

No. 72011-2
Snohomish County Superior Court No. 12-1-00138-8

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

AMOS GYAU,
Defendant-Appellant.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
[Signature]

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

The Honorable Richard T. Okrent, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that:

There is no reason the defendant could not have filed a written motion for new trial within 10 days of the verdict or at least prior to the date of sentencing. There was no new evidence discovered, no surprises, and there is nothing contained in the motion that was not known to the defendant at the time of the trial.

Finding of Fact 34; CP 61.

2. The trial court erred in concluding that Gyau has “a solid understanding of the English language.” Finding of Fact 21; CP 59.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in failing to find that Gyau’s motion for new trial was untimely?
2. Did the trial court err in concluding that Gyau received a fair trial when the trial court did not provide him with an interpreter?

III.
STATEMENT OF THE CASE

Amos Gyau was charged with one count of second degree rape. He was 17 on September 21, 2011, when the alleged rape took place. Thus, he was initially charged in Snohomish County Juvenile Court. The juvenile court declined jurisdiction. Gyau was convicted after a bench

trial in the Superior Court. That judgment and sentence are on appeal in this Court in *State v. Gyau*, No. 71013-3-I.

The appeal concerns the trial court's denial of Mr. Gyau's motion to for new trial.

Sentencing was held on October 13, 2013. Prior to sentencing, trial counsel filed a motion for new trial at the request of Gyau. 10/9/13 RP 855. Trial counsel stated, however, that he was not comfortable going forward because Gyau's main complaint was that trial counsel was ineffective. *Id.* at 885-88. The State argued that the motion was "untimely." RP 887. The trial judge stated that he was going to proceed with sentencing but that he would hear the motion for new trial "at a later date." *Id.* at 888.

New counsel was eventually appointed and on April 18, 2014, and she filed a motion for new trial pursuant to CrR 7.5. Gyau alleged that his conviction should be reversed because 1) he was not provided with an interpreter during the proceedings, 2) he did not knowingly waive his right to a jury trial, and 3) trial counsel failed to call a key witness. 2nd Supp. CP ____, Motion for New Trial, Sub. 129, filed April 18, 2014.

Defense counsel presented her own affidavit. She stated that she traveled to Airway Heights Correctional Center to meet with Gyau. At their in-person meeting "it became immediately clear that there were some

significant language and cultural barriers that effected communication between counsel and Mr. Gyau.” She pointed out that Gyau had only arrived in the United States from Ghana in 2008. His first language was Twi. She also stated that Gyau spoke Twi at home. She observed that although Gyau “speaks English very well conversationally, he likely struggled to understand the legal proceedings.” 2nd Supp. CP ____, Motion for New Trial, Sub. 129, filed April 18, 2014.

The State’s primary argument was that under CrR 7.5(b), Gyau’s motion was not timely. The State also admitted that no interpreter had been provided but argued that the Gyau did not need an interpreter. The State also argued that Gyau knowingly and voluntarily waived his right to a jury trial and that his trial counsel was not deficient.

On May 8, 2014, the trial court heard argument on the motion and took testimony from Aiko Barkdoll, Gyau’s Snohomish County Juvenile Court probation officer. 5/8/14 RP 6. Barkdoll testified that she worked with Gyau for two years. She stated that she had no trouble communicating with Gyau. *Id.* at 8. But she never asked Gyau if he needed an interpreter and he never told her that he could not understand her. *Id.* 8-9. Barkdoll did state that Gyau and his family had a difficult time understanding the process of posting bail. *Id.* at 12-13. She said: “It also need to be mapped out, kind of a cause and effect.” *Id.* at 13. She

also stated that she never had any discussion with Gyau that required her to convey legal concepts. *Id.* at 13.

The trial court ultimately decided that Gyau's motion was untimely. CP 62. Nonetheless, the trial court entered findings of fact and conclusions of law on the issues raised in Gyau's motion. CP 56-63.

IV. ARGUMENT

A. THE TRIAL JUDGE ABUSED HIS DISCRETION WHEN HE HELD THAT GYAU'S MOTION FOR NEW TRIAL WAS UNTIMELY

CrR 7.5 provides:

(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) Time for Motion; Contents of Motion. A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

The motion for a new trial shall identify the specific reasons in fact and law as to each ground on which the motion is based.

A trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. *State ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the trial judge abused his discretion when he refused to enlarge the time for filing the CrR 7.5 motion. The motion was based, in large part, on Gyau's claim that his lawyer did not provide him with effective assistance of counsel. Thus, trial counsel correctly told the trial judge at the initial sentencing that he could not file a motion and argue his own incompetence.

Moreover, the record does not establish that anyone ever told Gyau that he was entitled to have an interpreter present during trial. Thus, it was unreasonable for the court to conclude that a 17 year-old, who had been in the United States for about two years would have the wherewithal to realize that he had a right to an interpreter and request one. It was also unreasonable to assume that Gyau knew that he had only 10 days to file his motion for new trial.

Conversely, there was simply no prejudice to the State to enlarge the time. The State's argument appears to be that the only time such a motion should be granted is when the motion for new trial is based upon

newly discovered evidence. But the rule permits enlargement of time for any claim under CrR 7.5(a). And, by the time a hearing was held, the State had fully briefed the issues and arranged to call two witnesses. And the trial judge proceeded to hear from one of the witnesses.

Thus, it was an abuse of discretion for the trial court to refuse to enlarge the time.

B. GYAU WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO PROVIDE HIM WITH AN INTERPRETER FOR TRIAL

Again, the trial court primarily ruled that Gyau's motion was untimely. However, paradoxically, the trial court heard evidence on this claim and denied Gyau's motion on its merits. But his findings on this issue were also an abuse of discretion.

In this State, the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and "the right inherent in a fair trial to be present at one's own trial." *State v. Woo Won Choi*, 55 Wn. App. 895, 901, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990). It is also the declared policy of this state under RCW 2.43.010:

to secure the rights, constitutional or otherwise, of persons who, because of a non-English speaking cultural background, are unable to readily understand or communicate in the English language, and who

consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

The federal cases hold that the right to an interpreter affects a defendant's Sixth Amendment right of confrontation and the right inherent in a fair trial to be present at one's own trial. *See United States ex rel. Negron v. State of New York*, 434 F.2d 386, 389 (2nd Cir. 1970). The right rests fundamentally on the notion that "no defendant should face the Kafkaesque specter of an incomprehensible ritual which may terminate in punishment." *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973), *cert. denied*, 416 U.S. 907, 94 S.Ct. 1613, 40 L.Ed.2d 112 (1974). The federal courts have held that whenever put on notice that there may be some significant language difficulty, the trial court should exercise its discretion to determine whether an interpreter is needed. *Carrion*, 488 F.2d at 14-15; *accord State v. Korich*, 130 Wash. 243, 246, 226 P. 1016 (1924), *appeal dismissed*, 271 U.S. 690, 46 S.Ct. 472, 70 L.Ed. 1153 (1926); *State v. Trevino*, 10 Wn. App. 89, 94-95, 516 P.2d 779 (1973), *review denied*, 83 Wn.2d 1009 (1974) (both state cases pertaining to interpreters to assist witnesses). The court "should make unmistakably clear" to a defendant that he has a right to a court-appointed interpreter at trial if the court determines that one is needed. *Carrion*, 488 F.2d at 15; *Negron*, 434 F.2d at 390-91.

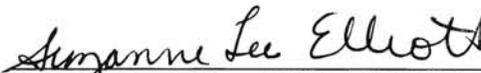
The trial court erred in failing inquire whether an indigent juvenile spoke sufficient English to comprehend the nature of our adversarial processes when he was in peril of spending the next 10 years in prison. The prosecutor, defense counsel and the judge (in both juvenile and superior court) all knew that Gyau was not a native English speaker, that he was young and that he had not been in the United States long.¹ Under these circumstances he was entitled to an interpreter and the trial judge abused his discretion when he failed to grant Gyau an interpreter on that basis.

**V.
CONCLUSION**

This Court should find that Gyau's motion was timely. This Court should also grant Gyau a new trial because the trial court failed to provide him with an interpreter.

DATED this 3rd day of November, 2014.

Respectfully submitted,


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Attorney for Amos Gyau

¹ It is not clear if they knew precisely that Gyau's native language was Twi.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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11 / 03 / 2014
Date

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