

NO. 34316-9-II

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

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STATE OF WASHINGTON, Respondent

v.

MIRASLAV SHUGANI, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE JOHN F. NICHOLS  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-01922-1

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The issue raised in this appeal deals with the waiver of jury trial by the defendant and the necessity for an interpreter.

The earliest transcript provided by the defense in this case begins on October 28, 2005, at the omnibus hearing. At that time, the defense attorney, Mr. Wooden, talks to the court about whether or not an interpreter is needed. He addresses the court as follows:

THE COURT: And we don't need an interpreter? No, Mr.

—

MR. WOODEN: I didn't have a problem this morning talking with him.

THE COURT: Okay. Okay.

MR. FARR (Deputy Prosecutor): Did note that the supervised release required him to report to his attorney on a weekly basis. Apparently, he has not been doing so. And I believe supervised release indicated to Mr. Jackson he had not reported for a week before the last court date.

MR. WOODEN: I think we're on track, your Honor. I talked that — to Mr. Shugani about that. He said he had lost that number. I instructed him to go over this morning to get the information. Apparently, he had been contacting supervised release until just last week.

THE COURT: Okay. So where's Mr. Shugani going after court this morning?

Where are you going after work this morning?

MR. SHUGANI: Home.

THE COURT: No, wrong answer.

MR. SHUGANI: Oh, I mean, I'm gonna to get the supervisor –

THE COURT: That's right.

MR. SHUGANI: - get the number –

(RP 1, L.18 – 2, L.16)

At that omnibus hearing, there was no request for an interpreter nor did it appear to the court that any was necessary.

The next transcript provided by the defense deals with the arraignment on an Amended Information which took place on November 23, 2005. The defendant waived speedy trial and entered a not guilty plea to the Amended Information. This does not appear to have involved the use of an interpreter. No complaint was made by the defense nor by the defendant himself. It does not appear that the court was concerned about the defendant not understanding what was going on.

(RP 4-6)

The next part of transcript provided by the defense was the pretrial hearing on January 5, 2006. It is clear from the record that an interpreter was present and this Russian speaking interpreter was utilized by the defendant and his attorney. (RP 7, L.18-25) At that time they executed a written waiver of jury trial and the judge handling the pretrial matter (not

the trial judge) went through in detail with the defendant his rights to a jury trial. (RP 8-10) At the end of that, it did not appear that the defendant had any questions, concerns or problems with that and the court entered the Waiver of Jury Trial (CP 47). A copy of the Waiver of Jury Trial (CP 47) is attached hereto and by this reference incorporated herein.

The non-jury trial was held on January 10, 2006. At that time a Russian interpreter was present and was sworn in on the record by the court (RP 11).

The question was raised and discussed in some detail among the participants as to whether or not an interpreter was really needed. This discussion took place before the calling of witnesses in the non-jury trial.

MR. WOODEN: Okay.

Your Honor, another pretrial issue regards the interpretation. Mr. Shugani is a primary Russian speaker. His native language is Russian. He's also a very good English speaker. We've met and spoken about the case both with and without an interpreter.

At his arraignment, he had an interpreter. We had a second court appearance where, after I had met with him, I didn't feel it was even really necessary that we needed an interpreter. But then we got into court and the understanding seemed to have broken down at that point. So I've been conscientious since then to use an interpreter as much as possible.

In order to facilitate the interpretation today, we have discussed this with Mr. Shugani and with Mr. Potanski, and we would raise the issue with the court, perhaps to not have

a – I don't know how to describe it, a hundred percent consistent translation, but to have Mr. Potanski available –

THE COURT: Standby?

MR. WOODEN: Well, to be there, to be available as a resource if there's a – there's a misunderstanding or breakdown of understanding. I – I'll just raise that with the court. I would –

THE COURT: Mr. Shugani, are you able to understand the proceedings at this time?

MR. SHUGANI: Yes.

THE COURT: Okay. And you do wish to have the interpreter here just in case something comes up with a word that you're not familiar with?

MR. SHUGANI: Yes.

THE COURT: Okay. Well, I don't have any problem with that. Again, he's indicated on the record that he does understand the proceedings and understands the – the language barrier, I guess, but we do have the interpreter on a standby position if there's any need for that. I have sworn him and we can proceed accordingly.

MR. WOODEN: Okay. Thank you, your Honor.

(RP 18, L.11 – 19, L.24)

The court then went on to conduct a non-jury trial with the defendant and the interpreter in a standby capacity. At no time in the record provided to the prosecution by the defense are there any objections lodged by either the defense attorney or the defendant that they do not understand the proceedings or do not understand the interpretation.

Further, there is no indication that the defendant did not understand what was going on without the need of the interpreter.

It is also of note that the defendant testified at the trial in his own behalf. (RP 88-101). During that time he had requested that the interpreter be available to him and the court allowed that (RP 88) but as the transcript relates, there are many examples when he responds to questions on direct and cross-examination and does not utilize the interpreter at all, but responds to the questions. There do not appear to be any examples of non sequiturs or an inability to understand what was being said.

## II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is that he did not knowingly waive his right to a jury trial. Waiver of the right to a jury trial must be knowing, intelligent and voluntary and demonstrated in the record by affirmative, unequivocal action by the defendant. City of Bellevue v. Acrey, 103 Wn.2d 203, 207-208, 691 P.2d 957 (1984). The waiver of jury trial must be either in writing or done orally on the record. State v. Treat, 109 Wn.App. 419, 427, 35 P.3d 1192 (2001).

There is absolutely nothing that has been demonstrated in this record to support a proposition that the defendant did not understand the right to a jury and was voluntarily giving that right up to be heard by a

judge. Quite the contrary, he has repeatedly demonstrated through his own words and through his attorney that he wanted this matter heard by a judge. For example, the defendant specifically tells the judge at the pretrial hearing, when the written waiver of jury trial is entered, that he wants it heard “before a judge” (RP 10, L.3). This is consistent with what the defense attorney had advised the court when the defense attorney told the judge “we are electing to have a bench trial rather than a jury trial. We’ve gone over that with Mr. Shugani in some detail. We’re executing a written waiver for the court and we’ve contacted Judge Nichols to see if there would be any changes in time for that.” (RP 7, L.22 – 8, L.1).

As indicated in State v. Stegall, 124 Wn.2d 719, 881 P.2d 797 (1994), the waiver of a jury trial only requires the defendant’s personal expression. It further clarifies that to be either a personal statement from the defendant expressing agreement to the waiver or an indication that the trial court judge or defense counsel has discussed the issue with the defendant before the attorney’s own waiver of jury trial. Stegall, 124 Wn.2d at 728-729. In our case, the defendant not only had these rights explained to him and he agreed to the waiver but he signed a documentation and his attorney indicated to the judge that this had been gone over with the defendant and this was their wish to have it heard by a judge only instead of taking the situation to a jury.

However, the defendant on appeal maintains that the waiver of constitutional right to a jury trial without the benefit of a sworn, certified interpreter prevents the State from being able to demonstrate that this was a knowing, intelligent and voluntary act on the part of the defendant. It is important to note, and as the following case law demonstrates clearly, that this was never raised at the Superior Court level. It was never raised in front of Judge Bennett, the Superior Court Judge at the pretrial waiver of jury, nor was it raised in front of Judge Nichols, when he heard the bench trial. It was never raised at the time of sentencing nor was raised on any post-sentencing motions. The first time it has been raised is on this appeal.

This then becomes very similar to the situation found in State v. Sengxay, 80 Wn.App. 11, 906 P.2d 368 (1995). One of the four issues raised in the Sengxay appeal was a failure to swear in the interpreter. The Court of Appeals addressed the issue as follows:

Unsworn Interpreter. Both RCW 2.42.050 and ER 604 provide that an interpreter in a judicial or administrative proceeding must, before beginning to interpret, take an oath to interpret (or translate) truthfully. It is undisputed here that the interpreter who translated for several Laotian witnesses at trial was not sworn on the record. As Sengxay notes, the right to an interpreter is derived from the constitutional rights to confront witnesses and to a fair 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). Neither Sengxay nor any of the other

witnesses, however, was denied an interpreter. Further, Sengxay did not object to the interpreter's participation at trial. Accordingly, review of this issue is precluded unless Sengxay can show an obvious error affecting the fairness of the trial. United States v. Perez, 651 F.2d 268, 273 (5<sup>th</sup> Cir. 1981) (failure to object to unsworn interpreter waives the issue unless plain error is shown). Sengxay does not contend the interpreter here translated inaccurately; he only hypothesizes that if the interpreter did translate inaccurately, it may have affected his ability to successfully cross-examine those witnesses. This is not enough to show obvious error. Perez, 651 F.2d at 273.

- State v. Sengxay, at 16.

The Sengxay case refers to United States v. Perez, 651 F.2d 268 (1981). In Perez, the record did not reflect that an interpreter who translated the questions of two crucial prosecution witnesses was sworn in. But the record also failed to reveal any objection to this apparent omission. Perez, nevertheless, argued that it was plain error and subject to an appeal in the absence of any objections at the trial court level. The Perez court indicated as follows:

As a general rule, even in a criminal case errors of the trial court will not be noticed on appeal unless they have been called to the judge's attention when made, with a statement of why counsel believes the action taken to have been erroneous. (cite omitted). This salutary rule has its roots in obvious considerations of finality of the criminal trial process, of judicial efficiency, and of avoiding trials by ambush. - - -

It has long been the general rule that even a failure to swear a witness may be waived. This may occur either by knowing silence and an attempt to raise objection after

verdict or by the mere failure to counsel to notice the omission before completion of the trial. If this be true of a witness, one who may and often does have an interest in the outcome of the trial and who may therefore require the admission of an oath in a form calculated to awaken his conscious and impress his mind with his duty to tell the truth, how much more so of an interpreter. Such court functionaries stand somewhere between an expert witness called by the court and the court reporter. As to such persons, the fundamental question is one of qualification, not of veracity or fidelity. In the absence of special circumstances, the later qualities are assumed. No such circumstances appear here. The omission has been waived.

- U.S. v. Perez, at 273

In our case, it is obvious from the discussion between the defense attorney and the court that the defendant did understand and speak English. The issue of whether or not an interpreter is necessary was also raised in State v. Mendez, 56 Wn.App. 458, 784 P.2d 168 (1989), review denied, 114 Wn.2d 1017, 791 P.2d 535 (1990). The Mendez court noted that the criminal rules imposed a duty only if a party is not “fluent” in the English tongue. It further determined that a court’s duty to appoint an interpreter accrues when the court determines or it is apparent that a person cannot readily speak or understand the English language. (Mendez, 56 Wn.App. at 462). In our situation, the court, showing great discretion, chose to use a standby interpreter for the purposes of the non-jury trial. The defendant had previously gone through an omnibus application hearing, an amendment of the information, and a waiver of

speedy trial all without the assistance of an interpreter and with an attorney who was cognizant of his limitations with the English language. Yet, he indicated to the court that the defendant spoke very good English. At no time were any of the concerns that are now being raised by a different attorney on appeal, raised with the trial court or at the Superior Court level. There was no objection at the trial on this issue. Thus, in order to determine whether an alleged error is reviewable it must be decided whether the trial court's actions or inactions constituted a manifest error affecting a constitutional right. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). A review of the record demonstrates that although the defendant's English may not have been perfect, he was capable of making himself understood and seemed readily to comprehend questions put to him. More importantly, he was able to clearly express his defense and never appeared to have any apprehensions about having the case heard by a judge only. In fact, he made it clear on the record that he wanted it heard by a judge.

### III. CONCLUSION

The State submits that it has shown that there has been a knowing, intelligent and voluntary waiver of jury trial. The defendant understood what was going on and clearly expressed his interest in having this matter heard by a judge only. At no time were any objections made to this

procedure at the Superior Court level. The State further submits that this appeal is wholly without merit.

DATED this 6 day of Oct, 2006.

Respectfully submitted:

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By:

  
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**APPENDIX "A"**  
**WAIVER OF JURY TRIAL**

FILED

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Jo Anne McBratna, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
Plaintiff,

v.

Miroslav Ivanich Shugani  
Defendant.

WAIVER OF ~~SPEEDY~~ <sup>JURY</sup> TRIAL

No. 05-1-01922-1

I have been informed and understand that I have the following rights:

- \_\_\_\_\_ 1. The right to trial within sixty (60) days following the commencement date, as defined in CrR 3.3(e), if I am incarcerated.
- \_\_\_\_\_ 2. The right to trial within ninety (90) days following the commencement date, as defined in CrR 3.3, if I am not incarcerated.
- X 3. The constitutional right to a <sup>Jury</sup> speedy trial. *— see colloquy*
- \_\_\_\_\_ 4. The right to arraignment within 14 days after the date that the information is filed in Superior Court. (CrR 4.1).
- \_\_\_\_\_ 5. The right to have a charge filed in Superior Court within 72 hours after detention in jail or release on conditions. (CrR 3.2B(c)).

I have been informed and understand that if I do not receive a trial within the applicable time limits, the case against me will be dismissed and cannot ever be filed again. Knowing all of the above, I hereby waive (give up) these rights.

I agree to a new commencement date of \_\_\_\_\_.

DATED this 5 day of January, 2006.

⊗ [Signature]  
Defendant

[Signature]  
Attorney for Defendant WSBA # 29523

APPROVED: [Signature]  
Deputy Prosecuting Attorney, WSBA # 2570

**FINDINGS AND ORDER**

I have questioned the defendant and find that (1) he intelligently, knowingly and voluntarily waived the above rights to speedy trial, and (2) that he was competent to make such waiver.

DONE in Open Court this 5 day of January, 2006.

[Signature]  
JUDGE OF THE SUPERIOR COURT

JURY  
WAIVER OF ~~SPEEDY~~ TRIAL  
Revised 9/8/03

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