

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Jun 26 2020

SC Court of Appeals

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARQUILLE RONDALE LIVINGSTON,

APPELLANT.

APPELLATE CASE NO. 2018-001595

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by denying Appellant's motion for a continuance where "good cause" existed since Appellant's motion to relieve counsel and proceed *pro se* was previously granted but Appellant was given inadequate time to prepare for trial, particularly given the constraints due to his pretrial incarceration, including little to no access to the law library, and where Appellant was prejudiced because he was ultimately forced to proceed without adequate time to prepare his defense?

STATEMENT OF THE CASE

A Richland County Grand Jury indicted Appellant on March 13, 2018 for first degree burglary, first degree criminal sexual conduct (CSC), kidnapping, and petit larceny. R. 729-736. A pretrial hearing was held on June 7, 2018 before the Honorable Clifton Newman. R. 1. Assistant Solicitor Kathryn Luck Campbell represented the state, and Robert Bank and Stephen Krzyston represented Appellant. R. 1. A second pretrial hearing was held on June 14, 2018 before the Honorable Robert Hood. R. 38. Assistant Solicitors Kathryn Luck Campbell and Joanna McDuffie represented the state, and Robert Bank, Stephen Krzyston, and Alicia Goode represented Appellant. R. 38. A third pretrial hearing was held on June 28, 2018 before Judge Newman. R. 91. Assistant Solicitor Joanna McDuffie represented the state, and Robert Bank and Alicia Goode represented Appellant. R. 91. A fourth pretrial hearing was held on July 30, 2018 before Judge Newman. R. 118. Assistant Solicitor Joanna McDuffie represented the state, and Robert Bank, Stephen Krzyston, and Alicia Goode represented Appellant. R. 118.

Appellant's case was called to trial on August 6, 2018 before the Honorable Deadra Jefferson. R. 137. Assistant Solicitors Kathryn Luck Campbell and Joanna McDuffie represented the state, and Robert Bank, Stephen Krzyston, and Alicia Goode represented Appellant. R. 137. Judge Jefferson ultimately granted Appellant's motion to proceed *pro se* and subsequent motion for a continuance. R. 229, ll. 1-5; R. 233, ll. 7-9. Appellant's case was finally called to trial on August 20, 2018 before Judge Newman, and a jury. R. 237. Assistant Solicitors Kathryn Luck Campbell and Joanna McDuffie represented the state. R. 237. Appellant represented himself. R. 237. Alicia Goode was stand by counsel. R. 237.

On August 22, 2018, the jury found Appellant guilty as indicted. R. 712, l. 16 – 713, l. 13. He was sentenced to life without parole pursuant to S.C. Code Ann. § 17-25-45 for first degree burglary, first degree CSC, and kidnapping, and thirty days concurrent for petit larceny. R. 724, l. 21 – 725, l. 23.

Appellant timely filed a notice of appeal. On October 9, 2019, Appellant filed a motion to relieve counsel and proceed *pro se*. By order filed March 19, 2020, this Court denied the motion.

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)) (internal quotation marks omitted). “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)) (internal quotation marks omitted). “Even if there was no evidentiary support, ‘in order for an error to warrant reversal, the error must result in prejudice to the appellant.’” Id. 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)) (alternation omitted); *see also* State v. Wyatt, 317 S.C. 370, 372-373, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not warrant reversal).

ARGUMENT

The trial judge abused his discretion by denying Appellant's motion for a continuance where "good cause" existed since Appellant's motion to relieve counsel and proceed *pro se* was previously granted but Appellant was given inadequate time to prepare for trial, particularly given the constraints due to his pretrial incarceration, including little to no access to the law library, and where Appellant was prejudiced because he was ultimately forced to proceed without adequate time to prepare his defense.

Relevant Facts

On August 6, 2019, Judge Jefferson granted Appellant's motion to relieve counsel and proceed *pro se*. R. 229, ll. 1-5. The judge also granted Appellant a two week continuance to allow him to adequately prepare for trial, which included reviewing electronic evidence he had previously been unable to view due to his pretrial incarceration. R. 233, ll. 7-9. When Appellant's case was ultimately called to trial on August 20, 2019 before Judge Newman, Appellant again moved for a continuance arguing he needed additional time to prepare for trial due to his lack of access to the law library at the local detention center where he was incarcerated. R. 242, l. 5 – 243, l. 3. Appellant explained that the jail was "locked down" several days over the prior two week period preventing him from visiting the law library or using the telephone. Consequently, Appellant was unable to conduct the research necessary to prepare his defense. R. 242, l. 23 – 243, l. 3. Moreover, Appellant explained that he had been given approximately fifteen hundred pages of discovery and was unable to review it all in a mere two weeks. R. 243, ll. 3-6.

The state did not oppose Appellant's motion. The assistant solicitor explained that she had arranged for Appellant to be transported to the judicial center on three separate days over the

course of the previous two weeks to allow him to view the digital evidence in the case. R. 243, ll. 8-16. She claimed Appellant “elected to view a very limited amount of the digital evidence.” R. 243, ll. 17-18. As far as Appellant’s assertion that he did not have adequate access to the law library, the solicitor admitted she had no information to refute his claim. R. 243, ll. 19-24.

After ensuring the state was prepared for trial, the judge denied Appellant’s motion for a continuance. He asserted, “People who are locked up don’t have access to law libraries and adequate research materials, and that’s why they are appointed lawyers to represent them . . . You [Appellant] had three lawyers representing you.” R. 244, ll. 18-23. The judge continued, “There is no scenario under which the Court could provide a *pro se* litigant full and complete opportunity to do legal research access all legal materials for optimum representation of yourself. The Court is not going to grant a continuance. The motion is denied. R. 245, ll. 8-14.

Discussion

The trial judge abused his discretion by denying Appellant’s motion for a continuance where “good cause” existed since Appellant, who was *pro se*, was given inadequate time to prepare for trial, particularly given the constraints due to his pretrial incarceration, including little to no access to the law library. Appellant, who was facing mandatory life without parole if convicted, was prejudiced because he was ultimately forced to proceed without sufficient time to review the approximately fifteen hundred pages of discovery and properly prepare his defense.

The Fourteenth Amendment to the United States Constitution guarantees criminal defendants the right to due process of law. U.S. Const. Amend. XIV. “The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent

power to control the order of its business to safeguard the rights of litigants.” Williams v. Bordon’s, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980).

The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon “a showing of good and sufficient legal cause.” Rule 7(c), SCRCrimP. As such, “[t]he 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. 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.” State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); See State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law”).

“It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case.” State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While “[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process,” the decision must rest upon “the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” Ungar v. Sarafitr, 376 U.S. 575, 589 (1964).

In Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016), our Supreme Court held the trial judge erred in failing to grant Winkler an extension of time in order to investigate evidence of brain damage. After Winkler was convicted of murder and sentenced to death, he filed an application for post-conviction relief (PCR) and was appointed counsel. Id. at 659, 795 S.E.2d at 695. Approximately two months into the representation, counsel suspected Winkler may suffer

from brain damage. Id. at 660, 795 S.E.2d at 695. Counsel requested funding to investigate, which was approved, and retained a neuropsychologist. Id. The neuropsychologist recommended neuroimaging and consulting a neurologist or neuropsychiatrist. Id. Counsel, thereafter, requested funding for neuroimaging. Id. The judge approved the request. Id. Subsequently, counsel moved to extend the deadlines in the scheduling order by ninety days, explaining the testing and analysis would require approximately ten weeks. Id. at 660-661, 795 S.E.2d at 696. The judge extended the deadline for filing an amended application, but refused to extend the PCR hearing date. Id. at 661, 795 S.E.2d at 696.

Although Winkler obtained the recommended MRI scan, he was unable to obtain the recommended PET scan because of elevated blood glucose levels. Id. Thereafter, counsel began working to treat Winkler's previously undiagnosed and untreated diabetes. Id. Despite Winkler receiving diabetes treatment, weeks later, a physician explained his blood sugar was still too high to perform an accurate study of his brain, and that an additional six to eight weeks of treatment would be required, followed by an additional six to eight weeks for analysis. Id. Counsel filed a second motion to extend the deadlines, requested a continuance of six months to file his final amended PCR application and adjustments of other dates, including the hearing date. This request was denied. Id. at 662, 795 S.E.2d at 696.

Our Supreme Court explained that the PCR statute, much like the Rules of Criminal Procedure, provided that additional time should be granted "if 'good cause is shown to justify a continuance.'" Id. (quoting S.C. Code Ann. § 17-27-160(c)). The Court found the PCR judge abused his discretion in denying Winkler's second motion for additional time because Winkler presented "good cause" for the continuance. Id. at 663, 795 S.E.2d at 697. The Court emphasized the diligence with which counsel acted at each stage. Id. The Court found no evidence to support

the PCR judge's finding that PCR counsel had "ample opportunity" to investigate and develop the evidence related to potential brain damage. Id. In fact, the Court found "it would have been impossible for PCR counsel to obtain PET scans in time to have an expert review them and be prepared to testify at the PCR trial." Id. Thus, Winkler provided "good cause" to justify a continuance. Id. According to the Court, the PCR judge's denial of the continuance request "left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler's brain damage." Id.

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), our Supreme Court held the trial judge abused his discretion in denying McMillian's motion for continuance in order to obtain the transcript of his first trial, which ended in a hung jury, in order to prepare for his second trial. McMillian requested the transcript timely, but the second trial started prior to his receipt of the transcript. Id. at 19, 561 S.E.2d at 603. He moved for a continuance to obtain the transcript in order to impeach the witnesses against him, but this request was denied. Id. The Court explained that "[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. As such, the Court found "her credibility was essential to McMillian's defense." Id. This fact was reinforced by the fact that the first jury deadlocked, eight to four, after rehearing her testimony. Id. According to the Court, "[t]he crucial nature of Rumph's testimony cannot be overstated." Id. In fact, the Court concluded "the verdict hinged upon her credibility, and that McMillian was hindered in his ability to impeach her" without the transcript from the first trial. Id. at 23, 561 S.E.2d at 605.

In State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989), our Supreme Court held the trial judge erred in failing to grant a continuance. Tanner and Taylor were in a car accident in which two people died. Id. at 461, 385 S.E.2d at 833. At trial, the evidence was

conflicting as to whether Tanner or Taylor was the driver, with Tanner's defense being he was not the driver. Id. Although Tanner's counsel was aware that blood, skin, and hair samples were taken from the car in which he and Taylor were occupants, the solicitor informed counsel that the samples were lost or misplaced. Id. at 462, 385 S.E.2d at 834. Ten minutes before the pretrial hearing, SLED brought the samples to court, and defense counsel learned of their availability. Id. Requesting a continuance, Tanner's counsel asked to conduct an independent examination of the samples, or at least to wait for a SLED analysis. Id. Denying the request, the judge ruled the state could not use the samples in its case against Tanner. Id.

The Supreme Court held the trial judge abused his discretion in denying the defense's motion for a continuance because the judge failed to consider the potential exculpatory value of the samples. Id. at 463, 385 S.E.2d at 834. In light of Tanner's defense that he was not the driver, the samples were "critical" to the case because "[a] testing of the samples could have supported Tanner's contentions that he was merely a passenger by demonstrating that some of Ms. Taylor's hair or blood was located on the driver's side of the car. Discovering who the samples belonged to and the samples' exact location in the car may also have aided Tanner's accident reconstruction expert in arriving at his opinion about who was driving." Id. Consequently, the Court held "the eve of trial production of these samples warranted the granting of a continuance so that the defendant could adequately ascertain the samples' full evidentiary harm," and that "[n]o real harm would have befallen the state from this continuance." Id.

The Supreme Court has also held a defendant was entitled to a continuance where his attorneys were incapacitated due to illness. Varn v. Green, 50 S.C. 403, 403, 27 S.E. 862, 862 (1897). One attorney was "confined to his bed and unable to attend court," and the other, "although attending court was unable to articulate above a whisper, and only then with great

pain, owing to an attack of grip and sore throat.” Id. The trial judge refused to grant the continuance request because the case “had been so long upon the docket.” Id. “Considering all the circumstances,” the Court held the defendant was entitled to a continuance of the case on account of the illness of his counsel, and that the circuit judge abused his discretion in forcing the case to trial under the circumstances.” Id. The Court concluded the judge committed an error of law by allowing his exercise of discretion “be controlled by his custom to require clients to employ other counsel when the counsel engaged were too sick to conduct the cause, and the cause had been long on the docket.” Id.

In this case, the trial judge abused his discretion by denying Appellant’s motion for a continuance where “good cause” existed. Appellant’s case was called to trial a mere six months after the offense occurred and five months after indictment. The fast track of this case, involving very serious charges and approximately fifteen hundred pages of discovery plus digital evidence, would have made it difficult for even multiple licensed defense attorneys to be prepared for trial. Appellant was given a mere two weeks to prepare after his motion to relieve counsel was granted. Given the volume of the discovery Appellant needed to review and the constraints caused by his pretrial incarceration, which prevented him from accessing the law library and conducting necessary research, Appellant was unable to adequately prepare his defense. Because of his lack of preparation, Appellant was unable to effectively cross-examine the witnesses against him or raise proper motions and objections.

Since Appellant established “good cause” existed and that he was prejudiced by the trial judge’s failure to grant a continuance, Appellant respectfully requests this Court reverse his convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of June, 2020.

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THE STATE,

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APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marquille Rondale Livingston states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial, which was held on June 7, 2018 before the Honorable Clifton Newman, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Marquille Rondale Livingston.

Respectfully Submitted,

s/ Lara M. Caudy
Appellate Defender

This 26th day of June, 2020.

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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) Complete Pretrial Transcript Dated June 7, 2018;
- (2) Complete Pretrial Transcript Dated June 14, 2018;
- (3) Complete Pretrial Transcript Dated June 28, 2018;
- (4) Complete Pretrial Transcript Dated July 30, 2018;
- (5) Complete Pretrial Transcript Dated August 6, 2018;
- (6) Complete Trial Transcript Dated August 20-22, 2018;
- (7) True-Billed Indictments;
- (8) Sentence Sheets.

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

June 26, 2020

s/ Lara M. Caudy
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.”

June 26, 2020.

s/ Lara M. Caudy _____
Appellate Defender

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