

63426-7

63426-7

No. 63426-7-I

King County Superior Court  
Cause No. 08-1-12723-SEA

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

|                        |   |
|------------------------|---|
| CITY OF KENT ,         | ) |
|                        | ) |
| Appellant,             | ) |
|                        | ) |
| v.                     | ) |
|                        | ) |
| DAVINDER SINGH SANDHU, | ) |
|                        | ) |
| <u>Respondent.</u>     | ) |

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 NOV 12 AM 10:39

RESPONDENT'S BRIEF

Respectfully submitted,



Robert M. Leen  
 Attorney for Respondent  
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## A. INTRODUCTION

"[C]onsider the effect on your business or your life when you can't receive a timely trial because of crowded court calendars. ... [I]n 2002, these [are] ... just a few examples of the state of affairs faced by Washington's trial courts. These conditions have profound implications for our justice system. ... [C]rowded calendars in trial courts across the state [have] resulted in long delays. ... Justice in Jeopardy 101, Washington State Bar News, November 2009 by Chief Justice Gerry Alexander, Judge Deborah Fleck, and Jeff Hall.

The question for review is whether the judge of a municipal court acts within her/his discretion when immediately prior to commencing jury selection s/he grants a renewed defense motion to dismiss for inability of the City to proceed where the complainant, a necessary witness, has twice not appeared as required by a subpoena and the trial court has a substantial reason to believe the witness won't appear when needed to testify. The Superior Court affirmed the dismissal holding the trial court did not abuse its discretion when it denied the City's request to begin trial where its complaining witness had not appeared. Exhibit 3, ROA-21-22.

B. ASSIGNMENTS OF ERROR

Dismissal of the case was not an abuse of discretion when the complainant twice did not appear when subpoenaed to appear and the City nonetheless demanded the trial court begin jury selection without the presence of this recalcitrant witness.

C. STATEMENT OF THE CASE

On December 3, 2007 the City of Kent filed a one count amended complaint charging Assault 4 – Sexual Motivation. The defendant notified the court he was out of town for the original arraignment date and arraignment was rescheduled until February 11, 2008. ROA 23-26

On February 11, 2008 the defendant appeared, a Punjabi language interpreter was present, counsel was provisionally appointed, and the defendant entered a plea of not guilty. The defendant was released on PR with conditions. A pretrial hearing was set March 3, 2008. ROA-1.

Private counsel filed an appearance on February 19, 2008. ROA-1. On March 3, 2008 the defendant and his attorney appeared, a Punjabi interpreter was present, the defendant filed a speedy trial waiver until June 6, 2008 and the pretrial hearing was continued until April 18, 2008. ROA-2.

On April 18, 2008 the defendant and his attorney appeared, a Punjabi interpreter was present. The City and defendant agreed the case

was ready to be set for trial, the case was set for the July jury call and, with consent of the defendant, speedy trial was extended until August 31, 2008. A trial readiness hearing was set for July 15, 2008. ROA-2.

On July 15, 2008 the defendant and his attorney appeared, a Punjabi interpreter was present, and the City and defendant announced ready for trial. The defense requested trial on July 21, 2008. The City stated that the complaining witness would not be available until July 22, 2008 and asked that a July 22<sup>nd</sup> trial date be set. Trial was set for July 22, 2008. ROA-2.

On July 22, 2008 the defendant and his attorney appeared for trial, a Punjabi interpreter was present. The City moved to continue trial because the complaining witness was out of town. The defendant objected because the City had announced ready for trial and requested the July 22, 2008 trial date. The defendant moved to dismiss. The City said it didn't know why the witness had not returned in time for the trial date. The Court reserved ruling on the defendant's motion to dismiss and reserved ruling on defense motion for terms for interpreter costs. A hearing was set for August 5, 2008. ROA-3

On August 5, 2008 the defendant and his attorney appeared, a Punjabi interpreter was present. The Court addressed the defendant's motion to dismiss. The defense argued the complaining witness had been

subpoenaed but failed to appear for the July 22<sup>nd</sup> trial date. The City still didn't know why the complaining witness had not appeared but presented proof of a boarding pass showing its complaining witness was in California on the trial date. The Court tentatively denied the defendant's motion to dismiss but reserved a final ruling. The Court found good cause to set the case over to September jury term, found excluded speedy trial time and set case for a September 2, 2008 readiness hearing. ROA-3.

On September 2, 2008 the defendant and his attorney appeared, a Punjabi interpreter was present. The City and defendant announced ready for trial. The case was set for September 8, 2008 at 8:45 am. ROA-3. On September 8, 2008 the defendant and his attorney appeared for trial, a Punjabi interpreter was present. The City and the defendant announced ready and the case was sent to Judge Robert McSeveney for trial.

When the parties appeared before Judge McSeveney the defense told the Court although it announced ready the City wasn't actually ready to proceed because the complaining witness wasn't present. The defendant renewed his motion to dismiss. The defense pointed out there were four active warrants for the witnesses and she had numerous prior convictions for crimes of fraud and dishonesty.<sup>1</sup> ROA 3-4, ROA-7-8. The City

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<sup>1</sup> See ROA 28-30. (continued on next page at footer)

responded that [it] just got off the phone with the victim and ... “she indicates that she’s on her way. Obviously I can only take that at face value and assume that she is actually on her way and will appear.” ROA-8.

The Court asked if the witness was subpoenaed. The City said she was. ROA-10. The Court asked the City why the witness was not present at 9 am? ROA-11. The City said that the witness was on call based on “the nature of this morning’s calendar and what-when was-what case was going to be sent out when.” ROA-11.

The defense responded that “[W]e’re just sitting here now. ... [W]e move for dismissal. The City is not ready to go forward.” ROA-12. To which the City said, “The trial hasn’t even started yet.” ROA-12. The Court replied, “It started. It’s already started.” The City then stated that it didn’t have to have its witness present until the point in the trial where the City would call the witness to testify. ROA-12. (emphasis added). The trial judge saw things differently.

Commenting on many cases [in the courthouse] waiting to be tried and only limited courtrooms [available] the judge said “[w]e’ve got 30, 40

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|         |          |                                 |
|---------|----------|---------------------------------|
| Theft 3 | 09/02/06 | Lynwood Municipal Court         |
| Theft 3 | 06/26/06 | Lynwood Municipal Court         |
| Theft 3 | 04/02/07 | Evergreen District Court        |
| PSP 1   | 09/13/06 | Snohomish County Superior Court |

case next door for juries that are somewhat on hold,” .... [ROA-13] and that “[t]he City is honestly not ready to proceed and [it doesn’t] know if [its] witness is even going to be here within an hour.” ROA-13.

The judge asked the City if there was any good cause why the witness wasn’t present at 9:00 am? ROA-13. The City referred to heavy court calendars [but not realizing it’s position was potentially contributing to the problem] as the reason to put this witness on call. ROA-13-14.

The judge said to the City that it already had two continuances because of witness issues. The City said this was true. ROA-14. The Clerk told the judge that jurors were checking in and there were enough to get started. ROA-14. The judge said:

Okay. I’m going to dismiss the case. Number one, this is a September of ’07 case, and I realize the arraignment was on February 11<sup>th</sup> of ’08. There has been some delays to witness issues and so forth, but this case was set for trial. The subpoena requires the witness to be present at 9:00 am. And I realize that there are often times there are a number of cases that must proceed to trial, but the subpoena is very specific for 9 am. And if the witness was available and present then the City would be able to proceed with the case. They are not. The City does not necessarily have the discretion to tell its witnesses when they should arrive and when they should not arrive necessarily in lieu of a subpoena. The subpoena is very clear. This case was assigned out for trial now. The court has three courtroom available today, but only two can proceed to juries, and there (inaudible) juries that must proceed today. So I guess if I’m being critical it’s your witness is not present and ready to go, and there is some uncertainty as to whether that witness may appear. ROA-15.

The City objected. The City insisted that despite the crush of cases waiting to be tried, the problems it had in securing this particular witness' presence and the Court's reluctance to waste judicial resources, the Court was required to start jury selection. The City, the prosecutor continued to insist, was not required to have this witness present until it was time for her to testify. ROA-16. (emphasis added).

The trial court disagreed. The Clerk confirmed that the witness had \$12,700 in outstanding warrants (Snohomish County - \$2500; Lynnwood Municipal Court - \$5100; Lynnwood Municipal - \$5100). The Court again said that the witness wasn't present at 9:00 am when she was subpoenaed to be present. The Court told the City it had an obligation to have its witness ready to go. Based on having to choose whether to proceed or dismiss, the Court dismissed. ROA-18.

#### D. ARGUMENT

The trial court's decision to dismiss a case when the prosecution objects is reviewed on an abuse of discretion standard. See, State v. Koerber, 85 Wash.App. 1, 3, 931 P.2d 904 (1996). Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." An appellate court will find an abuse of discretion only "on a clear

showing” that the court's exercise of discretion was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” A trial court's discretionary decision “is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” A court's exercise of discretion is “ ‘manifestly unreasonable’ ” if “the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’ ” Id. T.S. v. Boy Scouts of America, 157 Wash.2d 416, 423-424, 138 P.3d 1053, 1056–1057 (2006) (citations omitted).

The City put the trial court judge to the choice of dismissal for lack of prosecution, that is, an inability to proceed, or proceed with jury selection with justified uncertainty whether the prosecutor was wasting litigant’s time and scarce judicial resources. Here the complaining witness had multiple outstanding warrants and a prior history of not appearing when subpoenaed. The complaining witness had been subpoenaed to appear at 9 am but by 9:45 am was still not present. The defense had its witness present. See ROA-27. Jurors were available and there were 30-40 other cases on hold waiting for a courtroom. Under the circumstances the trial court judge’s choice to dismiss was well within its discretion.

Had the City requested a third continuance rather than shut down the courtroom, while waiting to see if the witness would appear, the trial court judge and this Court would have been presented with a different question. But that is not what happened here. Here the City insisted that it, not the Court, would be the arbiter of whether it was ready, and it, not the Court, would decide if jury selection should begin under the circumstances. “Control of a trial calendar ultimately rests with the court, not the litigants.” State v. Chicester, 141 Wash.App. 446, 459 (2007).

This is not a case where the trial court judge dismissed the case in the interests of justice pursuant to CrRLJ 8.3(b), nor should it be analyzed under that rule. The trial court judge dismissed the case because the City was not ready to proceed. See Chicester, at 457. Dismissal of the case under the circumstances presented here, that is, to avoid an apparent waste of scarce judicial resources as well as further time and expense to the litigants, and other litigants who were waiting for their cases to be tried, when the complainant twice did not appear when subpoenaed to appear and there was good reason to believe she would never appear, was not an abuse of discretion. It was, as Judge McSeveney succinctly stated, ...“a command decision.” ROA-18.

E. CONCLUSION

Under the circumstances presented the trial court judge's dismissal of the case was not an abuse of discretion. The decision of the Superior Court should be affirmed.

Respectfully submitted this 10 day of November 2009.

A handwritten signature in black ink, appearing to read "Robert M. Leen", written over a horizontal line.

Robert M. Leen  
WSBA 14208

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FILED  
JUN 09, 2008  
KENT MUNICIPAL COURT

IN THE KENT MUNICIPAL COURT  
COUNTY OF KING, STATE OF WASHINGTON

CITY OF KENT, a municipal corporation,  
Plaintiff,  
vs.  
Davinder S. Sandha  
Defendant.

K 556 49  
PRO SE DEFENDANT'S MOTION TO CONTINUE  
CLERK'S ACTION REQUIRED

I, \_\_\_\_\_, Pro Se Defendant moves the court to continue my court date for the following reason(s): \_\_\_\_\_

*See attached letter.*

*EXHIBIT 4*

Brubaker  
City Attorney  
Department  
11th Ave. S., Kent, Wa 98032  
(253) 856-5770 / fax (253) 856-6770



JAN 09 2008

Dear Sir or Madam,

I have a court date on 15<sup>th</sup>, Jan 2008. But I can not appear on this date because I am out of country from Dec, 11<sup>th</sup> 2007 to February 6<sup>th</sup> 2008, so please I need reschedule, but give me some extra time, it is very long ravel for me, hopefully I will be back home on time, I will call you or come over there, when I will be back home, I am so sorry for the inconvenience and thank you very much for all your help, patience and co-operation, and have a nice time.

Sincerely

Davinder S.Sandhu  
Case no. K 55649  
Jan, 5<sup>th</sup> 2008

*Davinder S. Sandhu*

Attached is a copy of Ticket Confirmation

Your Itinerary

Page 1 of 2

USA TRAVEL SERVICES  
 23509 104th Ave SE #101  
 Kent WA-98031  
 253-867-0450  
 253-867-0451  
 253-867-0452(F)

Trip Locator: 4747JX

DAVINDER S SANDHU  
 GURBAX SANDHU  
 MANJOT SANDHU

**Tuesday 11 December 2007**

United Airlines Inc - Flight UA 0703  
 Depart: Seattle/Tacoma Int'l Airport  
 Seattle/Tacoma, WA, US  
 6:40 PM

Status: Confirmed  
 Airline Ref: LKVF31  
 Seat:  
 Class: V-Economy/Coach  
 Mileage: 946  
 Travel Time: 2:32  
 Stopovers: 0  
 Aircraft: Boeing 757-200/300  
 Meal:

Arrive: Los Angeles Int'l Airport  
 Los Angeles, CA, US  
 9:12 PM  
 Terminal 7

Remarks:

**Wednesday 12 December 2007**

Asiana Air - Flight OZ 0203  
 Depart: Los Angeles Int'l Airport  
 Los Angeles, CA, US  
 12:30 AM  
 Terminal B  
 Arrive: Seoul Incheon International  
 Seoul, KR  
 Thursday, December 13, 2007  
 7:00 AM

Status: Confirmed  
 Airline Ref: CG6KTX  
 Seat:  
 Class: K-Economy/Coach  
 Mileage: 5968  
 Travel Time: 13:30  
 Stopovers: 0  
 Aircraft: Boeing 777-200/300  
 Meal: Breakfast

Remarks:

**Thursday 13 December 2007**

Asiana Air - Flight OZ 0767  
 Depart: Seoul Incheon International  
 Seoul, KR  
 12:40 PM  
 Arrive: Delhi Indira Gandhi Int'l Airport  
 Delhi, IN  
 6:10 PM  
 Terminal 2

Status: Confirmed  
 Airline Ref: CG6KTX  
 Seat:  
 Class: K-Economy/Coach  
 Mileage: 2898  
 Travel Time: 9:00  
 Stopovers: 0  
 Aircraft: Airbus A330-300  
 Meal:

Remarks:

**Wednesday 5 February 2008**

Asiana Air - Flight OZ 0768  
 Depart: Delhi Indira Gandhi Int'l Airport  
 Delhi, IN  
 2:10 AM  
 Terminal 2  
 Arrive: Seoul Incheon International  
 Seoul, KR  
 12:15 PM

Status: Confirmed  
 Airline Ref: CG6KTX  
 Seat:  
 Class: K-Economy/Coach  
 Mileage: 2898  
 Travel Time: 6:35  
 Stopovers: 0  
 Aircraft: Airbus A330-300



FILED  
JUL 22 2008  
Kent  
Municipal Court

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KENT MUNICIPAL COURT

|                        |   |                            |
|------------------------|---|----------------------------|
| CITY OF KENT,          | ) |                            |
|                        | ) | No. K 55649                |
| Plaintiff,             | ) |                            |
|                        | ) | MEMORANDUM RE: IMPEACHMENT |
| v.                     | ) |                            |
|                        | ) |                            |
| DAVINDER SINGH SANDHU, | ) |                            |
|                        | ) |                            |
| Defendant.             | ) |                            |

DEFENDANT DAVINDER SINGH SANDHU submits the following memorandum re impeachment of a City witness.

Tonya Marie Pounds is a City witness. She has the following known criminal convictions for crimes of dishonesty or false statement:

- Theft 3      04/02/2007      Evergreen District Court
- Theft 3      09/02/06      Lynwood Municipal Court
- Theft 3      06/26/06      Lynwood Municipal Court
- PSP 1      09/13/06      Snohomish County Superior Court

In addition this witness is a scofflaw who repeatedly drives a vehicle in this state after being told not to do so because her driving privilege has been suspended or revoked:

- DWLS 3      02/19/07
- DWLS 3      08/11/06

EXHIBIT 6

A-28

RT M. LEEN  
 JBA#14208  
 ARNEY AT LAW  
 ONE UNION SQUARE  
 600 UNIVERSITY STREET, SUITE 3310  
 SEATTLE, WASHINGTON 98104-4172  
 (206) 748-7817 • FAX (206) 748-7821

1 DWLS 3 08/09/06  
2 DWLS 3 05/28/06  
3 DWLS 3 04/11/06

4 At the present time this witness has 4 active warrants for her arrest. The defense  
5 contends that it should be permitted to inquire in cross examination as to what steps, if any,  
6 the witness has taken to clear these warrants and to what extent the witness has discussed with  
7 the prosecutor these warrants, and the possibility of her arrest, upon appearing in court in this  
8 matter.  
9

10 ARGUMENT

11 The Sixth Amendment to the United States Constitution and article I, section 22 of our  
12 state constitution guarantee the criminal defendant's right to confront and cross-examine  
13 adverse witnesses. *State v. Hudlow*, 99 Wash.2d 1, 14-15, 659 P.2d 514 (1983) (citing *Davis*  
14 *v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Chambers v. Mississippi*, 410  
15 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). Cross-examination to elicit facts that tend to  
16 show bias, prejudice, or motive is generally a matter of right, although the scope of such  
17 cross-examination is within the trial court's discretion. *State v. Roberts*, 25 Wash.App. 830,  
18 834, 611 P.2d 1297 (1980). Although there is no bright line rule for determining when the  
19 permitted cross-examination passes constitutional muster, the United States Supreme Court  
20 has stated that a defendant must be "permitted to expose to the jury the facts from which  
21 jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to  
22 the reliability of the witness." *Davis*, 415 U.S. at 318.

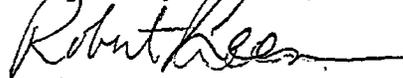
23 ER 609(a)(2) provides: For the purpose of attacking the credibility of a witness in a  
24 criminal or civil case, evidence that the witness has been convicted of a crime shall be  
25  
26

ROBERT M. LEEN  
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1 admitted if elicited from the witness or established by public record during examination of the  
2 witness but only if the crime ... (2) involved dishonesty or false statement, regardless of the  
3 punishment. Crimes of theft involve dishonesty and are *per se* admissible for impeachment  
4 purposes under ER 609(a)(2)." See, *State v. McKinsey*, 116 Wash.2d 911, 913, 810 P.2d 907,  
5 908 (1991).

6  
7 Generally, "{a} defendant has a right to cross-examine the State's witness concerning  
8 possible self-interest in cooperating with the authorities." *State v. Pickens*, 27 Wash.App. 97,  
9 100, 615 P.2d 537 (1980) (citing *State v. Robbins*, 35 Wash.2d 389, 213 P.2d 310 (1950)),  
10 *review denied*, 94 Wn.2d 1021 (1980). "Further, the court may violate the confrontation  
11 clause if it prevents the defense from placing facts before the jury from which such bias or  
12 prejudice may be inferred." *Pickens*, 27 Wash.App. at 100, 615 P.2d 537 (citing *Davis*, 415  
13 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347; *State v. Brooks*, 25 Wash.App. 550, 611 P.2d 1274,  
14 *review denied*, 93 Wash.2d 1030 (1980)).  
15

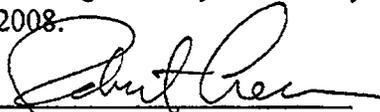
16 Respectfully submitted,

17 

18 Robert M. Leen  
19 Attorney for Defendant

20 CERTIFICATE OF SERVICE

21 I hereby certify that a true copy of this pleading was  
22 emailed to the Prosecuting Attorney for the City of Kent this  
23 21 day of July 2008.

24   
25 Robert M. Leen  
26

ROBERT M. LEEN  
WSBA#14208  
ATTORNEY AT LAW  
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600 UNIVERSITY STREET, SUITE 3310  
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(206) 748-7817 · FAX (206) 748-7821

CERTIFICATE OF SERVICE

I declare under penalty of perjury that on November 10, 2009, I served one copy of the foregoing document by United States Mail, postage prepaid, to: Michelle D. Walker, City Attorney's Office, 220 Fourth Avenue South, Kent, WA 98032

  
Robert M. Leen