

**NO. 63957-9-1**

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

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**STATE OF WASHINGTON**  
Respondent,

v.

**CHRISTOPHER COLUMBO**

Appellant.

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

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

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**RESPONDENT'S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

Mr. Christopher Columbo was convicted by a jury of one count of Theft in the First Degree and one count of Trafficking Stolen Property in the First Degree. Mr. Columbo claims that his right to a fair trial was violated when his request for a continuance the morning of trial was denied. Alternatively, Mr. Columbo argues that the trial court abused its discretion in denying him a continuance the morning of trial. Mr. Columbo had been granted eight continuances during the pendency of his case. Mr. Columbo had the same defense counsel throughout the pendency of his case. The morning of trial, defense counsel indicated that Mr. Columbo had just provided the last name of a potential witness and that he had provided another piece of information regarding his son who was also a potential witness. There was nothing stated on the record as to how these developments may materially affect Mr. Columbo's case or cause undue prejudice. In light of the numerous continuances that had been afforded Mr. Columbo throughout the duration of the case, the trial court denied Mr. Columbo's motion for a continuance the morning of trial. Mr. Columbo now timely appeals the court's ruling.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court abused its discretion in denying the appellant's request for a continuance on the morning of trial.

## **III. STATEMENT OF THE CASE**

### **1. Statement of Procedural History**

<sup>1</sup>The appellant was charged with Theft in the First Degree and Trafficking in Stolen Property in the First Degree. CP 1-2. On May 7, 2009, Mr. Columbo appeared before the Honorable Susan K. Cook for trial confirmation. 5/7/2009 RP 3. At trial confirmation, Mr. Columbo's attorney requested a continuance. The State opposed the continuance. Judge Cook stated the following:

No continuances, Mr. Columbo. You're not paying attention. You're not participating in this case like you are interested. I'm looking at continuance after continuance here because you're not meeting with your attorney, you're not giving him the information he needs to process your case. This is not going to get continued again. So you and your attorney put your heads together and figure out whether you're going to take the offer or whether you're going to trial on Monday. 5/7/2009 RP 4-5.

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

On May 11, 2009, the morning of the commencement of trial, Mr. Columbo appeared before the Honorable Judge David Needy with his attorney and requested a continuance. 5/11/2009 RP 3. Mr. Columbo's defense attorney indicated that he needed a continuance because Mr. Columbo had just provided the last name of a witness and that he had provided another piece of information regarding his son. 5/11/2009 RP 4. The prosecutor did not agree to the continuance. 5/11/2009 RP 4. Judge Needy stated the following:

My reading of the file shows the charges were filed in July of 2008, and there have been eight continuances since that time. This request was made Thursday in front of Judge Cook and denied. Now we are sitting morning of trial with 35 or 36 jurors in the courtroom with a request once again to continue the trial. Under these circumstances and given all the time and the many continuances that the defense has had to be ready, the Court is going to deny the motion to continue at this time.  
5/11/2009 RP 7.

On May 11, 2009, a jury trial was held before the Honorable David Needy, and the appellant was found guilty of Theft in the First Degree and Trafficking in Stolen Property in the First Degree. CP 30-31. At trial, Mr. Columbo called no witnesses. The appellant filed a timely notice of appeal. CP 46.

## **2. Statement of Facts**

In June of 2008, Roseanne Columbo left her home in Bow, Washington, in order to attend to her mother who had a surgery scheduled in Seattle. 5/11/2009 RP 21. On her way down south, Ms. Columbo's brother, Christopher Columbo, called to ask if he could stay in the Bow home while Ms. Columbo was away. 5/11/2009 RP 22. Ms. Columbo agreed. 5/11/2009 RP 22. When Ms. Columbo returned to her home less than a week later, she found her nephew and his girlfriend at her home with their motor home in the driveway. 5/11/2009 RP 23. Ms. Columbo's brother was not present at the home. 5/11/2009 RP 23. Ms. Columbo requested that her nephew and his girlfriend leave and the two complied. 5/11/2009 RP 24.

Soon after returning home, Ms. Columbo received a phone call from her brother, the appellant, who stated that he had taken one of her rings to get it cleaned. 5/11/2009 RP 24-25. Ms. Columbo had not requested such a service from her brother and she asked for her ring back. 5/11/2009 RP 26. In a series of approximately thirteen phone calls in one day, Ms. Columbo learned from her brother that he had not taken the ring to be cleaned, but instead he had pawned the ring. 5/11/2009 RP 26-28. Ms. Columbo repeatedly asked for her

ring back. 5/11/2009 RP 26-28. At one point Mr. Columbo agreed to meet her within an hour to return the ring. 5/11/2009 RP 27. Mr. Columbo did not bring the ring and he stopped answering his phone; instead, Mr. Columbo had his son answer his phone for him. 5/11/2009 RP 27. Ms. Columbo called the police and with their aid was able to locate her ring at a pawn shop in Bellingham. 5/11/2009 RP 30.

At trial, Ms. Columbo testified that while her brother and nephew may have similar sounding voices, there was no doubt in her mind that the person she had been conversing with regarding her ring had been her brother, Christopher Columbo. 5/11/2009 RP 38, 41.

At trial, Daniel Wall of the Bellingham Pawn Exchange, testified that records indicated that Christopher Columbo pawned Ms. Columbo's ring using his own driver's license as identification for the transaction. 5/11/2009 RP 45-46.

Mr. Columbo was found guilty of Theft in the First Degree and Trafficking in Stolen Property in the First Degree. CP 30-31. Mr. Columbo now timely appeals.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. COLUMBO A CONTINUANCE ON THE MORNING OF TRIAL.**

The grant or denial of a continuance will not be disturbed on appeal absent a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1097, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). A motion for a continuance is addressed to the sound discretion of the trial court, whose decision will only be reversed for abuse of discretion, that is, only "if no reasonable person would have taken the view adopted by the trial court." *State v. Henderson*, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980); *State v. Barker*, 35 Wn. App. 388, 397, 667 P.2d 108 (1983).

Moreover, the decision to deny a continuance will be disturbed only if the defendant shows he was prejudiced or that the result of the trial would likely have been different had the motion for a continuance been granted. *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982).

Courts have noted that continuances and the compulsory process in criminal cases involve such disparate elements as surprise, diligence, materiality, redundancy, due process, and the

maintenance of orderly procedures; and that this Court leaves the decision largely within the discretion of the trial court, to be disturbed only upon a showing that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied. *State v. Harp*, 13 Wn. App. 273, 275, 534 P.2d 846, 848 (1975); *State v. Edwards*, 68 Wn.2d 246, 412 P.2d 747 (1966).

The trial court here acted properly in denying Mr. Columbo a last-minute continuance. Given the fact that Mr. Columbo had been granted eight continuances in order to be ready for trial, a reasonable person would likely take the same view as the trial court and deny the continuance. Furthermore, Mr. Columbo failed to make a showing that he was prejudiced by the denial of the continuance or that the result of his trial likely would have been different had the motion been granted; therefore, denial of the continuance was appropriate.

**B. THE APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE COURT DENYING HIS CONTINUANCE REQUEST; FURTHERMORE, REVERSAL IS NOT APPROPRIATE.**

Motions for continuance are addressed to the sound discretion of the trial court and there is no mechanical Fifth Amendment test for

deciding when a denial of a continuance violates due process. Each case must be judged according to its own circumstances. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *State v. Cadena*, 74 Wn.2d 185, 188-89, 443 P.2d 826 (1968); *State v. Eller*, 84 Wn.2d 90, 95-96, 524 P.2d 242 (1974); RCW 10.46.080. Likewise, there is no mechanical Sixth Amendment test regarding what constitutes a reasonable time to prepare a case; each case must be examined individually to determine whether the defendant has been given sufficient time for effective legal representation. See *Chambers v. Maroney*, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 1982-1983, 26 L.Ed.2d 419, 429-30 (1970).

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 the 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. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Although guarded jealously, the right to present witnesses is not absolute. The Court's holding in *Washington* limits the right to compel witnesses to those witnesses who are material to the defense. In *Washington*, the Court found error because the defendant was denied access to a "witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, at 23, 87 S.Ct. at 1925; *State v. Smith*, 101 Wn.2d 36, 677 P.2d 100, 103 (1984). As suggested in the aforementioned section above, the defendant carries the burden of showing materiality, especially when requesting a continuance in order to secure a witness's testimony or appearance. This burden has been described as establishing a colorable need for the person to be summoned. See *Ashley v. Wainwright*, 639 F.2d 258 (5th Cir.)(1981); *State v. Smith*, 101 Wn.2d 36, 677 P.2d 100 (1984).

In *State v. Eller*, the trial court denied defense motion to continue to allow time for service of process upon a reluctant witness. *State v. Eller*, 84 Wn.2d 90, 524 P.2d 242 (1974). Our State Supreme Court sided with the trial court finding that the missing witness could have offered merely cumulative information to that of evidence available at trial and that there would have been no

qualitative impact on the ultimate result of the trial. *State v. Eller*, 84 Wn.2d 90, 98, 524 P.2d 242 (1974). Similarly, in the instant case, Mr. Columbo requested a continuance to possibly procure an additional witness, but nothing on the record supports that this additional witness would have been material to Mr. Columbo's case or that the witness would have offered new information, rather than merely cumulative information.

Further, as in the instant case, the court in *State v. Barker* also properly denied the defense motion for a continuance. In *Barker*, the original defense attorney withdrew prior to trial and new counsel was appointed one month before trial was set to begin. *State v. Barker*, 35 Wn. App. 388, 390, 667 P.2d 108, 114 (1983). The new defense counsel had access to all of the state's witnesses, access to prior counsel's notes and no motion for a continuance was made until just three days before trial. *Id.* at 397. In addition, the defendant in *Barker* failed to indicate how he would be materially prejudiced by the court's denial of a continuance of the trial. *Id.* at 397-98. Based on the aforementioned facts, the court properly denied Barker's request for a continuance.

Like the appellant in *Barker*, Mr. Columbo failed to make a showing that he was materially prejudiced by the trial court's denial of

his continuance request. Mr. Columbo had at least eight continuances granted over the period of a year in order for both he and his counsel to be prepared for trial. The trial court did not err in denying Mr. Columbo's last minute request for a continuance.

In certain instances, a last minute continuance is appropriate. The general consensus of judicial opinion in other states is that cases set for hearing by an appellate court have precedence over those set by a trial court on the same date where an attorney is counsel in both cases. *State v. Hartwig*, 36 Wn.2d 598, 600, 219 P.2d 564, 566 (1950). In *Hartwig*, the trial court improperly denied a request for continuance by defense counsel when counsel was set to appear before the state Supreme Court the same day as trial was scheduled. While the appellant points to *Hartwig* in support of his contention that he was improperly denied a continuance, his case is clearly distinguishable from that of *Hartwig*. Unlike the appellant in *Hartwig*, Mr. Columbo had the same attorney represent him for the duration of his case, his attorney was present and available at trial call, his attorney had adequate time to investigate and prepare a defense, and his attorney made no material showing as to why a continuance was necessary to avoid prejudice. The trial court in the instant matter

acted reasonably in denying Mr. Columbo's request for a continuance the morning of trial and reversal is inappropriate.

**V. CONCLUSION**

The trial court properly denied Mr. Columbo's request for a continuance the morning of trial. Mr. Columbo did not make a showing that he was materially prejudiced by the denial of the continuance; furthermore, the trial court did not abuse its discretion in denying such a late continuance request. Reversal is inappropriate.

DATED this 30<sup>th</sup> day of March, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
MELISSA W. SULLIVAN, WSBA#38067  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by:  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: VANESSA M. LEE, addressed as 1511 3<sup>rd</sup> Avenue, Suite 701, Seattle, Washington 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 30<sup>th</sup> day of March, 2010.

  
KAREN R. WALLACE, DECLARANT