

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Calhoun County

Honorable Diane Schafer Goodstein, Circuit Court Judge

RECEIVED
SEP 06 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DERRICK NELSON STONE,

APPELLANT

APPELLATE CASE NO. 2017-002016

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by denying defense counsel's motion for a continuance, where counsel told the judge appellant suffered a heat stroke and presently was unable to assist counsel in preparation for the revocation hearing, and in addition counsel needed additional time to investigate, since the denial of a continuance under these circumstances was an arbitrary abuse of discretion?

STATEMENT OF THE CASE

A probation arrest warrant was issued against appellant on March 21, 2017. R. 17 – 19. Appellant appeared on September 19, 2017, before the Honorable Diane Goodstein for a probation revocation hearing. Martin Banks represented appellant. Ted Lupton was the assistant solicitor, who appeared with an agent from Probation, Pardon, and Parole. R. 1.

During the probation revocation hearing, Judge Goodstein revoked appellant's probation. R. 14, 1. 19 – 15, 1. 3. The probation sentencing sheet showed appellant was ordered to serve the two years on his prior suspended sentence. R. 20.

This appeal follows.

STANDARD OF REVIEW

A motion for continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion. State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981). In South Carolina “[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.” Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007).

“ ‘The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.’ ” State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005)). “ ‘An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.’ ” Id. (quoting State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006) (“An abuse of discretion occurs when the trial court's ruling is based on an error of law.”). Even if there was no evidentiary support, “ ‘[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.’ ” Geer, 391 S.C. at 190, 705 S.E.2d at 447 (quoting State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005)); see also State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891–92 (1995) (stating that error without prejudice does not warrant reversal).

The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. State v. White, 311 S.C. 289, 293, 428 S.E.2d 740, 742 (Ct.App.1993). Reversals of refusals of continuances “are about as rare as the proverbial hens teeth.” State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602,

604 (2002) (citation omitted) (stating this comparison, but ultimately reversing the trial courts refusal to grant a continuance). The party asking for the continuance must show due diligence was used in trying to procure the testimony of an absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief. See White, 311 S.C. at 293, 428 S.E.2d at 742-43; see also Rule 7(b), SCCrimP (explaining that a motion for continuance to procure the testimony of a witness will not be granted unless the party seeking the testimony made use of due diligence to procure the testimony).

ARGUMENT

The court erred by denying defense counsel's motion for a continuance, where counsel told the judge appellant suffered a heat stroke and presently was unable to assist counsel in preparation for the revocation hearing, and in addition counsel needed additional time to investigate, since the denial of a continuance under these circumstances was an arbitrary abuse of discretion.

Relevant Facts

Defense counsel Banks moved to continue the revocation hearing on several grounds. Banks told the judge that appellant had had a heat stroke and "he's had difficulty remembering a lot of the charges in his paperwork. I've only had a chance to meet with him yesterday. He doesn't live in Calhoun County any more. R. 3, ll. 2-17.

In addition, Banks argued that he only found out the day before that appellant denied contacting the victim at three a.m. on a certain day. This would have violated a "no contact" provision. Appellant said he did not contact the victim as alleged. Counsel Banks added that he needed further time to investigate the state's revocation allegations. R. 3, l. 6 – 5, l. 14. Appellant told the judge that he had not even been charged with impermissibly contacting the victim. This showed appellant did not understand the allegations contained in the addendum to the probation arrest warrant.

Assistant solicitor Lupton asserted that "every time he comes to court, he has some medical condition that requires a continuance." R. 7, ll. 6-8.

The judge ruled she would not grant a continuance because she believed the solicitor's assertion that "this is a continuing issue, that he has medical conditions that he needs continuances, you could have brought medical records." R. 7, l. 23 – 8, l. 2.

Defense counsel Banks offered in response to the denial of the continuance motion that appellant had also suffered from spider bites which affected him medically. The judge repeated that she was not going to grant the defense a continuance. R. 8, ll. 3-20.

The judge then ruled appellant had willfully violated his probation, and she revoked it in full. R. 11, l. 14 – 14, l. 24.

Discussion

“The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.” Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). In State v. Hill, 409 S.C. 50, 760 S.E.2d 802 (2014), the defendant appealed the circuit court’s grant of a six-month continuance to the state. The defendant asserted this violated the IAD compacts, which enables participating states to obtain custody of prisoners incarcerated in other jurisdictions and bring those prisoners to trial. At the time of Hill’s South Carolina trial, he was incarcerated in Tennessee.

This Court held that the same abuse of discretion standard that applies in every other case applied to a challenge to an IAD continuance as not being granted for “good cause.” The trial judge in State v. Hill had previously presided over another murder trial involving the same victims, and he stated on the record he found that the trial was going to be complex, intensive and that a continuance was justified. This Court found no abuse of discretion in the judge granting a continuance.

In Gatti v. Gatti, 280 S.C. 546, 347 S.E.2d 506 (1986), the Court of Appeals held the denial of a continuance was an abuse of discretion where the continuance was necessary through no fault of the moving party. The Court of Appeals noted that the plaintiffs in Gatti “sought only a two and one-half month continuance.” The motion was based on the need for the testimony of

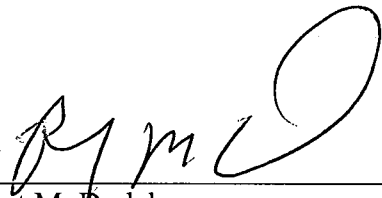
an expert witness. The Court of Appeals found the moving party was not at fault, and that the trial judge abused his discretion in denying the motion for a continuance.

In Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980), this Court similarly found an abuse of discretion where the judge refused to grant a short continuance based on the attorney-legislator's need or desire to attend sessions in the Legislature in consideration of the state's appropriation bill. This Court found the refusal to grant the continuance on these grounds was a clear abuse of discretion.

In this case, the short continuance requested by defense counsel, was also an abuse of discretion where counsel, as an officer of the court, told the judge that appellant's illness had caused him memory problems, and that counsel also needed more time to investigate the allegations. A short continuance to ensure the fairness of the revocation proceedings was in order, it would not have caused any prejudice to the state, and it was respectfully an abuse of discretion for the judge to deny the motion.

CONCLUSION

By reason of the foregoing argument, the revocation of appellant's probation should be vacated.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of September, 2018.

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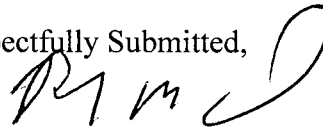
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Derrick Nelson Stone states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's revocation hearing before Judge Diane Schafer Goodstein, which was held on September 19, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Derrick N. Stone.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 6th day of September, 2018.

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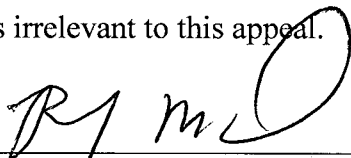
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Probation revocation hearing;
- (2) Probation revocation arrest warrant;
- (3) Sentencing order.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 6, 2018


Robert M. Dudek
Chief Appellate Defender

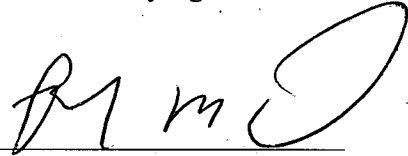
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 6, 2018.



Robert M. Dudek
Chief Appellate Defender

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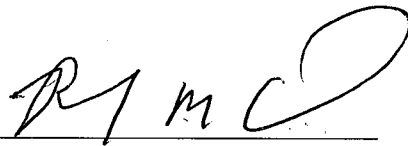
V.

DERRICK NELSON STONE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Derrick Nelson Stone, at 309 Old River Rd., Elloree, SC 29047; this 6th day of September, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of September, 2018.

Courtney Powers (L.S.)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.