

66707-6

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NO. 66707-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DARIN GATSON,

Appellant.

---

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING CONTINUANCES OVER MR. GATSON'S VIGOROUS OBJECTIONS, AND THE DELAY VIOLATED MR. GATSON'S SPEEDY TRIAL RIGHTS.

- a. Review of the speedy trial issue is appropriate.

The State contends that this Court should not review Mr. Gatson's statutory speedy trial claim because he did not formally move to dismiss the charges in the trial court. Resp. Br. at 6. In fact, Mr. Gatson did make a pro se request that the court dismiss the charges against him because his speedy trial rights had been violated. He also requested his counsel file a motion to dismiss on the same basis. The State's application of State v. Barton is overly formulaic. Id. (relying on State v. Barton, 28 Wn. App. 690, 626 P.2d 509 (1981)).

In Barton, the defendant's preliminary hearing was held 123 days after he was arrested. Id. at 691. Barton was tried and found guilty. Id. At no point before the trial court did Barton raise any objection based on his delayed preliminary hearing. For the first time on appeal, Barton argued that the convictions should be dismissed because the preliminary hearing was not held within the time period proscribed by CrR 3.3. Id. at 691-92. Based on the

overly technical nature of CrR 3.3 and the lack of record whether any exclusionary periods applied, this Court declined to consider Barton's issue because he had not raised it below. Id. at 692-93.

This case presents a very different situation. First, Mr. Gatson vigorously objected in the trial court to every continuance that was granted. Op. Br. at 8-11. Further, in a November 7, 2010 letter to the court, Mr. Gatson again noted his objection to the continuances and argued they violated his speedy trial rights. CP 186 ("I never signed off on my speedy trial rights. . . . these continuances are violating my trial rights."). On November 13, Mr. Gatson sent another letter to the court explaining that he asked his attorney to file a motion to dismiss based on the violation of his speedy trial rights. CP 183. Because "his attorney just stood there," Mr. Gatson continued, "I am asking you judge to have my case dismissed for failure of dew [sic] process." CP 183. Unlike in Barton, the trial court was fully aware of Mr. Gatson's precise concern and noted that it was an issue he could pursue on appeal. 11/12/10RP 6-7.

Mr. Gatson's repeated pro se objections and requests, including a letter that specifically set forth a speedy trial basis for

dismissal, constitute a sufficient record for this Court to review the issue here.

- b. Because the continuances were inextricably linked, the Court should decline the State's request to consider only the last granted continuance.

The State argues conveniently that only the last of the trial court's continuances should be reviewed. Resp. Br. at 7-8. However, the court was informed at the hearing on the initial continuance that if the trial was held over to November defense counsel would have an extended conflict requiring an additional, lengthy delay of Mr. Gatson's case. 10/29/10RP 3. At the October 29 hearing, the State and defense counsel, over Mr. Gatson's objection, requested a one-week continuance. 10/29/10RP 2. Defense counsel plainly informed the court that if the trial did not go forward the following week, he would not be able to go to trial until at least December. 10/29/10RP 3. Nonetheless, the trial court granted a one-week continuance. 10/29/10RP 4.

The need for the final and lengthier continuance was thus squarely presented to the trial court and the State at the initial hearing. The State's subsequent request to continue the trial further into November (over objection of both defendant and

defense counsel)<sup>1</sup> and the final 29-day continuance, must be reviewed with that context in mind.

c. Reversal is compelled by *Barker*, CrR 3.3 and *Saunders*.

In this case, like in *State v. Saunders*, the trial court's repeated grants of continuances over defendant's vigorous objections was an abuse of discretion. Op. Br. at 14-15 (elaborating on *State v. Saunders*, 153 Wn. App. 209, 220 P.3d 1238 (2009)).<sup>2</sup> Because absent the continuances, the trial did not proceed within the 60 days required by CrR 3.3, Mr. Gatson's convictions should be reversed and the charges dismissed. See *State v. Kenyon*, 167 Wn.2d 130, 139, 216 P.3d 1024 (2009); *Saunders*, 153 Wn. App. at 220.

Likewise, application of the factors set forth in *Barker v. Wingo*, demonstrate that Mr. Gatson's constitutional speedy trial right was also violated. Op. Br. 11-12, 15-17 (discussing constitutional test under *Barker v. Wingo*, 407 U.S. 514, 531-32, 92

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<sup>1</sup> On appeal, the State has continued to delay resolution of Mr. Gatson's case by failing to timely file its response brief, despite the speedy trial issues raised and without moving for an extension.

<sup>2</sup> The State distinguishes *Saunders* because that defendant objected to plea negotiations, which was defense counsel's basis for seeking a continuance. Resp. Br. at 11. This factual "distinction," however, actually demonstrates a further similarity. Like in *Saunders*, Mr. Gatson's trial counsel also proffered ongoing negotiations as a basis to continue trial. 10/29/10RP 3; 11/4/10RP 2. Mr. Gatson denied the justification and objected to the continuance. E.g., CP 186.

S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). The constitutional violation similarly requires the convictions be reversed and the charges dismissed. State v. Ellis, 76 Wn. App. 391, 395, 884 P.2d 1360 (1994).

2. TRIAL COUNSEL'S OBJECTION TO THE LATENT FINGERPRINT EVIDENCE WAS SUFFICIENT FOR THIS COURT TO CONSIDER THE ISSUE ON APPEAL.

Based on State v. Wilbur-Bobb, 134 Wn. App. 627, 141 P.3d 665 (2006), the State argues this Court should not review the trial court's erroneous admission of unreliable latent fingerprint evidence. Resp. Br. at 22-23. But trial counsel preserved the issue for review through cross-examination showing the unreliability of the fingerprint expert's methodology and by asking the judge (in a bench trial) to disregard the evidence. 12/14/10RP 7-11, 15-19, 45, 47-49. Consequently, review here is proper at least on the same basis as in State v. Black, where the issue was reviewed because the defendant adequately apprised the trial court of the basis for his objection to the evidence, even if precise language was not used. State v. Black, 109 Wn.2d 336, 340-41, 745 P.2d 12 (1987); see Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (preservation of error rule affords trial court opportunity to resolve).

As set forth in Mr. Gatson's opening brief, the latent fingerprint identification evidence was unreliable and should have been excluded under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923. Op. Br. at 21-26. The error requires reversal of Mr. Gatson's convictions. Op. Br. at 27-28.

3. THE SENTENCING FINDING IS PROPERLY  
CHALLENGED FOR THE FIRST TIME ON APPEAL.

The State contests Mr. Gatson's basis for raising the court's erroneous revocation of driver's license for the first time on appeal. However, "[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (collecting cases).

For the reasons set forth in the opening brief, if the Court does not reverse Mr. Gatson's conviction, the erroneous special sentencing finding should be corrected. Op. Br. at 28-37.

C. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Gatson's convictions should be reversed because his speedy trial rights were violated and the convictions were based on unreliable latent fingerprint evidence. In the alternative, the special finding

should be reversed and vacated as to count two because a vehicle was not used in commission of that crime.

DATED this 30th day of January, 2012.

Respectfully submitted,



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Washington Appellate Project  
Attorney for Appellant

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	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF JANUARY, 2012, 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:

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| [X] | DARIN GATSON<br>889851<br>WSP<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362           | (X) U.S. MAIL<br>( ) HAND DELIVERY<br>( ) _____ |  |

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 30<sup>TH</sup> DAY OF JANUARY, 2012.

X \_\_\_\_\_ 