the two other men did. RP 157. Mr. Edmiston recognized Mr. Davis but didn’t recognize any of the three men that entered the trailer with Mr. Davis. RP 158. One of the men wearing a mask was carrying an AK-47 and the other had a pistol in his hands. RP 159. Mr. Edmiston observed that the pistol was “dark.” RP 159.

At trial, Mr. Edmiston identified Mr. Maua Muasau as the “big guy” who entered the trailer. RP 159-161. Mr. Muasau hit Mr. Parrott in the side of the head. RP 161. One of the other men hit Mr. Edmiston several times in the head with the butt of the pistol. RP 161. Mr. Edmiston was sure that he was not hit with brass knuckles. RP 168. One

of the men said, “give us the gold bars or we’re going to kill you.” RP 161.

Mr. Davis and Mr. Muasau went into the bedroom where Mr. Davis had been staying and began ripping the paneling off the walls. RP 162, 173, 228. The two men wearing masks pointed their guns at Mr. Edmiston and Mr. Parrot and kept them on their hands and knees while Mr. Davis and Mr. Muasau were in the bedroom. RP 163, 229.

Eventually, the men left the trailer. RP 172. The men left before any sirens could be heard. RP 172.

Around 12:30 a.m. on August 8, 2010, police responded to Mr. Parrott’s trailer after a neighbor called 911 and reported four individuals attempting to force their way into the trailer. RP 266, 356-357, 400-401. As police arrived in the area of the trailer, the neighbor who called 911 gave police a description of the vehicle the men who had broken into the trailer got into. RP 266-267, 359. The caller indicated that the men had gotten into their vehicle and were preparing to leave. RP 267. 911 dispatch advised the officers that the men were leaving the area and that their vehicle was travelling towards the officers. RP 274-276, 360. The officers stopped the vehicle and arrested the men inside of it. RP 276-278, 360-361.

Four men were removed from the vehicle stopped by police. RP 281. The driver was identified as Mr. Damos Handsom, the front passenger was identified as Mr. Michael Smith, the right rear passenger was identified as Mr. Cody Davis, and the left rear passenger was identified as Mr. Maua Muasau. RP 281. Mr. Handsom was wearing a camouflage flak jacket and had a black ski mask bunched up on top of his head. RP 282.

Mr. Handsom told police that he had been inside the trailer and that he had had the AK-47 with him to keep things from escalating. RP 375. Mr. Handsom told police that the AK-47 was in the trunk of his vehicle and the ammunition was in the glove box. RP 375-376.

Mr. Smith told police that he had driven to the trailer with his younger brother, Damos, to get something from the trailer. RP 403. Mr. Smith told police that he knew Mr. Handsom was wearing the flak jacket and mask but that he was wearing them to keep the peace. RP 404. Mr. Smith told police that he had not gone inside the trailer and had remained outside by the car. RP 404.

After the men were removed from the vehicle, the police contacted the occupants of the trailer. RP 284. The police arrived at the trailer about five minutes after the men left. RP 172. The police took Mr. Edmiston out of the trailer, showed him the four men from the vehicle that

had been stopped, and asked him if he could identify them. RP 176-178. Mr. Edmiston recognized two of the men as having been inside the trailer. RP 178-180. The police also asked Mr. Parrot to look at the four men and see if they were the men who had been in the trailer. RP 235. Mr. Parrot was pretty sure that the four men were the ones who had been in the trailer. RP 235. The only thing that made Mr. Parrott believe the men were the ones who had been in the trailer was the fact that Mr. Davis was with them. RP 253.

The vehicle driven by the four men was seized and was searched pursuant to a warrant on August 11, 2010. RP 298, 303. Police found two rifle magazines in the passenger area of the car -- one on the floor by the gas pedal -- and the other in the glove box. RP 304-305. The magazines were loaded with the type of ammunition used in an AK-47. RP 305. The police found an AK-47 rifle and a loaded pistol in the trunk of the vehicle. RP 307. There were no magazines in the AK-47 when it was found. RP 312.

The pistol was processed and was determined to be fully functional. RP 419. No fingerprints were recovered from the pistol. RP 332-333, 416.

At trial, Mr. Edmiston testified that he had no idea if Mr. Smith was one of the men who had been in the trailer. RP 198.

B. Procedural Background

On August 9, 2010, Mr. Smith was charged with burglary in the first degree and assault in the fourth degree. CP 258-259. The State asserted the burglary was a first degree burglary because Mr. Smith or another participant was armed with a firearm, specifically a rifle. CP 258-259. The State also alleged a firearm sentencing enhancement in relation to the burglary charge. CP 258-259. On August 9, 2010 the State also filed a persistent offender notice. RP 264.

On September 16, 2010, Mr. Smith's case was continued against Mr. Smith's wishes due to his trial counsel having a pre-planned vacation and needing further time to prepare and investigate. CP 267; RP 4, 9-16-10.¹

On November 15, 2010, Mr. Smith's case was continued again on grounds that a codefendant had not yet been determined to be competent and that more investigation was necessary. CP 269. All parties requested this continuance and Mr. Smith agreed to this continuance. RP 2, 11-15-10.

¹ The transcripts of the hearings on the continuance of the trial were not paginated continuously with the rest of the transcript. Reference will be made to these hearings by giving the page number followed by the date of the hearing. Reference to the main portion of the transcript beginning on July 18, 2011, will be by page number only.

On January 4, 2011, Mr. Smith's trial was continued again so trial counsel could prepare a mitigation package. CP 273. Also on January 4, 2011, the State filed another persistent offender notice. CP 274.

On February 14, 2011, Mr. Smith's case was continued again in order for Mr. Smith's counsel to set up victim interviews, have surgery, and complete the mitigation package. CP 275.

On April 5, 2011, Mr. Smith's trial was continued over his personal objection due to his trial counsel being in another trial. CP 278; RP 5-6, 4-5-11.

On June 6, 2011, Mr. Smith filed a motion to dismiss the case on the basis that he had been unable to interview the victims in the case. CP 281-283, 285-287. Also on June 6, 2011, the trial was continued again due to Mr. Smith's trial counsel being in another case. CP 284.

On June 9, 2011, Mr. Smith's trial was continued over Mr. Smith's personal objection because the prosecutor was in trial and one of Mr. Smith's codefendants was in trial. CP 288.

Mr. Smith's trial was continued over his objection again on June 29, 2011, this time because no courtrooms were available. CP 289; RP 5-6, 6-29-11.

On June 30, 2011, Mr. Smith's trial was again continued due to lack of courtrooms. CP 290. Mr. Smith objected to the continuance. RP 3-4, 6-30-11.

On July 5, 2011, Mr. Smith's trial was again continued due to lack of courtrooms. CP 291. Mr. Smith objected to the continuance. RP 3, 7-5-11.

On July 6, 2011, Mr. Smith's trial was continued over his objection due to an interpreter not being available. CP 292; RP 4, 7-6-11.

On July 14, 2011, the State filed its motions in limine. CP 293-295.

On July 18, 2011, the trial court addressed Mr. Smith's motion to dismiss. RP 23-33. The court denied the motion but directed that the interviews of the witnesses occur. RP 31-33.

On July 19, 2011, a 3.5 hearing was held to determine the admissibility of the statements made by the defendants to the police. RP 50-117. The trial court held that Mr. Smith's statements to the police were admissible. RP 117.

On July 20, 2011, argument was heard regarding the admissibility of the tape of the 911 call to the police. RP 125-143. The trial court held that the portion of the call prior to the arrival of the police was admissible as excited utterance and present sense impression, but that the portion of

the call occurring after the police arrived was inadmissible. RP 134-141. However, due to the poor quality of the recording of the 911 call, the trial court conditioned the admissibility of the call on “the audio being sufficient enough that a jury could actually hear it.” RP 137.

Trial began on July 20, 2011. RP 148.

On July 21, 2011, the parties revisited the issue of the admissibility of the 911 tape. RP 383-392. The trial court held that the 911 tape was admissible up to the point where the officers arrived under the present sense impression and excited utterance exceptions to the hearsay rule. RP 392. The trial court also held that the tape was admissible since the State had found speakers which rendered the audio of the call much more understandable. RP 391-392.

On July 25, 2011, the parties stipulated to the authenticity of the 911 tape. CP 301-302.

Mr. Davis testified in Mr. Handsom’s case in chief. RP 439-471. Mr. Davis testified that all three defendants went into the trailer with him and that Mr. Smith followed Mr. Davis into the trailer after Mr. Davis kicked the door in. RP 456-457, 462.

Trial concluded on July 25, 2011. RP 500.

Mr. Smith objected to the State’s proposed jury instruction number 7, the “to convict” instruction. RP 506-508. Mr. Smith’s objection was

that the State had charged the defendants with violating RCW 9A.52.020(1)(a) which defines a burglary as a first degree burglary if the actor or another participant in the crime is armed with a deadly weapon, but the State's proposed jury instruction included the alternative means of committing first degree burglary that a person was assaulted during the course of the burglary. CP 258-259, 315; RP 506-508.

The State responded by agreeing to remove the language relating to assault from the jury instructions. RP 509-510. However, the State requested leave from the court to amend the charges against the defendants from the original language identifying a rifle as the deadly weapon used in the burglary to language indicating "a rifle and/or a handgun" was used. RP 510. Mr. Smith objected to any amendment to the charges. RP 511-513.

The trial court held that the State could not amend the charges, but that the "to convict" jury instruction would say only that a deadly weapon was used and would have no reference to an assault. RP 516-517.

Mr. Smith requested the jury be instructed on second degree burglary and criminal trespass as lesser included charges of the first degree burglary charge. RP 527.

On July 26, 2011, the State submitted supplemental jury instructions regarding the definition of burglary, the burglary "to convict"

instruction, and the special verdict instructions. CP 386-394; RP 543-544. The definition and “to convict” instructions deleted all reference to a firearm and indicated only that one of the participants in the burglary had to be armed with a deadly weapon. CP 386-394. The State changed the alleged aggravating factor from a firearm enhancement to a deadly weapon enhancement. CP 386-394; RP 543-544. Over objection from all defendants, the trial court accepted the State’s supplemental instructions. RP 544-551.

On July 28, 2011, the jury found Mr. Smith guilty of burglary in the first degree and not guilty of assault in the fourth degree. CP 397-398. The jury found by special verdict that Mr. Smith or an accomplice was armed with a deadly weapon during the burglary. CP 399.

On September 23, 2011, Mr. Smith stipulated to his prior record and offender score. CP 446-448.

Mr. Smith received a sentence of life without the possibility of parole. CP 446-448.

Notice of appeal was filed on October 19, 2011. CP 467.

IV. ARGUMENT

Mr. Smith’s right to a speedy trial was violated where his trial was continued over his objection and without his signature on the order.

- a. *The trial court abused its discretion in entering the September 16, 2010 order continuing Mr. Smith's trial under CrR 3.3(f)(1) where Mr. Smith did not sign the orders.*

A trial court's decision to grant or deny a motion for a continuance is reviewed under an abuse of discretion standard. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

Under CrR 3.3(b)(1), a defendant detained in jail must be brought to trial within 60 days of being arraigned. CrR 3.3(b)(1), (c)(1).

The September 16, 2010 Order Continuing Trial was entered pursuant to CrR 3.3(f)(1). CP 267.

Under CrR 3.3(f)(1), "Continuances...may be granted as follows:...Upon written agreement of the parties, **which must be signed**

by the defendant...the court may continue the trial date to a specified date.” (Emphasis added).

Mr. Smith did not sign the September 16, 2010 Order Continuing Trial. Thus, continuing the trial date under CrR 3.3(f)(1) was not an acceptable choice for the trial court to make given the applicable legal standard and the facts of the case. To continue the trial date under CrR 3.3(f)(1), Mr. Smith’s signature was required to be on the order. Mr. Smith did not sign the order, therefore the requirements of CrR 3.3(f)(1) were not met and the trial court abused its discretion by continuing the trial under that rule.

b. Mr. Smith’s right to speedy trial was violated where his trial date was improperly continued beyond the 60 day time for trial.

As of September 16, 2010, Mr. Smith’s case was 38 days old. RP 2, 9-16-10. Thus, as of September 16, 2010, the State had 22 days remaining in which to bring Mr. Smith to trial. Mr. Smith’s trial date was continued from October 5, 2010, to November 29, 2010. CP 267.

Because the September 16, 2010 Order was not validly entered, the State was required to bring Mr. Smith to trial by October 8, 2010, 22 days after September 16, 2010. CrR 3.3(b)(1). After September 16, 2010, the next hearing in Mr. Smith’s case was on November 15, 2010. RP 2-4, 11-

ARNOLD LAW OFFICE

April 23, 2012 - 7:47 AM

Transmittal Letter

Document Uploaded: 425092-Appellant's Brief~3.pdf

Case Name: Michael A. Smith

Court of Appeals Case Number: 42509-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Sheri L Arnold - Email: **sheriarnold2012@yahoo.com**

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us