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NO. COA13-67
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH CAROLINA

v. Wake County
No. 12 CRS 200918

PARIS JUJUAN TODD

Appeal by defendant from judgment entered 14 June 2012 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Menard, for the State.

Wait Law, P.L.L.C., by John L. Wait, for defendant appellant.

McCULLOUGH, Judge.

Paris Jujuan Todd ("defendant") appeals from his conviction of robbery with a dangerous weapon on the following grounds: (1) the trial court erred when it denied defendant's motion for a continuance made on the first day of trial, and alternatively,

(2) he received ineffective assistance of counsel. For the following reasons, we find no error.

I. Background

Shortly before midnight on 23 December 2011, the Raleigh Police Department responded to a report of an armed robbery at 325 Buck Jones Road. Upon arrival, George Major (the "victim") informed police that, as he was walking home from work, an unknown African-American male approached him from behind, placed his hand on his shoulder, told him to get on the ground if he did not want to be hurt, and then forced him to the ground on his stomach. Once victim was on the ground, a second unknown African-American male approached and held victim's hands while the original assailant went through victim's pockets and felt around victim's clear plastic backpack. As the assailants prepared to flee, they ordered victim to remain facedown on the ground until he counted to 200 because they "didn't want to shoot [him]." Victim complied until he could no longer hear the assailants' footsteps. The assailants took victim's wallet containing an identification card, credit cards, and a small velvet drawstring bag containing change.

During the police investigation, Stacey Sneider of the City-County Identification Bureau was dispatched to assist in processing the backpack for fingerprints. During her analysis,

Sneider collected two fingerprints from the backpack, one of which was later determined to be the defendant's right middle finger. As a result, a warrant was issued for defendant's arrest.

On 18 January 2012, Officer Potter of the Raleigh Police Department stopped defendant for illegal tint on his car's windows near the scene of the robbery. During the stop, Officer Potter came across defendant's outstanding warrant and arrested defendant.

On 30 January 2012, the State served defense counsel with the forensic report, which indicated that defendant's fingerprints were located at the scene of the crime. Following defendant's indictment for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon on 8 April 2012, defendant's case was called for trial on 23 April 2012. The case was continued and rescheduled to begin on 12 June 2012. Pursuant to defendant's request for voluntary discovery, and pursuant to N.C. Gen. Stat. § 15A-901, et seq., the State continued to disclose all relevant discovery material up until trial. When the State received a copy of the fingerprints the day before trial they provided them to defense counsel that same day. While defense counsel stated that she was prepared to go to trial, she requested a continuance in order for her to obtain an expert to analyze the fingerprints. No affidavit was attached to

counsel's unsigned motion, which neither indicated the expert she planned to call nor what testimony the expert would offer.

In opposing defendant's motion, the State cited the lack of specificity and also the fact that defense counsel was notified of the State's intention to use fingerprint evidence as early as 18 January 2012. Before ruling on the motion, Judge Stephens asked the State how many points of identification there were on the fingerprints, to which the State responded that there were ten. Judge Stephens then denied the motion.

During the trial, Agent Rebecca Heinrich, the State's fingerprint expert, explained how she verified that the fingerprint lifted from the scene matched defendant's. Defendant's counsel was prepared to rebut the State's expert's testimony, and she cross-examined Agent Heinrich on various weaknesses in the fingerprint identification.

On 14 June 2012, the jury found defendant guilty of robbery with a dangerous weapon. The trial court entered judgment on the verdict, sentencing defendant to a term of 84 to 113 months' imprisonment. Defendant gave oral notice of appeal in open court.

II. Denial of Defendant's Motion for a Continuance

Defendant's first argument on appeal is that the trial court committed prejudicial error in denying defendant's motion for a continuance after defense counsel was served with

essential discovery material on 11 June 2012, the day before trial. Our courts have long held that "[c]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976). In deciding whether to grant a continuance, the trial court must consider "[w]hether the failure to grant a continuance would be likely to result in a miscarriage of justice." N.C. Gen. Stat. § 15A-952(g)(1) (2011).

Despite the fact that continuances are disfavored, a defendant is entitled to a reasonable time to prepare and present his defense. *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). No precise amount of time to prepare for trial is guaranteed and whether the denial of a motion to continue amounts to a due process violation is dependent upon the circumstances of each case. *Id.* at 153-54, 282 S.E.2d at 433. "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993). This can be demonstrated by a showing of how a defendant's case "would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of

his motion." *Id.* (internal quotation marks and citation omitted).

Additionally, a motion to continue should only be granted if the reasons supporting it are fully established and "there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts[.]" *State v. Pollock*, 56 N.C. App. 692, 694, 289 S.E.2d 588, 589, *appeal dismissed, disc. review denied*, 305 N.C. 590, 292 S.E.2d 573 (1982) (emphasis omitted). However, "a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial." *Id.* at 694, 289 S.E.2d at 589. The inclusion of supporting affidavits is not required to establish grounds for a continuance, but they are generally encouraged. *See State v. McCullers*, 341 N.C. 19, 33, 460 S.E.2d 163, 171 (1995) (upholding denial of the defendant's motion to continue since it was not supported by affidavits, did not fully establish the need to question proposed witnesses, and "did not set forth some form of 'detailed proof indicating sufficient grounds for further delay'") (quoting *Searles*, 304 N.C. at 155, 282 S.E.2d at 434).

When reviewing a denial of a continuance, this Court has also considered the following factors:

> (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with

> which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

State v. Barlowe, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003). "Further, before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice." *Shankle*, 289 N.C. at 483, 223 S.E.2d at 386.

Generally, the denial of a motion to continue is reviewed for abuse of discretion. *Searles*, 304 N.C. at 153, 282 S.E.2d at 433. However, the right to "adequate time to prepare a defense" is "guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina[.]" *Tunstall*, 334 N.C. at 328, 432 S.E.2d at 336. Since a constitutional basis presents a question of law, we review the sufficiency of the trial court's inquiry *de novo*. *Searles*, 304 N.C. at 153, 282 S.E.2d at 433.

Here, defendant claims that a continuance should have been granted under the *Barlowe* test because of the materiality of the evidence and the potential gravity of the harm that defendant could suffer due to an improper denial. We believe that an

analysis of the *Barlowe* factors and other authority indicates the denial was proper.

First, counsel knew that defendant was linked to the robbery only because his fingerprints were found on the victim's backpack. Thus, despite the fact that defense counsel did not receive the actual fingerprints until the day before trial, she was served with discovery material on 30 January 2012 indicating that defendant was linked to the robbery by fingerprint evidence. While defense counsel is correct in stating that the fingerprints would not have come any earlier had they been requested, it is well known that comparison of fingerprint information involves a process that requires "a few minutes work." *State v. Abernathy*, 295 N.C. 147, 160, 244 S.E.2d 373, 382 (1978).

While we do not question defense counsel's tactics, the record is devoid of any effort by counsel to obtain a forensic expert until the first day of trial. In reviewing the denial of a continuance, this Court has held that the "defendant's lack of diligence in placing his witnesses under subpoena when he had ample opportunity to do so . . . forestalls his belated attempt to place responsibility on the trial judge for their absence." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986) (internal quotation marks and citations omitted). Similarly, because defense counsel knew the fingerprints would be provided

at some point before trial, she had ample opportunity to retain a forensic expert for when the fingerprints eventually arrived. Despite knowing this, in her motion for a continuance counsel only stated that "it does not appear to be clear to me that [the latent fingerprint] might be a perfect match, and I'm asking for a continuance in the fact I need somebody with more expertise than myself to review this."

Moreover, the failure to identify an expert witness also evidences a lack of specificity regarding the reasons for requesting the continuance. Defense counsel failed to show (1) which expert would be called; (2) what testimony would be elicited by the expert; and (3) how defendant's case would have been stronger with expert testimony. In addition to counsel's aforesaid statement, she went on to state that "[i]f you are uninclined to continue the case . . . I would ask that you at least give me today to *try* to find an expert witness that could *potentially* testify in this case." (Emphasis added.) This vague assertion resembles an "intangible hope" that helpful evidence may surface. *Pollock*, 56 N.C. App. at 694, 289 S.E.2d at 589. Accordingly, we believe the second factor also weighs against defendant.

Third, as to the materiality of the evidence, while a forensic expert may often provide a meaningful defense in criminal cases, defendant has not shown that any expected

testimony would have strengthened his defense. Indeed, on cross-examination of the State's fingerprint expert, defense counsel exposed any weaknesses she believed existed in the State's case. Defense counsel elicited testimony on cross-examination that (1) there was no way to tell how long the fingerprint had been on the backpack; (2) there were other persons' fingerprints nearly matching the defendant's; and (3) there were distortions in the fingerprint that linked defendant to the crime.

Without delving into what other weaknesses a forensic expert could have exposed, we find that the potential gravity of harm from an erroneous denial was significantly lessened by defense counsel's thorough cross-examination of the State's forensic expert. We therefore hold that defendant has failed to carry its burden of establishing that the continuance was erroneous and prejudicial.

III. Claim of Ineffective Assistance of Counsel

Defendant's remaining argument on appeal is that, if the motion for a continuance was properly denied, he is entitled to a new trial because he was denied effective assistance of counsel. We disagree.

Courts have consistently held claims of ineffective assistance of counsel ("IAC") to a higher standard of proof. *State v. Sneed*, 284 N.C. 606, 613, 201 S.E.2d 867, 871 (1974).

In order to succeed on an IAC claim, the defendant's burden requires showing the following:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Quick, 152 N.C. App. 220, 222, 566 S.E.2d 735, 737 (citation omitted), *appeal dismissed, disc. review denied*, 356 N.C. 311, 570 S.E.2d 896 (2002). North Carolina Courts have consistently held that "[t]he decisions on what witnesses to call, whether and how to conduct cross-examination . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client. Trial counsel are necessarily given wide latitude in these matters." *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979) (internal quotation marks and citation omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

In *State v. Swann*, the defendant brought an IAC claim arguing that defense counsel "should have had a chemical analysis performed of the mattress on which the alleged incident

occurred in order to determine whether there was blood on the mattress." 322 N.C. 666, 681, 370 S.E.2d 533, 542 (1988). In rejecting defendant's argument, our Supreme Court held, inter alia, "the defendant has not shown that there is a reasonable possibility that but for the errors of the defendant's counsel in his pretrial investigation the result of the trial would have been different." *Id.* at 681-82, 370 S.E.2d at 542. Thus, the Court concluded the defendant "made no showing that his trial counsel failed to render effective assistance of counsel, to the prejudice of his defense[.]" *Id.* at 688, 370 S.E.2d at 546.

Similarly, the defendant in *State v. Quick* argued that his trial counsel erred in not having a doctor testify as to his mental capacity because that "*might* have negated [his] ability to form the specific intent necessary to commit the crimes charged." 152 N.C. App. at 222, 566 S.E.2d at 737 (emphasis added). Not only did this Court refuse to question defense counsel's tactics, but it also noted how defendant failed to demonstrate that any hypothetical testimony would have made the case stronger. *Id.* at 223, 566 S.E.2d at 737.

Here, as in *Swann* and *Quick*, defendant has failed to show that his counsel failed to render effective assistance to his prejudice. The vague assertion that defense counsel should have called an expert to produce testimony falls well short of establishing a violation of defendant's constitutional right to

effective counsel. By no means does this Court's determination that the denial of the continuance was proper lead to the inevitable conclusion that counsel was ineffective.

IV. Conclusion

For the reasons discussed above, we hold the trial court did not err in denying defendant's motion to continue and defendant did not receive IAC.

No error.

Judges HUNTER (Robert C.) and GEER concur.

Report per Rule 30(e).