

NO. 63957-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER COLUMBO,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN -4 AM 11:11

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

The Honorable Susan K. Cook
The Honorable David R. Needy

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR.

The trial court denied the defendant a fair trial by refusing a continuance necessary to prepare a defense.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

A criminal defendant has a constitutional right to a fair trial, which is violated if defense counsel does not have sufficient time to gather witnesses and prepare a defense. Here, Mr. Columbo requested a continuance after receiving new information about potential defense witnesses. Did the trial court's denial of Mr. Columbo's motion for a continuance violate his right to due process and fundamental fairness guaranteed by the Sixth and Fourteenth Amendments and Article I, Section 21¹ and Section 22² of the

¹ The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const., article I, section 21.

² In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

Wash. Const., article I, section 22.

Washington Constitution, requiring reversal of his conviction?

C. STATEMENT OF THE CASE.

Roseanne Columbo testified that in early June 2008, she went to Seattle for a few days because her mother was having surgery there. 5/11/09RP 21-22. Her brother, Christopher Columbo, called and asked if he could stay at her house in Bow while she was gone. 5/11/09RP 22. Ms. Columbo agreed and told him to pick up a spare key from a friend. 5/11/09RP 23. When she returned five days later, Ms. Columbo found a motor home in the driveway and Mr. Columbo's son and the son's girlfriend in her house. Mr. Columbo was not there. 5/11/09RP 23-24. Because she had not given permission for her nephew and his girlfriend to stay there, she called Mr. Columbo and told him to ask them to leave. 5/11/09RP 23. When Ms. Columbo woke up the next morning, they were gone. 5/11/09RP 24.

That morning, Ms. Columbo received a telephone call from her brother, informing her he had taken her ring to be cleaned. 5/11/09RP 24-25. She had not asked him to do this and told him to bring it back that day. 5/11/09RP 26. In response to her questioning, Mr. Columbo admitted he had taken the ring to a pawn shop, but did not tell her which one. 5/11/09RP 26. Ms. Columbo

continued to call him throughout the day; at one point he said he would be at her house within an hour, but he did not come and after that conversation, only his son answered the phone.

5/11/09RP 27.

Ms. Columbo called the police that evening and Skagit County Sheriff's Deputy Bart Moody responded to her home.

5/12/09RP 7-8. While he was there, Ms. Columbo received a call from Mr. Columbo's phone, but she identified the voice as his son, and gave the phone to the deputy. 5/11/09RP 28-29. The deputy obtained the pawn ticket number and arranged for the ring to be returned by 10:00 a.m. the next day. 5/11/09RP 29.

The next day, the when that did not occur, Ms. Columbo called area pawn shops until she located the ring at a Pawn Exchange in Bellingham. 5/11/09RP 29. She brought a picture of the ring with her to the store, and contacted the Bellingham Police Department there. 5/11/09RP 29-30. Bellingham Police Detective Sue Howell responded, identified the ring from the picture, and supervised the transfer of the ring back to Ms. Columbo.

5/11/09RP 50-52. Pawn Exchange employee Daniel Wall testified based on business records that Mr. Columbo, using his Washington driver's license, had pawned the ring on June 4, 2008.

5/11/09RP 45-46. Ms. Columbo testified her ex-husband had bought the ring for her in January, 2005 for about \$3,000.

5/11/09RP 25-26.

Mr. Columbo was charged with theft in the second degree and trafficking in stolen property and, after a jury trial before the Honorable David Needy, was convicted as charged. CP 1-2, 30, 31.

Judge Needy denied Mr. Columbo's request for an exceptional downward departure and imposed a standard range sentence of 33 months for the theft and 53 months for trafficking in stolen property, to be served concurrently. CP 108.

This appeal timely follows. CP 46.

D. ARGUMENT.

THE TRIAL COURT ERRONEOUSLY DENIED MR. COLUMBO'S MOTION TO CONTINUE, EFFECTIVELY PREVENTING HIM FROM PRESENTING A DEFENSE.

a. Mr. Columbo requested a continuance in order to marshal witnesses in his defense. On May 11, 2009, the day trial was scheduled to begin, defense counsel moved for a continuance of one week. 5/11/09RP 3. He explained he had just received crucial information from Mr. Columbo that day, including the last

name of one potential witness, unspecified additional information about two witnesses, and information about Mr. Columbo's son. 5/11/09RP 4. The State opposed the motion, arguing it was Mr. Columbo's own fault for not giving his attorney this information earlier, although the State offered no basis for the assumption that this information had been available to Mr. Columbo earlier. 5/11/09RP 4-6. The court, agreeing with the State, denied the motion and the trial began that day. 5/11/09RP 7. Mr. Columbo presented no witnesses at trial.

b. A court abuses its discretion when it bases its decision on untenable grounds. The decision to grant or deny a continuance is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Campbell, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). A trial court abuses its discretion when it exercises that discretion on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Allowing counsel time to prepare for trial is a valid basis for continuance. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); State v. Williams, 104 Wn.App. 516, 523, 17 P.3d 648 (2001). However, a ruling which violates a defendant's

constitutional rights is necessarily based on untenable grounds, requiring reversal. State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950). The trial court in this case abused its discretion in denying Mr. Columbo's the time necessary to adequately prepare for trial and present his defense.

c. A criminal defendant is guaranteed a fair trial and due process of law, which includes the right to present a defense and present witnesses to counter the State's allegations. The Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 of the Washington State Constitution provide that an accused has the right to obtain witnesses and present a defense as well as guarantee his due process right to a fair trial. U.S. Const., amends. VI and XIV; Wash. Const., article I, section 22; Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); see also RCW 10.52.040; CrR 6.12. "Due process demands that a defendant be entitled to present evidence that is relevant and of consequence to his or her theory of the case." State v. Rice, 48 Wn.App. 7, 12, 737 P.2d 726 (1987).

The Washington Supreme Court has also specifically recognized that a defendant has the right to obtain witnesses in preparation of his defense:

The right to compel witnesses is guaranteed by the Sixth Amendment, which provides, among other things, “[i]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him [and] *to have compulsory process for obtaining witnesses in his favor.*”

(Emphasis in original.) State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). These rights were enunciated in Washington v. Texas, wherein the Supreme Court described the right to have witnesses to present a defense as a fundamental element of due process of law:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Smith, 101 Wn.2d at 41. See also State v. Jury, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978) (citing State v. White, 5 Wn. App. 283, 487

P.2d 243 (1971)) (Defense counsel “will be considered ineffective if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such a manner”).

The right to a fair trial, including preparing a defense and compulsory process, is paramount in a criminal trial. As the Supreme Court held in State v. Hartwig,

When the court recognized the constitutional right of appellant to have counsel and appointed an attorney to represent him, it then became the duty of the court to allow the appointed attorney a reasonable time within which to consult his client and make adequate preparation for trial. The constitutional right to have the assistance of counsel, Art. I, § 22, carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law in contravention of Art. I, § 3 of our constitution. Commonwealth v. O'Keefe, 298 Pa. 169, 148 A. 73; Jones v. Commonwealth of Kentucky, 97 F. (2d) 335; 14 Am.Jur. 886, Criminal Law, § 172; 16 C.J.S. 1187, Constitutional Law, § 591; Annotation, 84 A.L.R. 544.

36 Wn.2d at 601..

In Hartwig, the trial court refused to grant a continuance requested by defense counsel due to a scheduling conflict, and instead appointed substitute counsel but denied a continuance which would have allowed the new attorney time to prepare. Id. at 599-600. The Washington Supreme Court held that although the decision to grant or deny a continuance is a matter of discretion,

“such discretion necessarily has limitations and the action taken must not be arbitrary or without justification under the circumstances then existing.” Id. at 565. Although the trial court opined that the case was so simple that a continuance was unnecessary, this could not supplant the attorney’s duty to thoroughly investigate the case, advise his client, and “prepare adequately and efficiently to present any defenses he might have[.]” Id. at 601. Because the trial court did not allow sufficient time for that purpose, the conviction was reversed and remanded for new trial. Id. The same is true of Mr. Columbo’s case.

Similarly, in State v. Sain, defense counsel was appointed to represent co-defendants the day before trial, but the trial court denied his motion for continuance. 34 Wn.App. 553, 558, 663 P.2d 493 (1983). Although the attorney had cleared his schedule and interviewed his clients, he had not had time to speak to witnesses and argued he could not provide effective assistance of counsel without a continuance. The Court of Appeals agreed and reversed and remanded the convictions.

The Court reached the same result in State v. Bandura, 85 Wn. App. 87, 91, 931 P.2d 174, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997). There, the trial court allowed defense counsel to

withdraw on the day of sentencing, but denied the defendant's request for continuance so that a new attorney could familiarize himself with the case, instead requiring the defendant to represent himself. The Court of Appeals ruled that this violated the defendant's right to counsel. Id. at 97.

State v. Barker, where a continuance was properly denied, is easily distinguished. 35 Wn.App. 388, 667 P.2d 108 (1983).

There, new counsel had been appointed one month before trial and had received discovery and interviewed the defendant and the State's key witnesses. Counsel also had access to the preparation of former counsel, who had interviewed all witnesses, and all witnesses were in town and available to new counsel. The defendant could not show he was materially prejudiced by the denial of the continuance.

Here, Mr. Columbo was clearly prejudiced. The requested continuance would have allowed his attorney to interview potential defense witnesses he had previously been unable to contact. For example, defense counsel asked Ms. Columbo whether she could be certain that the voice on the phone was her brother's and not her nephew's. Although she testified she knew Mr. Columbo's voice, she also admitted that their voices are similar and she does

not know her nephew well. 5/11/09RP 38. Had Mr. Columbo's son been called as a witness, the jury would have been able to evaluate for themselves how similar the voices are and whether confusion would be likely. Additionally, Mr. Columbo's son and his girlfriend were in the house when Ms. Columbo returned home and defense counsel implied in closing one of them could have been responsible, but could not develop that theory without the testimony of the witnesses. The denial of the continuance violated Mr. Columbo's constitutional right to a fair trial.

d. Reversal is required. Because Mr. Columbo was denied his constitutional rights to compulsory process, to prepare a defense, and to a fair trial, reversal is required. Washington v. Texas, 388 U.S. at 19; Smith, 101 Wn.2d at 41; Hartwig, 36 Wn.2d at 601.

E. CONCLUSION.

For the foregoing reasons, Mr. Columbo respectfully requests this court reverse his convictions and remand for new trial.

DATED this 31st day of December, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Vanessa M. Lee', written over a horizontal line.

VANESSA M. LEE (37611)
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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63957-9-I
v.)	
)	
EDWIN NORTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING 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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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2009.

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