

63673-1

63673-1/HEK

NO. 63673-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS E. WRENN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Where a trial judge has made multiple discretionary rulings prior to the exercise of an affidavit of prejudice, was the affidavit of prejudice untimely and properly denied?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Douglas Wrenn was charged under cause number 08-1-03362-3 SEA with two counts of Assault in the Second Degree. CP 1-2. Numerous hearings were held before Judge Rogers over the fall of 2008. See Subs 38, 46, 48, 49, 56, 63. On January 26, 2008, the case was assigned to Judge Rogers for trial. 1/26/09 RP 4; Sub 92. When the parties appeared before Judge Rogers, the appellant attempted to exercise an affidavit of prejudice. 1/26/09 RP 4-6. Judge Rogers denied Wrenn's motion for an affidavit of prejudice on the basis that it was untimely because the court had already made a discretionary ruling in the case. 1/26/09 RP 5-6. Trial proceeded and Wrenn was found guilty on both counts. CP 28-29. Wrenn appealed.

2. PROCEDURAL FACTS RELATING TO APPEAL.

Wrenn was arraigned on March 27, 2008. Sub 3. On September 3, 2008, a hearing was held to set an omnibus hearing and trial date for the case. Subs 32, 34. Wrenn was present and signed the order indicating he had notice of the date. Subs 32, 34. The omnibus hearing was scheduled for October 17, 2008, and the trial was scheduled for October 27, 2008. Sub 34.

On October 17, 2008, Wrenn failed to appear at the omnibus hearing before Judge Rogers. Subs 38, 40. Wrenn's attorney was present. Sub 38. In response to a motion by the respondent, Judge Rogers determined that good cause had been shown, and directed the clerk to issue a bench warrant for the arrest of the defendant. Sub 40. The judge also fixed bail at \$50,000. Sub 40.

On October 22, 2008, appellant re-appeared in court. Sub 42. The outstanding bench warrant was quashed. Sub 44. A new omnibus hearing was scheduled for November 14, 2008; a new trial date was scheduled for November 24, 2008. Sub 41.

On November 14, 2008, the parties appeared before Judge Rogers for the scheduled omnibus hearing. Subs 46, 47. Appellant was present at this hearing. Sub 46. The omnibus hearing was continued by stipulated order to November 21, 2008.

Sub 47. Wrenn signed this order, indicating he had notice of the new date. Sub 47.

On November 21, 2008, Wrenn again failed to appear on time at the scheduled omnibus hearing before Judge Rogers.

Sub 49. In response to a motion by the respondent State of Washington, Judge Rogers again determined that good cause had been shown, and again directed the clerk to issue a bench warrant for Wrenn's arrest. Sub 52. This time, the judge fixed bail at \$200,000 and directed the jail not to release the defendant on his personal recognizance. Sub 52.

Wrenn showed up later that day and made a motion before Judge Rogers to quash the bench warrant issued several hours earlier. Subs 48, 50. The court denied the motion to quash the defendant, however, granted Wrenn a temporary release until November 25, 2008 to post a bond of \$100,000. Subs 48, 50. At the same hearing, Wrenn made a motion to continue the trial date from November 24, 2008 to December 8, 2008. Sub 51. Judge Rogers granted Wrenn's motion in the administration of justice. Sub 51. The court also set a new omnibus hearing for December 5, 2008 and reset the expiration date to January 7, 2009. Sub 51.

On December 5, 2008, the parties appeared for the scheduled omnibus hearing before Judge Rogers. Sub 56. Because the appellant had not posted bail following his temporary release, the appellant was remanded into custody. Sub 55. The court also quashed the warrant for \$200,000; bail in the amount of \$100,000 remained in effect. Sub 54.

At the same hearing on December 5, 2008, the respondent State of Washington moved for a continuance of the trial date because the assigned prosecutor was ill and a witness interview had to be rescheduled. Sub 57. Judge Rogers granted the motion in the administration of justice. Sub 57. The trial date was continued from December 8, 2008 to December 15, 2008. Sub 57. The court also set a new omnibus for December 12, 2008, and reset the expiration date to January 14, 2009. Sub 57.

On December 12, 2008, the court held an omnibus hearing. Sub 63. Again, Judge Rogers was presiding. Sub 63. In the Order on Omnibus Hearing, Judge Rogers made several rulings, including ordering the respondent to file dispositive motions no later than December 15, 2008. Sub 62. This ruling required presentation of

motions on different timelines than provided for in CR 6 (adopted for criminal proceedings by CrR 8.1). The dispositive motions included motions relating to identification and to the suppression of evidence under CrR 3.6. Sub 62.

Also on December 12, 2008, Wrenn again brought a motion to continue the trial date. Sub 61. Judge Rogers granted the motion and ordered the continuance of the trial date in the administration of justice. Sub 61. The trial date was rescheduled for December 17, 2008 and the expiration date was reset to January 16, 2009. Sub 61.

On January 26, 2009, after several more motions for continuances before other judges, the case was assigned to Judge Rogers for trial. Sub 92. Pre-trial motions commenced with a defense motion to suppress evidence under CrR 3.6 that was presented on the day of trial. CP 93. A trial was held and the respondent was found guilty on both counts. CP 28-29. The respondent appealed.

C. ARGUMENT

- 1. BECAUSE THE TRIAL JUDGE MADE MULTIPLE DISCRETIONARY RULINGS PRIOR TO THE EXERCISE OF THE AFFIDAVIT OF PREJUDICE, THE AFFIDAVIT WAS UNTIMELY AND PROPERLY DENIED.**

Wrenn claims that the trial court had not made any discretionary rulings before he exercised his affidavit of prejudice and therefore his affidavit of prejudice was timely and should have been granted. Wrenn acknowledges in his brief that Judge Rogers granted a continuance on December 12, 2008, but argues that because the State did not object to his motion for a continuance, the court did not exercise discretion in granting the motion. App. Brief at 12. However, because granting a continuance of the trial date—even where the parties agree—is an exercise of discretion and because Judge Rogers exercised discretion on several occasions prior to the submission of the affidavit of prejudice, Wrenn’s claim is without merit.

“RCW 4.12.040 is a mandatory, nondiscretionary rule allowing a party in a superior court proceeding the right to one change of judge upon the timely filing of an affidavit of prejudice under RCW 4.12.050.” State v. Dennison, 115 Wn.2d 609, 619, 801 P.2d 193 (1990) (citing State v. Hansen, 107 Wn.2d 331, 333,

728 P.2d 593 (1986); Marine Power & Equip. co. v. Department of Transp., 102 Wn.2d 457, 461, 687 P.2d 202 (1984); State v. Guajardo, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987) review denied, 110 Wn.2d 1018 (1988)). However, the affidavit of prejudice must be filed before the trial court makes any discretionary rulings. State v. Parra, 122 Wn.2d 590, 594, 859 P.2d 1231 (1993); Dennison, 115 Wn.2d at 619; Guajardo, 50 Wn. App. at 19. "The exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather, the court's discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party's request." Parra, 122 Wn.2d at 597 (quoting Rhinehart v. Seattle Times Co., 51 Wn. App. 561, 578, 754 P.2d 1243 (1988)).

Granting or denying a continuance is a discretionary ruling. State v. Espinoza, 112 Wn.2d 819, 823, 774 P.2d 1177 (1989); Dennison, 115 Wn.2d at 620; Guajardo, 50 Wn. App. at 19; Rhinehart, 51 Wn. App. at 578 (citing State v. Maxfield, 46 Wn.2d 822, 829, 285 P.2d 887 (1955)); see also Parra, 122 Wn.2d at 601 ("To either grant or deny a motion involves discretion."). "Grant or denial of a continuance is a discretionary ruling because the court must consider various factors, such as diligence, materiality, due

process, a need for orderly procedure, and the possible impact of the result on the trial.” Guajardo, 50 Wn. App. at 19. Thus, granting a continuance is a discretionary ruling even where the parties agree to the continuance. Dennison, 115 Wn.2d at 620, n. 10; Parra, 122 Wn.2d at 601 (granting motions to which there is no objection does not indicate that the judge failed to exercise discretion).

In Dennison, the defendant argued that his affidavit of prejudice was filed before the trial judge made discretionary rulings. 115 Wn.2d at 618. The Washington Supreme Court noted, however, that the trial court had made multiple discretionary rulings prior to the date when the defendant filed the affidavit, including granting a motion to continue the trial date. Id. at 620. The Court even went on to state: “As the Court of Appeals noted, although the parties stipulated to the continuance, the trial court in its discretion decided whether to grant or deny the continuance.” Id. at 620, n. 10. The Court rejected the defendant’s contention as “without merit.” Id. at 619.

Likewise, in Espinoza, the Washington Supreme Court again observed that the trial judge had “twice exercised his judicial

discretion in ruling on motions for continuances...” 112 Wn.2d at 823.

In the current case, Judge Rogers made several discretionary rulings before trial on January 26, 2009. First, on November 21, 2008, Judge Rogers granted Wrenn’s motion to continue the trial date. Sub 51. Then, on December 5, 2008, Judge Rogers granted the respondent’s motion to continue the trial date. Sub 57. Finally, Judge Rogers granted Wrenn’s motion for a continuance on December 12, 2008. Sub 61. None of these motions were stipulated orders, although the respondent did not object on December 12, 2008. 12/12/08 RP 2-3. Indeed, the box indicating that the rulings were “Upon agreement of the parties” under CrR 3.3(f)(1) was not checked on any of the continuance orders (it was checked and crossed out on 12/12/2008). All of these discretionary rulings occurred well before the appellant filed his affidavit of prejudice on January 27, 2009. Wrenn’s attorney even conceded that Judge Rogers had previously made a discretionary ruling when he attempted to exercise an affidavit of prejudice. 1/26/09 RP 4.

At a bare minimum, the continuances granted on November 21, December 5 and December 12, 2008, were each a clear and

separate exercise of discretion sufficient to render the affidavit untimely. See Dennison, 115 Wn.2d at 620; Espinoza, 112 Wn.2d at 823; Guajardo, 50 Wn. App. at 19; and Rhinehart, 51 Wn. App. at 578.

However, Judge Rogers also granted the respondent's motion for a warrant on October 17, 2008, granted another motion for a bench warrant on November 21, 2008, and denied Wrenn's motion to quash his warrant later on the same day. Subs 40, 50, 52. In the omnibus order, Judge Rogers also ordered the defendant to submit motions by a certain date that was a variation from the timelines in the Civil Rules. Sub 62.

The decision to grant a motion for a bench warrant does not follow as a matter of right; rather, a motion for a bench warrant may or may not be granted when the State requests it. Therefore, the decision to grant a motion for a bench warrant requires the exercise of discretion. See Rhinehart, 51 Wn. App. at 578. Likewise, the decision to direct a defendant to present certain motions at certain dates also requires a court's discretion. Here, Judge Rogers exercised his discretion by ordering the clerk to issue a bench warrant on two occasions and denying the defendant's motion to

quash the warrant. He also exercised discretion by setting a specific timeline for motions to be brought.

Wrenn points to a 1942 case in support of the argument that a stipulated order is not a discretionary ruling. App. Brief at 12-13 (citing State Ex. Re. Floe v. Studebaker, 17 Wn.2d 8, 17, 134 P.2d 718 (1942)). This case might be relevant if the issue before this Court was whether the stipulated order to continue the omnibus hearing on November 14 involved the exercise of discretion. Sub 47. But it is not. Instead, it is the continuances of the trial date—which necessarily required the trial court to take into account all of the considerations articulated in Guajardo, including the extension of the expiration date—that are the rulings that required the court to exercise its discretion.

These motions for continuances were brought before the court in the form of motions that required resolution. See Parra, 122 Wn.2d at 594. "That the judge elected to grant the motions in this case, rather than deny, does not indicate that the judge failed to exercise discretion." Id. at 601. For the same reasons, the granting of the motions for warrants and the denial of the motion to quash the warrant also invoked the court's discretion. The appellant's claim should be rejected.

D. CONCLUSION

A discretionary ruling prior to the exercise of an affidavit of prejudice renders the affidavit untimely. In this case, Judge Rogers made several discretionary rulings before the appellant exercised an affidavit of prejudice. Wrenn's affidavit was therefore untimely and properly denied. Accordingly, the trial court's ruling and Wrenn's conviction should be upheld.

DATED this 28th day of June, 2010.

Respectfully submitted,

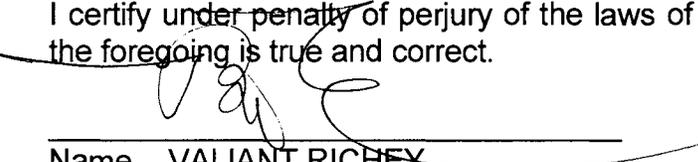
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Anthony Savage, the attorney for the appellant, at 615 Second Avenue, Suite 340, Seattle, WA 98104-1882, containing a copy of the Brief of Respondent, in STATE V. DOUGLAS WRENN, Cause No. 63673-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name VALIANT RICHEY
Done in Seattle, Washington

06/25/10

Date

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