

No. 46222-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK ANTHONY BARBARO,

Appellant.

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

The Honorable James Dixon, Judge
Cause No. 13-1-01775-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether the trial court abused its discretion by denying Barbaro's motion to continue his trial five days before the trial began.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

The court acted within its discretion when it denied Barbaro's motion to continue the trial five days before the trial actually began.

On April 16, 2014, the court denied Barbaro's motion for a continuance of the trial. 04/16/14 RP 7. Two days earlier, on April 14, 2014, a different judge had granted the State's motion in limine, which asked that the defense be precluded from presenting as a defense that Barbaro did not know the firearm he was accused of unlawfully possessing was an operable firearm, or of arguing that the State had the burden to prove that he did. 04/14/14 RP 30. The trial began on April 21, 2014, and concluded the following day. Trial RP. Barbaro was found guilty of first degree unlawful possession of a firearm. 04/22/14 RP 256. He argues on appeal that the court abused its discretion by denying his motion to

continue the trial and that this abuse denied him his due process right to an adequately prepared attorney.

The decision to deny a motion to continue "is within the discretion of the trial court and will not be disturbed absent an abuse of discretion." State v. Ollivier, 178 Wn.2d 813, 822-23, 312 P.3d 1 (2013). The court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court may consider a number of factors, including "surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." State v. Downing, 151 Wn.2d 265, 273, 87 P.3d 169 (2004). Whether the defendant's constitutional rights have been violated by the denial of a continuance is examined on a case-by-case basis. Id. at 275.

The State does not dispute that a criminal defendant has the right to counsel who is prepared, and that counsel may need time to be prepared. State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Time to prepare is a legitimate reason to grant a continuance, even if the defendant himself objects. Ollivier, 178 Wn.2d at 825.

In Barbaro's case, however, he has offered no evidence that his attorney needed any additional time to prepare. On April 9, 2014, his counsel was aware of the State's motion in limine; he had reviewed some case law and expected to brief the issue. 04/09/15 RP 5-6. Defense counsel requested a one-week continuance to write that brief, as well as to interview a witness that the State did not intend to call. 04/09/14 RP 6. The matter was continued until April 14 for a hearing on the State's motion as well as the defense motion to continue. 04/09/14 RP 8.

As noted above, the State's motion in limine was heard and granted on April 14 and the defense motion to continue was denied on April 16, 2014. Trial began on the fifth day following that.

Barbero argues on appeal that he needed additional time to consult with counsel about how to defend his case after the court precluded his planned defense. Appellant's Opening Brief at 10. But in his motion to continue, defense counsel offered no basis for the continuance except to allow time for Barbaro to "digest" the ruling prohibiting him from making the defense argument he wished to make, and what "this trial would look like should the case proceed to trial." 04/16/14 RP 5-6. While counsel acknowledged

that his defense strategy was altered, he never said he needed more time to formulate a new one. *Id.*

This was not a complicated case. There was one charge presented to the jury and it was not a difficult one to present or understand. Counsel knew about the State's motion since before April 9th, and had more than ten days to reconsider his strategy. His options were limited. Indeed, any competent defense attorney would have been aware from the outset of the case that his defense would not be permitted and would have been considering available alternatives for some time. On appeal, Barbaro has not suggested any alternative defenses that counsel could have raised but didn't because he lacked the time to prepare.

Barbaro argues that because he was denied a continuance, he did not testify or present any witnesses. Appellant's Opening Brief at 10. It is not apparent what witnesses he would have called had he been granted a continuance. He still would not have been permitted to argue that the State had to prove he knew the firearm was operable, even if the trial court had continued his trial for a year. The lack of a continuance did not prevent him from testifying; he could not have testified that he didn't know the firearm was a working firearm even if a continuance had been granted. He was

free to testify to any relevant facts that were not precluded by the court's order. The fact remains that he had no defense and never did have a defense. The denial of a continuance did not change that. Barbaro has failed to show any prejudice from the court's denial of a continuance, particularly since he told the arresting officer that he knew he was not supposed to possess the firearm. 04/21/14 RP 82, 92.

When the trial court denied the motion for a continuance, it did not make a record of the specific reasons for that ruling. However, immediately before making the ruling, Barbaro had asked for time to "digest" the ruling granting the State's motion in limine. The State opposed the motion. The case had been filed December 4, 2013. The State had arranged for all of its witnesses to be there twice. The prosecutor argued that the ruling precluding Barbaro's planned defense could have been foreseen and prepared for. 04/16/14 RP 5-7. It cannot be said that the court abused its discretion by making a manifestly unreasonable ruling, or making it for untenable reasons or on untenable grounds. State ex rel. Carroll, 79 Wn.2d at 26. The court would have acted within its discretion to grant the continuance, but was also within its discretion to deny it.

D. CONCLUSION.

The trial court did not abuse its discretion in denying Barbaro's motion to continue his trial. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 11th day of February, 2015.



Carol La Verne, WSBA# 19229
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THURSTON COUNTY PROSECUTOR

February 11, 2015 - 10:57 AM

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