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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2015-002620

THE STATE,RESPONDENT

v.

EMMANUEL BASHAN ELLEBY,

.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in declining to grant a continuance based on Appellant's absence where the State did not indicate it would hold open the offer for a twenty-year negotiated sentence.

STATEMENT OF THE CASE

Appellant was indicted during the November 2014 term of the Richland County Grand Jury for armed robbery (2014-GS-40-7355) and kidnapping (2014-GS40-7364). (R.p.537-538; 540-541) Appellant failed to appear for trial and was tried in his absence before the Honorable DeAndrea G. Benjamin. Appellant was convicted as charged and sentenced to life without possibility of parole on both charges pursuant to Section 17-25-45 of the South Carolina Code (2014).

STATEMENT OF FACTS

Appellant was arrested and charged with armed robbery and kidnapping and the State noticed him that it would seek life without parole (LWOP) on both the charges pursuant to section 17-25-45. (R. pp. 4–5.) The State offered a plea deal for a negotiated sentence of twenty years' imprisonment, which would expire at 12:30 pm the day prior to trial. (R. p.19.) On the day when trial was set to begin, the State informed the trial court it would delay calling Appellant's case because earlier that day when defense counsel attempted to discuss the plea deal with his client, Appellant "fell out[and] perhaps had a seizure." (R. p.12.) Because Appellant was subsequently taken to the hospital, the case was delayed until the following day, with the trial court noting that if he was still in the hospital the next morning, it would continue the case. (R. p.16.) The following morning, Appellant failed to appear but defense counsel stated his belief his client was on the way and he requested an extension of the plea deal until 2:00 pm that day because his client had indicated he would accept the offer. (R. pp.17–18.) The solicitor agreed; however, by 2:00 p.m. Appellant still had not appeared. (R. pp. 20, 24.)

Defense counsel objected to a trial *in absentia* (TIA), arguing his client would be prejudiced by the denial of the opportunity to accept the plea deal. (R. p. 28.) In response, the solicitor clarified she "said the offer was only good through 2:00 [] because [they] all had to be [there] to start the trial. . . . The offer is now – we are here at trial. The offer is gone. We are at trial." (R. p. 34.) Nevertheless, the trial court waited until the following morning to swear the jury, and the solicitor agreed to extend the plea offer until then. (R. pp. 46, 169.)

However, the following morning, Appellant still had not been located. (R. p. 170.) Defense counsel again moved for a continuance based on his "objections to this being a TIA." (R. p. 170.) The trial court denied the motion and the case proceeded to trial. Appellant never appeared over the course of the three-day trial, and was ultimately convicted as charged. (R. pp.

501–502.) After being apprehended, Appellant was sentenced to LWOP on both charges.¹ (R. pp. 512–513, 539; 542.) Appellant filed a post-trial motion, arguing section 17-25-45 was unconstitutional and he should be resentenced, which the trial court ultimately denied by written order. (R. p.534-536.)

¹ The details of when or how Appellant was apprehended are not included in the record.

ARGUMENT

The trial court did not abuse its discretion in declining to grant a continuance based on Appellant's absence because the State did not indicate it would hold open the offer for a twenty-year negotiated sentence.

Appellant argues the trial court erred in refusing to grant a continuance because had it been granted, he would have accepted the State's offer of a negotiated twenty-year sentence. However, there is no indication the State was willing to hold open the offer until Appellant decided to appear for court. Instead, the State opposed the motion, arguing it was ready to proceed with trial.

The denial of a continuance rests within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). As it is oft stated, a reversal of the trial court's refusal to grant a continuance is about as "rare as the proverbial hens' teeth." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996).

In asserting the trial court erred in its denial, Appellant relies solely on *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006), in which the South Carolina Supreme Court found a petitioner was entitled to post-conviction relief where defense counsel neglected to object to a trial *in absentia* on the indicted charge even though the petitioner, the solicitor, and defense counsel all signed a sentencing sheet on the day of trial in anticipation of the petitioner pleading guilty to a lesser included charge of assault and battery of a high and aggravated nature (ABHAN). *Id.* at 280, 639 S.E.2d at 54. After the petitioner signed the sentencing sheet, he left the courthouse and a trial proceeded in his absence after which he was convicted of assault and battery with attempt to kill (ABIK). *Id.* at 281, 639 S.E.2d at 54. In finding counsel was ineffective in failing to request a continuance, the Supreme Court reasoned that under the

circumstances, the trial court would have had to grant the motion and continue the case given the clear prejudice that because the case proceeded he was subjected to “the ABIK conviction whereas the guilty plea would have been to ABHAN.” *Id.* at 283, 639 S.E.2d at 56.

In this case, the facts are clearly distinguishable from *Morris*. Here, there is no evidence the State would have kept the offer open and the court had no legal basis to require an extension of time for acceptance even if it wanted to. The offer of a plea rests within the discretion of the State and the court cannot expand the confines of an offer. *State v. Thrift*, 312 S.C. 282, 291–92, 440 S.E.2d 341, 346–47 (1994) (“Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case. Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor’s hands. . . . Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety.” (footnotes omitted)). Although the court can enforce an agreement once made, until the plea is formally accepted, it is non-binding. *Reed v. Becka*, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999) (“A plea agreement is only an ‘offer’ until the defendant enters a court-approved guilty plea. A defendant accepts the ‘offer’ by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court.”).

Therefore, although the trial court could have granted the continuance, no evidence exists the result would have been different. Notably, in response to defense counsel’s request for the continuance, the trial court clarified that a continuance would not affect the status of the plea: “Well, see, what I think you all are missing is the Solicitor is saying that her offer has expired. Regardless of whether or not I start the trial or not, she is saying her offer has expired.” (R. p.41.) Ultimately, the trial court *did* grant a continuance and agreed to not swear the jury that

day. Further, the solicitor allowed defense counsel the evening to locate his client, even though she had stated “[t]he offer is now – we are here at trial. The offer is gone. We are at trial.” (R. p. 34.) When Appellant again failed to in appear court the following morning, defense counsel renewed his objection “to this being a TIA.” (R. p. 170.) He did not mention continuing the case to secure the plea deal as it was apparent such a deal was no longer available. The solicitor clearly did not intend to extend the deal as she opposed the motion for a continuance, stating the State was prepared to proceed and would be prejudiced by further delay.²

Accordingly, the trial court did not err in denying the second motion for a continuance as it was not made on the grounds that Appellant wanted to plea and further, even if a continuance was granted, there is no evidence the State would keep it open (again) past its expiration.

²The trial court again noted the plea would not have remained open in addressing motions made by defense counsel after the State rested: “I just want to put that on the record that the offer was to expire, and even if this case was continued, I’m not sure if that offer still remained even if it was continued beyond this week, considering the State had indicated that it would have expired on Monday.” (R. p. 427.)

CONCLUSION

Based on the foregoing, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b),
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