

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**  
**Jun 26 2020**  
SC Court of Appeals

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Appeal from York County

Honorable Robert E. Hood, Circuit Court Judge  
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THE STATE,

RESPONDENT,

V.

JOHN W. THOMASSON SR.,

APPELLANT

APPELLATE CASE NO 2019-001517  
\_\_\_\_\_

INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred when it denied Appellant's motion for a continuance to procure new representation where Appellant showed good cause for a continuance because trial counsel's multiple mistakes led Appellant to believe that trial counsel had misrepresented him?

## STATEMENT OF THE CASE

During the July 2018 term the York County Grand Jury indicted Appellant for possession of methamphetamine third offense. R.\*.

On August 20, 2019, Appellant proceeded to trial before the Honorable Robert Hood, and a jury. Tr. 1. Jeffrey Baldwin Zuschke represented Appellant. Id. Austin Dargan Newman and Marina Bender Hamilton represented the state. Id.

Appellant was found guilty as indicted. Tr. 155, ll. 15 – 18. Judge Hood sentenced Appellant to five years imprisonment and revoked Appellant’s probationary sentence. Tr. 167, ll. 6 – 11.

This appeal follows.

## STANDARD OF REVIEW

“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).

## ARGUMENT

The trial court erred when it denied Appellant's motion for a continuance to procure new representation where Appellant showed good cause for a continuance because trial counsel's multiple mistakes led Appellant to believe that trial counsel had misrepresented him

### **Relevant Facts**

On May 23, 2018, Appellant was stopped on Filbert Highway in York County for speeding by Officer Matt Earls and Officer Christopher Laurencio. Tr. 71, l. 6 – 72, l. 10. Appellant was asked to get out of his car and for consent to search his person. Id.; Tr. 93, l. 2 – 95, l. 22. Officer Laurencio testified that Appellant gave consent to search his person. Id. Although there was no video of the encounter, the officers testified that a “rolled up piece of tinfoil” and a small plastic bag were found in Appellant’s pockets<sup>1</sup>. Tr. 73, ll. 14 – 17; Tr. 93, l. 2 – 95, l. 22; Tr. 96, ll. 6 – 16; Tr. 103, ll. 7 – 17.

After voir dire but before the jury was selected, Appellant requested to relieve trial counsel and moved for a continuance to procure different representation. Tr. 48, l. 23 – 51, l. 20. Appellant explained that he “just found out [he] was going to trial yesterday,” and that trial counsel’s delay in notifying him of the trial left him without enough time to defend himself. Id. Tellingly, Appellant was late on the day of the trial as a result of the delayed notice given by trial counsel because Appellant had caretaking obligations for his parents that he could not reschedule on such short notice. Id.

Appellant also explained that he “has been misrepresented” by trial counsel throughout the course of his representation. Id. Appellant stated that he informed trial counsel that he wanted

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<sup>1</sup> The officers at the scene did not conduct a field test of the items found on Appellant, but during trial the drug analyst Dee Johnson testified as an expert in chemical analysis and identification. Tr. 109, ll. 17 – 19. Johnson testified that the residue inside the bag tested positive for methamphetamine. Tr. 111, ll. 17 – 20.

the plastic bag found during the traffic stop, which was the key piece of evidence in this case, to be independently drug tested, but trial counsel failed to have that testing conducted. Id. Appellant also explained that after his arrest trial counsel delayed handling his bond paperwork which resulted in Appellant unnecessarily spending seven extra days in jail. Id. For those reasons, Appellant requested for a continuance to find a new attorney. Id.

Despite this being Appellant's first motion for a continuance, the court denied Appellant's motion because Appellant's case had been "pending for over a year." Tr. 51, ll. 21 – 22; Tr. 52, ll. 1 – 5. Appellant explained that he was not at fault for needing a continuance to procure new counsel because trial counsel should have notified him of the trial date "a long time ago." Tr. 52, ll. 6 – 8. The court replied that "we're here because... you've chosen to exercise your Constitutional right to a jury trial... You also have the right to exercise a guilty plea, to come before the Court and plead guilty, but to this point in time if there is no guilty plea then the trial is going forward." Tr. 53, ll. 15 – 21.

## **Discussion**

Before his trial started Appellant made a motion for a continuance to procure new representation because he believed trial counsel had not represented him adequately. Tr. 48, l. 23 – 51, l. 20. According to Appellant trial counsel did not inform him that his trial was taking place until the day before which left Appellant without have enough time to properly defend himself. Tr. 48, l. 23 – 51, l. 20. Appellant wanted a second drug analysis on the items that allegedly contained methamphetamine residue, but trial counsel never had that testing done. Tr. 48, l. 23 – 51, l. 20. Moreover, Appellant also explained that trial counsel's delay in processing his bond paperwork left him languishing in jail for seven extra days. Tr. 48, l. 23 – 51, l. 20. Accordingly, the lower court erred when it denied Appellant's motion for a continuance because

Appellant showed good cause as trial counsel did not go forward with Appellant's request to have independent drug testing conducted on the key piece of evidence and did not provide adequate notice for Appellant to properly prepare for trial.

In State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989) Tanner was arrested and charged with three counts of felony driving under the influence. Id. at 460, 385 S.E.2d at 833. Tanner was involved in a car accident as a result of driving under the influence and law enforcement collected DNA samples from Tanner's vehicle. Id. at 462 – 463, 385 S.E.2d at 834 – 835. Prior to trial Tanner made multiple inquiries and a discovery motion for the DNA samples. Id. The state told Tanner the DNA samples were lost or misplaced. Id. However on the day of the trial SLED brought the untested DNA samples to court, where the state informed Tanner of their existence ten minutes before a pretrial hearing. Id.

Tanner moved for a continuance to either conduct an independent examination of the DNA samples or wait for SLED to complete an analysis. Id. The circuit court ruled the state could not use the samples in its case but denied Tanner's request for a continuance for testing to be conducted. Id. Our Supreme Court held the circuit court abused its discretion when it denied Tanner's motion for a continuance because he showed the potential exculpatory value of the DNA samples such that Tanner satisfied the Squires<sup>2</sup> criteria for a continuance by “demonstrating other evidence that could have been produced[ ] and other points in his behalf that could have been raised [if the continuance was granted].” Id.

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<sup>2</sup> In State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966) our Supreme Court held “want of preparation” is good cause for a continuance if the appellant showed the existence of potentially exculpatory evidence that could have been produced if the motion for continuance was granted for the purpose of preparing the case for trial. Squires, 248 S.C. at 244, 149 S.E.2d at 603. See also, State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977).

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), our Supreme Court held the trial court abused its discretion when it denied McMillian's motion for continuance to obtain the transcript of his first trial in order to prepare for his second trial. McMillian made a timely request for the transcript of his first trial, but his second trial started before he received it. Id. at 19, 561 S.E.2d at 603. He moved for a continuance to obtain the transcript to impeach the key witness against him, Dorothy Williams Rumph, but his request was denied. Id. The Court found the lower court abused its discretion because, "[t]he only 'neutral' witness for the state during McMillian's second trial was Dorothy Williams Rumph." Id. at 21, 561 S.E.2d at 604. Therefore, the Rumph's credibility, "was essential to McMillian's defense," and the crucial nature of Rumph's testimony could not be overstated. Id. The Court concluded that, "the verdict hinged upon her credibility," and without the transcript from the first trial, "McMillian was hindered in his ability to impeach her." Id. at 23, 561 S.E.2d at 605.

In the instant case, Appellant showed good cause for a continuance when he explained to the trial court that he needed time to procure new representation because trial counsel "misrepresented [him]" in many ways. Tr. 48, l. 23 – 51, l. 20. As in, Tanner, Appellant showed a want of preparation in his case in that trial counsel did not have independent drug testing conducted on the plastic bag found during the traffic stop, the key piece of evidence in Appellant's case. Id.; Tanner at 462–463, 385 S.E.2d at 834–835. Thus, Appellant demonstrated "other evidence that could have been produced[ ] and other points in his behalf that could have been raised [if the continuance was granted]." Id. As in McMillian, Appellant did not have enough time to obtain crucial evidence for his defense because trial counsel did not notify Appellant of the trial date until the day before the trial. Id.; McMillian, at 19, 561 S.E.2d at 603. Accordingly, the lower court abused its discretion when it denied Appellant's motion for a

continuance because Appellant showed good cause for his motion for a continuance as he needed time to procure new counsel who would properly prepare for trial.

**CONCLUSION**

By reason of the foregoing arguments, Appellant's conviction should be reversed, and this case remanded to the York County Court of General Sessions for a new trial.

s/ Victor R. Seeger

Victor R Seeger  
Appellate Defender

ATTORNEY FOR APPELLANT

This 26<sup>th</sup> day of June, 2020.

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THE STATE,

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JOHN W. THOMASSON SR.,

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CERTIFICATE OF SERVICE  
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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case have been served upon William M. Blich, Jr., Esquire at the primary e-mail address listed in the Attorney Information System (AIS); and John W. Thomasson Sr., #269354, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 26<sup>th</sup> day of June, 2020.

s/ Victor R. Seeger

Victor R Seeger  
Appellate Defender  
ATTORNEY FOR APPELLANT