

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD C. BAKER,

Defendant-Appellant.

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UNPUBLISHED

July 25, 2000

No. 212987

Oakland Circuit Court

LC No. 97-157055-FH

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree retail fraud, MCL 750.356c; MSA 28.588(3), and operating a motor vehicle on a suspended license, MCL 257.904(1)(b); MSA 9.2604(1)(b). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to 1½ to 5 years' imprisonment for the first-degree retail fraud conviction and ninety days in the Oakland County Jail for the operating a motor vehicle on a suspended license conviction. We affirm.

On appeal, defendant argues that the trial court abused its discretion in failing to grant his motion for an adjournment so that he could attempt to locate a witness who failed to appear for the trial date. Defendant contends that the court's failure to grant the motion denied him his right to compulsory process. We disagree.

A trial court's decision to grant or deny a motion for an adjournment is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999). Likewise, a trial court's decision regarding compulsory process is reviewed for an abuse of discretion. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996).

In *People v Loyer*, 169 Mich App 105, 112-113; 425 NW2d 714 (1988), we summarized as follows:

An accused in a criminal prosecution has the right to compulsory process for obtaining witnesses in his favor. US Const, Am VI. This right is applicable to the states

through the Fourteenth Amendment. *Washington v Texas*, 388 US 14, 17-18; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). The Michigan Constitution similarly guarantees an accused in a criminal prosecution the right to compulsory process of witnesses in his favor. Const 1963, art 1, § 20. However, a criminal defendant's right to compulsory process is not absolute, and the constitution does not grant the right to subpoena any and all witnesses a party might wish to call. *United States v Wilson*, 732 F2d 404, 412 (CA 5, 1984), cert den 469 US 1099; 105 S Ct 609; 83 L Ed 2d 718 (1984); *United States v Espinoza*, 641 F2d 153, 159 (CA 4, 1981), cert den 454 US 841; 102 S Ct 153; 70 L Ed 2d 125 (1981).

In determining whether a continuance or adjournment is warranted, a trial court should consider whether defendant (1) has asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). With regard to the first consideration, defendant did assert his Sixth Amendment and Const 1963, art 1, § 20 constitutional rights to present witnesses in his favor. *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997). While the right to compulsory process is fundamental, it is not absolute. *Id.* at 408. A defendant must demonstrate that the witness' testimony is both material and favorable to his defense. *Id.* at 408-409, citing *United States v Valenzuela-Bernal*, 458 US 858, 873; 102 S Ct 3440; 73 L Ed 2d 1193 (1982). Additionally, the defendant's constitutional right must be balanced against "the state's legitimate interest in the integrity of the adversary process and the fair and efficient administration of justice." *McFall*, *supra* at 410, citing *Taylor v Illinois*, 484 US 400, 414-415; 108 S Ct 646; 98 L Ed 2d 798 (1988).

In *Valenzuela-Bernal*, *supra* at 861, the defendant claimed that the deportation of two individuals who had been arrested with him violated his rights to due process and compulsory process because he was thereby deprived of an opportunity to interview the two individuals to determine if they could assist his defense. However, the defendant failed to indicate how these two men could assist him in establishing his innocence. *Id.* The United States Supreme Court held that in order to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment due to the absence of a defense witness, a defendant must make "some showing that the evidence lost would be both material and favorable to the defense." The Court noted that it was not expressing any opinion regarding the showing that a defendant "must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses within the United States." *Id.* at 873, n 9. Nevertheless, the Court concluded that because the defendant made "no effort to explain what material, favorable evidence the deported passengers would have provided for his defense" the defendant "failed to establish a violation of the Fifth or Sixth Amendment." *Id.* at 874.

In the present case, defendant requested a continuance of the trial in order to provide him with an opportunity to attempt to locate defendant's codefendant who had failed to appear for the scheduled trial. In order to meaningfully exercise its discretion, the trial court needed information regarding the testimony anticipated from the witness. Defendant was with the codefendant throughout the incident that resulted in the charges in this case. Moreover, defendant asserted that he had an address for the codefendant and counsel claimed that he had spoken to her three days before the trial. It must be

presumed that defendant knew at least the general outline of how the codefendant would testify. Nevertheless, defendant failed to supply any indication of the codefendant's anticipated testimony to the trial court. Without such information, the trial court could not determine whether the codefendant's testimony would be material and favorable to the defense.

We recognize that in *People v Pullins*, 145 Mich App 414; 378 NW2d 502 (1985), this Court found an abuse of discretion in a similar factual situation, but we find that *Pullins* does not control the resolution of this case. In *Pullins*, the defendant's alibi witness was out of town on the date that the trial court was ready to hear his testimony. *Id.* at 417. The trial court denied the defendant's motion for a one-day continuance. *Id.* In finding that the denial was an abuse of discretion, this Court pointed to the fact that the defendant was not responsible for the witness' absence and that the request for a continuance was not a mere delay tactic. *Id.* This Court held that the trial court abused its discretion in refusing to grant a one-day continuance. *Id.* at 418. We find *Pullins* distinguishable. The *Pullins* Court did not consider the applicability of *Valenzuela-Bernal*, *supra*, and there is some indication in the opinion that the trial court possessed an indication of the anticipated testimony of the absent witness. The opinion notes that the witness was a listed alibi witness, and that defendant and his mother had already testified to the particulars of the alibi – a claim that defendant was with the alibi witness at the time of the alleged assault. *Id.* at 416-417. Given this information, the trial court could presume that the alibi witness would offer testimony that would be material and favorable to the defense. In this case, the defense did not present anything to the trial court and thus there was no basis upon which the court could presume that the codefendant's testimony would be material and favorable.

The next concern is whether defendant was negligent in waiting until the day of trial to request a continuance. Defense counsel represented to the trial court that when he spoke to the codefendant on the previous Saturday, he discovered that she had left a drug treatment center the Friday before trial (thereby violating her probation). Counsel stated that he did not know whether she was afraid to come to court or whether she was unaware of the trial date. We note that the latter speculation is questionable considering that the codefendant was allegedly under subpoena and had spoken to defense counsel three days prior to the trial. Defendant's motion for an adjournment was made on Tuesday, no action having been taken by counsel on the previous day. Moreover, counsel indicated that the codefendant had failed to contact him on the day prior to trial as she had been requested to do. He stated that he did not know where the codefendant was and he requested the adjournment so that he could check an address he had for her and contact some of her friends. We note that this was a two-day trial and therefore counsel could have endeavored to locate the codefendant after the first day of the trial was concluded, but he apparently failed to do so. Additionally, defendant never requested the assistance of the prosecutor in sending police to look for the codefendant while the trial continued. These considerations suggest that defendant was negligent in waiting until the last minute to request a continuance.

We do note that it appears from the trial court docket entries that the case was adjourned on two previous occasions, but there is no indication that these adjournments were made at defendant's behest. These prior adjournments may have been requested by the prosecution or by the court, for that matter, and should not be held against defendant.

Having considered the relevant factors, we conclude that because defendant failed to establish that the codefendant's testimony was material and favorable to the defense, and because defendant failed to make reasonable efforts to locate the codefendant after the first day of trial, the trial court did not abuse its discretion in denying defendant's request for a continuance.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald