

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LEE HART,

Defendant-Appellant.

UNPUBLISHED

June 2, 2009

No. 285212

Gratiot Circuit Court

LC No. 07-005480-FH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent. I conclude that the trial court abused its discretion by refusing to end the trial day at 6:30 p.m.—two hours after the scheduled end of proceedings for the day—in order to allow a final defense witness to testify first thing the next morning. Instead, the trial court directed the attorneys to make their closing arguments, instructed the jury and had the jury deliberate until they reached a verdict at 9:30 p.m. There is no record indication that the trial court attempted to balance the inconvenience to the court against the defendant’s right to present his case. Indeed, the court directed that the trial conclude that evening despite the fact that there was nothing on the court’s docket the following morning and the last witness was available to testify as soon as court reopened.

Defendant was charged with drunk driving as a repeat offender. Defendant contended that he was not intoxicated at the time he was driving and that the blood test taken several hours later did not accurately reflect his blood alcohol level at the time he was actually operating the vehicle. Defendant testified that he did not believe he was intoxicated at the time he was driving, that he was able to perform the field sobriety test, and that he did not engage in any violations of traffic control devices prior to his stop by the police officer. In contrast, the police officer testified that defendant operated his vehicle in a manner that depicted intoxication including having his left tire go across the yellow line, and not fully stopping at two flashing red lights. The police officer also testified that defendant was unable to complete the field sobriety test. The jury was shown a DVD without audio of the field sobriety test, however, that DVD has not been made available to this Court.

In addition to defendant’s testimony on his own behalf, defendant sought to introduce the testimony of his two passengers. One passenger was available to testify on the first day of trial and did testify that defendant was not intoxicated. However, her testimony was of questionable validity and she was subject to very effective cross-examination given that she admitted that she

was intoxicated and ill at the time and, therefore, could not make reliable observations. By contrast, the other passenger whom defendant wished to call as a witness was not intoxicated on the evening in question and, according to her testimony at a prior hearing, accurately observed defendant's driving and did not believe he was intoxicated at the time. This second passenger had been served with a subpoena by the defense, but approximately one week before the trial went to Florida for a vacation, or some other reason, and was not scheduled to return until late in the day on the first day of trial. One week prior to trial, defense counsel requested that the trial be adjourned to assure that this witness could testify. The trial court did not address this request until the morning of trial. The trial court expressed its unhappiness with the fact that the passenger had not complied with the subpoena that required her presence on the first day of trial and stated that it would not adjourn the entire trial but noted that:

It may be that we get to 4:30 today and we're not finished, and there will be an opportunity to have her presented tomorrow for testimony and I certainly will ask counsel not to delay matters, we want to move ahead. On the other hand, if we're butting up against that time and it appears that we couldn't wrap it all up within the confines of today, then we'll have that opportunity tomorrow to present her.

At approximately 3:30 p.m. there was a colloquy between the attorneys and the trial court. At that time, the prosecution indicated that they had two more witnesses to present. Given that only one hour remained until the court's regular closing time of 4:30 p.m., defense counsel again requested that the court allow his last witness to testify the following morning. The court did not rule on the request.

The prosecution rested at approximately 4:36 p.m. The defense called two witnesses. First, the middle passenger who, as noted, testified that she had been drunk at the time of the alleged offense. Second, the defendant, himself, testified, concluding his testimony at approximately 6:00 p.m. Defense counsel again reminded the court about the remaining witness and indicated that, if the court would not agree to have the trial continue to the following morning for this witness's testimony that the defense would have to rest. Without explanation, the trial court stated that it intended to finish the trial that evening. The defense rested and the court proceeded with closing arguments and instructions. The jury retired to deliberate at 7:35 p.m. and returned a verdict of guilty at approximately 9:30 p.m.

The trial court's decision not to allow the testimony of the final defense witness went beyond mere refusal to allow a continuance given that a full day of trial had been conducted and the remaining witness would have been present to testify first thing the following morning. Moreover, the trial court stated that it had "no cases on the docket" for the following day. However, even if ending court for the day, two hours after the scheduled end of proceedings is considered a continuance, I believe reversal is required.

A refusal to grant a continuance is reviewed for an abuse of discretion. *People v Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972). A trial court should grant a continuance request "to promote the cause of justice," see MCR 2.503(D)(1), where there is "good cause." *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). "While the matter of a continuance is within the sound discretion of the trial judge [citations omitted], a defendant also has a right to call witnesses in his defense, and a constitutional right to compulsory process to obtain witnesses in his favor. US Const Am VI; Const 1963, art 1, § 20." *People v Pullins*, 145 Mich App 414,

417; 378 NW2d 502 (1985). When considering a request for a continuance, the court is to balance “the inconvenience of defendant’s request . . . against defendant’s rights (to a fair trial and for compulsory process for witnesses in his favor).” *Id.* Here, the trial court never undertook such a balancing test, which is itself an abuse of discretion. Moreover, even if the trial court did consider this balance without referencing it on the record, I would find that the trial court’s conclusion was an abuse of discretion, given the de minimis inconvenience and the right of a criminal defendant to present his defense to the jury.

For these reasons, I would reverse and remand for a new trial.

/s/ Douglas B. Shapiro