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COURT OF APPEALS
DIVISION II

08 OCT 27 AM 10:30

ORIGINAL

IN THE COURT OF APPEALS, DIVISION TWO cm
BY DEPUTY
OF THE STATE OF WASHINGTON

State of Washington,
respondent,

v

Christopher Michael Scales,
appellant.

No. 37136-7-II

STATEMENT OF
ADDITIONAL GROUNDS
(RAP 10.10)

I, CHRISTOPHER MICHAEL SCALES, have received and reviewed the opening brief by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this statement of additional grounds for review when my appeal is considered on the merits.

The appellant asks this Court to liberally construe his argument and afford him the benefit of any doubt, and to apply the strongest claim suggested by the facts. Franklin v Murphy, 745 F.2d 1221, 1235 (9th Cir. 1984)(pro se pleading should be afforded the benefit of any doubt).

ADDITIONAL GROUND ONE

ABUSE OF DISCRETION BY THE COURT DUE TO GRANTING
THE STATE A CONTINUANCE WITHOUT "GOOD CAUSE".

ADDITIONAL GROUND TWO

PROSECUTORIAL MISCONDUCT BY MISLEADING THE COURT
ABOUT THE NEED FOR THE CONTINUANCES IN ORDER TO
OBTAIN A TACTICAL ADVANTAGE.

ADDITIONAL GROUND THREE

ABUSE OF DISCRETION BY THE COURT BY REFUSING TO
GRANT THE DEFENDANT'S PRO SE MOTION TO DISMISS.

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LAW AND ARGUMENT FOR ADDITIONAL GROUND ONE

A trial court's grant or denial of a continuance
is reviewed for an abuse of discretion. State v Cannon,
130 Wn 2d 313, 326, 922 P.2d 1293 (1996). Discretion
is abused if it is exercised on untenable grounds or
for untenable reasons. State ex rel. Carroll v Junker,
79 Wn 2d 12, 26, 482 P.2d 775 (1971).

In the instant case, the prosecutor made three requests for continuances. [September 4th, October 1st, & October 15th, 2007]. The court granted the prosecutor's first request for continuance from the 4th of September, 2007 until October 1, 2007 (approx. 28 days). Typically, Washington Court Rules allow for only one continuance up to fourteen days unless it substantially prejudices the defendant. CrR 3.3(g).

CrR 3.3(f)(2) reads in part:

"The court must state on the record or in writing the reason for the continuance."

CrR 3.3(g) continues in part:

"Such a continuance may be granted only once...if the defendant will not be substantially prejudiced."

The prosecutor's first request for continuance was in order to arrange for the transport of an out of state witness. [RP at 176]. The witness was an out of state police officer who could not provide any more information than the testimony offered by the other four (4) law enforcement officers already available. The prosecutor did not offer any evidence like a subpoena to support its request to the court. The court blindly allowed the continuance.

As it turned out, the prosecutor never arranged transport for this witness. [RP at 176-177].

It is Mr. Scales' position that the prosecutor used the excuse of needing to arrange transport for an out of state witness because he had not yet received the drug lab results from the crime lab. [RP at 127 & 176].

Mr. Scales was arrested on July 10, 2007. His speedy trial period ended on September 10, 2007. Trial was initially set for September 4, 2007. Mr. Scales was adamant in expressing his desire to a speedy trial, evident by his timely objections to all three continuances. [EXHIBIT #1].² The record is equally clear that had Mr. Scales been afforded his speedy trial, the prosecutor would have had insufficient evidence to convict him because the crime lab did not submit their results until Sept. 18, 2007. [RP at 174].

The prosecutor argued that it intended to originally call this out of state witness but did not. And that, the crime lab was prepared to "rush" the test results on the day of trial if the continuance was not granted. [RP at 176].

²Mr. Scales has requested the VRP for September 4 til Oct. 31, 2007 by letter to this court because it was not provided him by counsel at the time of this opening brief.

Mr. Scales argues that the prosecutor's reason was untenable and inexcusable. Trial in this case lasted for only three hours. If the prosecutor was in need for more time to obtain evidence, he had a duty to be truthful as to the nature of the request for continuance to allow Mr. Scales an opportunity to argue his position for speedy trial. As the record shows, this witness was not essential to this case at all, and the prosecutor did not have to wait until the morning of trial to claim he was arranging transport for this witness.

In State v Keorber, 85 WnApp 1, 931 P.2d 904 (1996), a drug case, the court learned on the morning of trial that a critical witness for the state was sick with the flu. The State was unable to pinpoint when the witness would be available. The court then, precipitously dismissed the case with prejudice for want of prosecution. Koerber, 85 WnApp at 2-3. It is a leap in logic to expect that the crime lab in this case would have been able to produce the drug lab results in the three hours that trial lasted in this case. In fact, it took another two weeks

before the lab results were completed.

The court granted the continuance without any proof such as a subpoena. Nor did the court inquire as to when exactly this witness would become available and whether the witness was material to the case. Then, to add insult to injury, the court extended the continuance for 28 days. The equivalent of two continuances in one shot.

The record reflects that the prosecutor never produced this witness, nor attempted to subpoena him for trial. [RP at 176-179]. It is Mr. Scales argument that the court alleviated the prosecutor from its burden to demonstrate on the record a real need for the continuance, nor consider the substantial prejudice caused to the defendant. Whereby, the prosecutor in this case did not have the drug evidence to convict him in time for speedy trial period.

In the case of State v Wake, 56 WnApp 472, 783 P.2d 1131 (1989), Division Three noted that unavailability of a material state witness is a valid ground for continuing a trial under CrR 3.3(h) (2), if there is a reason to believe the then unavailable witness will become available within

a reasonable time and if no substantial prejudice results to the defendant. Wake, 56 WnApp at 474-475. Additionally, the issuance of a subpoena is a critical factor in granting a continuance. Wake, 56 WnApp at 478, (citing State v Alford, 25 WnApp 661, 665, 611 P.2d 1268 (1980); and State v Yuen, 23 WnApp 377, 379, 597 P.2d 401, review denied, 92 Wn 2d 1030 (1979)).

Conversely, in State v Smith, 56 Wn 2d 368, 370, 353 P.2d 155 (1960) and State v Tolliver, 6 WnApp 531, 533, 494 P.2d 514 (1972), the court determined that the failure to issue subpoenas was grounds to deny the motions for continuances.

In this case, Mr. Scales timely objected to all three continuances on the record. [EXHIBIT #1].² It is also clear from the record that Mr. Scales raised the argument that the prosecutor misled the court when he sought the continuances. [RP at 173-181, EXHIBIT #2]. The prosecutor did not deny the allegations, and simply let the court decide whether or not it believed the prosecutor's reasons for the continuances. [RP at 178].

²These documents do not contain the record for September, 2007 that Mr. Scales has requested from this court.

The second and third continuances granted by the court at the request of the prosecutor was due because the prosecutor needed to appear in another trial. [EXHIBIT #1]. The court again, did not ascertain any details as to what court or why this was not foreseeable at the time the prosecutor was granted the first continuance. Nor did the court consider reassigning the case to maintain court principle, State v Heredia-Juarez, 119 WnApp 150, 154-55, 79 P.3d 987 (2003)(no per se requirement for the State to reassign a case when the prosecutor becomes unavailable), and protect Mr. Scales right to a speedy trial.

In the case of State v Chichester, 141 WnApp 446, 455 (2007), Division One reasoned that the State did not use diligence in solving the self-created scheduling conflict. Ultimately, the Chichester court denied the State's request for continuance because the date set was confirmed with the State in advance. Chichester, 141 WnApp at 449-51.

Similarly, the court in this case confirmed with the prosecutor at the time it granted the first continuance.

"[T]his is especially true when there is time to solve the problem and there has been no showing of a diligent attempt to do so. Moreover, the state cited no authority mandating that a court must grant a continuance in these circumstances." Chichester, 141 WnApp at 455.

Also, in State v Kokot, 42 WnApp 733, 713 P.2d 1121, review denied, 105 Wn 2d 1023 (1986), the defendant's trial was continued under CrR 3.3(h)(2) because of docket congestion and unavailable state's witness. The court dismissed the defendant's case, citing State v Mack, 89 Wn 2d 788, 576 P.2d 44 (1978). Somewhat similar circumstances were presented in State v Sulgrove, 19 WnApp 860, 578 P.2d 74 (1978) (dismissed because of the State's lack of preparation).

The court in this case erred in allowing for the continuances by blindly accepting excuses from the prosecutor without "good cause". This prejudiced Mr. Scales because the facts of the case indicate the state's case against him was substantially weak without the drug lab results that were not available within the time of speedy trial. This violated Mr. Scales state and federal constitutional rights to speedy trial.

LAW AND ARGUMENT FOR ADDITIONAL GROUND TWO

The prosecutor committed misconduct by deliberately misleading the court and defense as to the real reasons for seeking continuances. This was hotly contested on the record. [RP at 173-181, EXHIBIT #2].

As explained above, the prosecutor never offered any evidence to indicate that he was making arrangements to transport this out of state witness. There is no record of a subpoena nor colloquy with the court that would confirm there was an arrangement made with a legitimate witness (i.e. name, expected length of time needed to transport the witness, materiality of the witness, etc...).

Moreover, the prosecutor logically would have foreseen a conflict of trial dates when he asked for his first continuance. This trial was not complexed, evident by the fact it only lasted three hours. It should not have been necessary to postpone trial two more times because he had a pending trial somewhere else. Simply reassigning the case would have sufficed.

Lastly, the prosecutor's claim that he could have had the crime lab results on the day of trial

if he really had to, is baseless and absurd. [See RP at 176].

Mr. Scales contends that the prosecutor did not have the drug evidence to convict him at the time of actual trial (September 4th, 2007), so he manufactured excuses that the court blindly accepted. Under both United States v Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed2d 468 (1971) and United States v Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed2d 752 (1977), an intentional prosecutorial delay to gain a tactical advantage is impermissible.

Even if the other two continuances could somehow be deemed legitimate, it was negligent of the prosecutor to schedule a continuance on the same day he was scheduled to be in trial on another matter. Some courts have suggested that a reckless or even negligent delay is impermissible. United States v Ross, 123 F.3d 1181 (9th Cir. 1997); United States v Birney, 686 F.2d 102, 10 Fed.R.Evid.Serv. 1547 (2d Cir. 1982); State v Wilson, 108 WnApp 774, 31 P.3d 43 (2001), review granted, 146 Wn 2d 1008 (2002).

The Chichester court dismissed the case because the state was not ready, not because it prejudiced the defendant. Chichester, 141 WnApp at 457.

LAW AND ARGUMENT FOR ADDITIONAL GROUND THREE

Mr. Scales contends that the court erred by not ruling on his pro se motion to dismiss. [See RP at 177, EXHIBIT #2]. CrR 8.3(b).

Objections under CrR 3.3 must be specific enough to alert the court to the type of error claimed so that the court can carry out its own responsibilities. State v Greenwood, 120 Wn 2d 585, 605, 845 P.2d 971 (1993).

Likewise, dismissal under CrR 8.3(b) "is discretionary and reviewable only for manifest abuse of discretion." State v Blackwell, 120 Wn 2d 822, 830, 845 P.2d 1017 (1993); State v Hoffman, 115 WnApp 91, 102, 60 P.3d 1261 (2003). CrR 8.3(b) requires a showing of governmental misconduct. Hoffman, 115 WnApp at 102. Although simple mismanagement of the case is sufficient, dismissal remains an extraordinary remedy. Id at 103.

The seminal case is State v Price, 94 Wn 2d 810, 620 P.2d 994 (1980). In Price, the court held, "if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to the defendant until shortly before a crucial

stage in the litigation process," a defendant's right to a speedy trial or his right to be represented by adequately prepared counsel may be impermissibly prejudiced. Price, 94 Wn 2d at 814. This was the very concern expressed by Mr. Scales to the court. [RP at 174-175].

The record indicates that Mr. Scales alerted the court to the undisputed fact that the prosecutor was dilatory in getting the drug evidence to the crime lab. [RP at 178]. Furthermore, that the state did not have enough evidence to meet their burden in time for trial due to their own negligence. [RP at 179].

Ultimately, what the court did was state for the record that "I'm not sure that I'm the right judge to hear the matter, but since the case did get tried in front of me and your raising the issue in front of me..." Then the court went on to defend the prosecutor's excuses for the delays without making a ruling at all on Mr. Scales motion to dismiss for violation of his speedy trial. [RP at 181].

Mr. Scales asserts that inaction by the court to decide constitutes manifest error in itself.

In this case, the court never held the prosecutor to a standard requiring them to at least show due diligence when requesting three continuances for a trial that lasted all of three hours. See also, State v Adamski, 111 Wn 2d 574, 578, 761 P.2d 621 (1988)(that "due diligence requires the proper issuance of subpoenas to essential witnesses"). Each time the prosecutor in this case failed to even give adequate notice of its intent to seek a continuance until the morning of each scheduled trial day. See State v Hoffman, 115 WnApp at 108.

CONCLUSION

Mr. Scales was denied his right to a speedy trial in accordance with Washington Court Rule 3.3, Washington State Constitution art. I, § 22, and the United States Constitution Sixth Amendment.

Therefore, this court should vacate the judgement and sentence of the trial court with prejudice.

Done this 22 day of October, 2008.

Respectfully submitted,



Christopher Scales #
Airway Heights Corrections Center
P.O. Box 1809
Airway Heights, WA 99001-1809

EXHIBIT 1

70

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,)
Plaintiff)
vs.)
SCALES, CHRISTOPHER)
Defendant)

Cause No. 07-1-03462-7

ORDER CONTINUING TRIAL

Case Age 86 Prior Continuances 1

This motion for continuance is brought by state defendant court.
 upon agreement of the parties pursuant to CrR 3.3(f)(1) or
 is required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his or her defense or
 for administrative necessity.

Reasons: ~~Defendant Attorney just got back from vacation~~
DPA is in TRIAL

RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
<input type="checkbox"/> OMNIBUS HEARING				
<input type="checkbox"/> STATUS CONFERENCE HEARING				
<input type="checkbox"/> TRIAL READINESS STATUS CONFERENCE				
THE CURRENT TRIAL DATE OF <u>10/1/07</u>	IS CONTINUED TO: <u>10/15/07</u> @ 8:30 am Room <u>214A</u> (DDT)			

Expiration date is: 11/14/07 (Defendant's presence not required) TFI days remaining: 2

DONE IN OPEN COURT this 15 day of Oct, 2007.

Refuses to Sign
 Defendant _____
 Attorney for Defendant/Bar # 29294

Albany M. [Signature]
 Judge _____
 Prosecuting Attorney/Bar # 33338

SF

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

Pierce County, Washington
Interpreter/Certified/Qualified

100
2
IC

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,)
Plaintiff)
vs.)
Christopher Scales,)
Defendant)

Cause No. 07-1-03462-7

ORDER CONTINUING TRIAL

This motion for continuance is brought by state defendant court.
 upon agreement of the parties pursuant to CrR 3.3(f)(1) or
 is required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his or her defense or
 for administrative necessity.

Reasons: prosecutor is on trial in another matter

RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED the Defendant shall be present and report to:

	DATE	TIME	COURT ROOM	ID NUMBER
<input type="checkbox"/> OMNIBUS HEARING				
<input type="checkbox"/> STATUS CONFERENCE HEARING SET FOR:				
THE CURRENT TRIAL DATE OF: <u>10/15/07</u>	IS CONTINUED TO: <u>10/22/07 @ 8:30 am Room 214</u>			

Expiration date is: 11/21/07 (Defendant's presence not required) TFT days remaining: 30 **SF**

DONE IN OPEN COURT this 15th day of Oct, 2007.

Defendant
[Signature]
Attorney for Defendant/Bar # 16710

Judge
[Signature]
Prosecuting Attorney/Bar # 33334

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

Pierce County, Washington
Interpreter/Certified/Qualified

EXHIBIT,

2

2

EXHIBIT,

1 A (Witness complies.)

2 Q Do you recognize that document?

3 A Yes. This is a report that I prepared on an item that
4 I analyzed and I signed it on September 18th of 2007.

5 Q And did you author that report?

6 A Yes, I did.

7 Q Is there an incident number from the police agency on
8 that report?

9 A Yes, there is.

10 Q Is there a laboratory case number assigned to that
11 report?

12 A Yes.

13 MR. LEWIS: Your Honor, permission to
14 approach the witness again?

15 THE COURT: Yes.

16 Q (By Mr. Lewis) Ms. Kee, if you could actually hold on
17 to Plaintiff's Exhibit No. 3. I'm also handing you
18 what has been marked as Exhibit 5-A. Could you take a
19 moment and examine that exhibit, please.

20 A (Witness complies.)

21 Q You indicated that on your laboratory report there was
22 a police agency incident number; is that correct?

23 A That's correct.

24 Q Is that same number located anywhere that you can find
25 on Plaintiff's Exhibit 5-A?

1 fine.

2 THE COURT: Okay. What I'm going to do is
3 I'm going to write out the answer. I'm going to sign
4 it. I'm going to ask both of you to sign it. Denese
5 is then going to make a copy of this for each of you
6 and then she'll return a copy to the jury. And, again,
7 when we have another question or a verdict, we'll be in
8 touch, and I just wanted to verify that if they don't
9 have a verdict before noon, that both of you have
10 agreed -- I have talked to Judge Nevin. He is in the
11 courthouse today on the 5th floor and he has agreed to
12 work with my staff to handle any type of a question or
13 a verdict. Is that acceptable to you, Mr. Scales?

14 MR. SCALES: Yes, Your Honor. I have one
15 issue I would like to bring before the Court.

16 THE COURT: Okay.

17 MR. SCALES: This does not have to do with
18 actually the trial itself or any of this information.
19 It's before the trial. September 4th was my original
20 trial date. It was set for September 4. On that day,
21 me, myself, my prior attorney Marta Metcalf, and
22 Mr. Lewis were in front of the Court and Mr. Lewis
23 asked for a continuance for two weeks. The judge asked
24 him -- the presiding judge asked him why. He said that
25 he needed to arrange transportation for a witness

1 that's coming from New York, that had moved to New
2 York. Well, Your Honor, I don't believe that's quite
3 true as what Mr. Lewis makes it out to be. The drugs
4 weren't tested until September 18th, Your Honor. The
5 drugs were tested two weeks after my original trial
6 date. He asked for a continuance for one thing, but in
7 all actuality, he didn't have all the evidence in the
8 case. The drugs were tested September 18th. My trial
9 date was for September 4th. He told the judge that he
10 wanted the continuance because he needed to arrange
11 transportation for this witness. Well, as my
12 understanding, that witness did not testify and here it
13 is he got granted that continuance for that reason, but
14 in all actuality, it looks like here this
15 September 18th that the pathologist testified to,
16 that's when she tested the drugs was two weeks after my
17 original court date.

18 THE COURT: Was that the date that she tested
19 the drugs or was that --

20 MR. SCALES: She said it was received August
21 and she tested it September 18th. Your Honor, the
22 prosecutor has had these drugs from April 24th is when
23 this crime was committed -- April 24th. He didn't
24 submit the drugs to be tested until August. That is
25 not my fault. That is not my problem.

1 THE COURT: Well, I don't know that that's
2 when he submitted it. That's when she said she got
3 them into her possession.

4 MR. SCALES: Her possession.

5 THE COURT: From her possession.

6 MR. SCALES: Exactly.

7 THE COURT: I don't know when they were
8 submitted. So what is your request?

9 MR. SCALES: My request is that it's clearly
10 here that the continuance that was asked for and for
11 the reason that it was asked for is not entirely true.
12 I feel like Mr. Lewis deceived the Court in asking for
13 a continuance at that time because he didn't have the
14 evidence. Without that evidence, without the drug
15 evidence, Your Honor, Mr. Lewis would have had a hard
16 time with his case, would have had a harder time with
17 this case, and I would like for the Court to review
18 this and look at this, because in light of this, if
19 Mr. Lewis deceived the Court in order to put the rest
20 of his case together, the case should be thrown out.
21 It should be dismissed because Mr. Lewis wasn't ready.
22 That was nobody's fault but his own, to lie to the
23 Court and say that he needed a continuance to bring a
24 witness is not right.

25 THE COURT: Could you sign that? Mr. Lewis,

1 did you want to say anything?

2 MR. LEWIS: Your Honor, I understand what
3 Mr. Scales is saying. The primary purpose behind the
4 motion to continue on September 4th was the
5 unavailability of a witness we intended to call who had
6 moved to the East Coast. The crime lab on
7 September 4th was aware that we had a trial date set
8 that date. They were also aware that they would have
9 to do rush testing to provide that evidence during the
10 course of the trial. Ms. Metcalf was aware of that. I
11 don't know if that was ever conveyed to Mr. Scales;
12 apparently, it was not but, again, the primary reason
13 that the State requested a continuance on September 4th
14 is what Mr. Scales has already noted -- that we were
15 hoping to be able to transport a witness back from the
16 East Coast.

17 MR. SCALES: But also, Your Honor, I feel
18 that it was the State's burden -- I mean, it was on the
19 State to also make the Court aware of this evidence,
20 the evidence that he did not have control of, the
21 evidence that he did not have possession of. He didn't
22 have possession of this evidence and the evidence was a
23 key part of this case. It was what the confidential
24 informant said that he got from me. It is what the
25 confidential informant said that he received from me.

1 Without this evidence, Your Honor, the case would be
2 really much harder to prove.

3 THE COURT: Okay. I'm not tracking the last
4 argument that you just made. Mr. Lewis said that it
5 was submitted to the crime lab and that your then
6 attorney was aware that the crime lab had not had it in
7 their possession, but had not yet tested it; is that a
8 fair --

9 MR. LEWIS: Yes, Your Honor. And the other
10 thing that was represented to defense counsel and would
11 have been presented to the Court was that the crime lab
12 was aware that we had a trial date of September 4th.

13 They informed the State that the drugs had not yet
14 been tested, but they were in possession of those
15 drugs. They indicated that if the State's motion to
16 continue that morning was denied they would do a rush
17 testing that morning so we would have the evidence to
18 present to the jury over the course of that trial.

19 THE COURT: Okay. So it doesn't seem like
20 there's really anything to take any action on. In
21 order for there to be any type of a motion, you're
22 going to have to confer with Ms. Metcalf to determine
23 whether or not the assertions that Mr. Lewis has made
24 with respect to what she knew at that time was
25 consistent.

1 MR. SCALES: She told me at that time. At
2 that time we were in front of the Court getting another
3 continuance and she said well, you know, the problem
4 here because, you know, the drugs weren't tested until
5 after our continuance, she told me that too at that
6 time. I didn't realize it until I was going over my
7 papers and looking into all the evidence yesterday and
8 that -- and I really personally -- and I was hoping
9 that the Court would consider that this is not -- it's
10 the State's burden to prove a case.

11 THE COURT: Right.

12 MR. SCALES: And to have -- to be able to
13 have a continuance just to get evidence for your case,
14 that's not okay. My speedy trial rights were violated
15 because of that one continuance, that one continuance,
16 and also, Your Honor, the drugs were in the possession
17 of the court's -- I mean, of Mr. Lewis from April 24th,
18 April 24th. The drug lab -- the crime lab didn't have
19 those drugs from April 24th until September. So the
20 prosecutor, Mr. Lewis, he submitted those drugs at a
21 late time, at a late time, and which the crime lab is
22 I'm sure backed up on things, but I should not be held
23 responsible for that. I should have been able to go to
24 trial when need be. The witness that he said he was
25 going to call, he never even called, so the continuance

1 that he asked for was what -- to me it seems like it
2 was -- it was a way of getting the drugs back from the
3 Washington State Crime Lab. He knew that he had to
4 wait for them. He knew that, and to me that's what it
5 seems like to me because the witness said he wanted
6 to -- so-called that he wanted to call, come to court,
7 he never came. He never even called him, and if the
8 witness would have showed up and testified, then I
9 could have been comfortable -- I would have been a
10 little bit more, okay, okay that's acceptable, but this
11 right here to me is clearly, is clearly a way of
12 Mr. Lewis deceiving the Court. I feel that he deceived
13 the Court in asking for the continuance. That witness
14 that he said he was going to call did not come and
15 testify. If that witness would have come to court,
16 that would have been a different story, but the witness
17 never came to court, and I'm being -- like I said
18 before, my speedy trial rights were violated on that
19 one continuance.

20 If Mr. Lewis -- like I said before, if Mr. Lewis
21 would have had the drugs, it would have been one thing,
22 but Mr. Lewis didn't have the drugs. Without those
23 drugs, his case relied on those drugs and his
24 confidential informant and without the drugs the case
25 probably would not have been tried. The case probably

1 would not have been tried, and I feel that Your Honor
2 is -- you know, you should decide that what you should
3 do for me, and I would ask that you dismiss this case
4 based on the fact that Mr. Lewis deceived the Court.
5 He can say that he wanted to do this, he wanted to do
6 that, but you can't tell the Court you're going to do
7 something and then don't do it.

8 THE COURT: Yes and no. He has indicated to
9 the Court -- now, first of all, I don't believe I was
10 the judge that granted the continuance.

11 MR. SCALES: No, you were not, Your Honor.

12 THE COURT: Okay. So I'm not sure that I'm
13 the right judge to hear the matter, but since the case
14 did get tried in front of me and you're raising the
15 issue in front of me, as I understand it, Mr. Lewis was
16 indicating that one of the potential witnesses did
17 relocate to the East Coast and that he was looking at
18 having that witness transported back here. That
19 doesn't -- that is not an uncommon occurrence that one
20 side or the other is requesting a continuance for the
21 purpose of obtaining either witnesses or other types of
22 evidence including the crime lab finishing their drug
23 testing. Does that require the State to put on that
24 witness if the trial strategy changes, if they
25 determine that they believe they can prove beyond a

1 reasonable doubt every element of the crime without
2 that witness? No. Does that make his statement at the
3 time false, deceitful, perjurous or something because
4 he asserted to the Court at that time that there was a
5 witness who was on the East Coast that he was trying to
6 arrange to have transported back? No. That's why I
7 say you need to talk to Ms. Metcalf about what she
8 knew, and all of that, to see if there's any other
9 basis for your motion. But based on what I'm hearing,
10 you know, it doesn't hold the State to the burden of
11 requiring them to bring in that witness if for some
12 reason later they determine that that witness is not
13 necessary and the cost of bringing in the witness is
14 not going to benefit them. Okay.

15 MR. SCALES: Yes, Your Honor.

16 THE COURT: We will go ahead and give the
17 response. You have a copy of the response. You've
18 signed it. That simply instructs the jury to re-read
19 the jury instructions, okay, and we will notify you as
20 soon as we get another question or a verdict.

21 MR. SCALES: Okay. Yes.

22 THE COURT: Thank you. Thank you, Mr. Lewis.

23 (Jury deliberating.)

24 (Jury present.)

25 THE COURT: Good morning.