

[Cite as *State v. Dickens*, 2009-Ohio-4541.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA3272
 :
 vs. :
 WILLIAM L. DICKENS, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Eddie Edwards, 538 Sixth Street, Portsmouth, Ohio
45662

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney,
602 7th Street, Room 310, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-20-09

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. The jury found William L. Dickens, defendant below and appellant herein, guilty of: (1) forgery in violation of R.C. 2913.31(A)(3); and (2) receiving stolen property in violation of R.C. 2913.51(A).

{¶ 2} Appellant raises the following assignments of error for review.

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE DEFENDANT’S MOTION TO CONTINUE FOR AT LEAST A SHORT PERIOD TO LOCATE ITS WITNESS.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT USED FACTORS WHICH WERE NOT NEUTRAL OR OBJECTIVE IN DENYING THE DEFENDANT’S MOTION TO CONTINUE.”

{¶ 3} On December 1, 2008, the trial court held a jury trial. After the prosecution rested, appellant presented his defense. When he called his second witness, Shandy Cooper, she could not be located. Someone, however, indicated that she was on her way. Defense counsel then called other witnesses. Defense counsel once again attempted to locate Cooper, but she did not appear. He called another witness, Jason Sparks, who also failed to appear. Defense counsel indicated to the court that he had talked to Cooper on the phone and that she had stated she was on her way. The court took notice of the location of her residence and stated that she was within walking distance of the courthouse and had ample time to arrive. Defense counsel stated that he desired her testimony because she would testify “she drove [appellant] back and forth to work a few times; not to pick up the check, but actually to work.” The court then granted appellant a fifty-minute continuance to secure Cooper’s presence.

{¶ 4} After the approximately fifty-minute continuance, Cooper still had not

appeared. Defense counsel stated that she had been subpoenaed, that he had spoken with her, and that she stated she would testify. Defense counsel advised the court that he had phoned Cooper, but that she did not answer.

{¶ 5} In discussing continuing the trial in order to secure Cooper's presence, the trial court noted that it might need to continue the trial indefinitely. The court stated that it would have a police officer go to Cooper's residence to see if the officer could secure her presence. However, the result of the officer's attempt to locate Cooper at her residence is not reflected in the record.

{¶ 6} During a bench conference, the trial court noted that although defense counsel subpoenaed Cooper, the sheriff's office was unable to complete service. Appellant then requested a continuance. The prosecution argued that Cooper would have credibility issues due to prior convictions, but the court agreed with defense counsel that her credibility would be an issue for the jury. The court further stated that the jury had been summoned and explained:

"[H]ad there been service made I'd do everything in my power to get that person here, but if I were to grant you a continuance I wouldn't know when to grant it 'til. You know, if this person is purposely eluding or evading this Court, you know, it sometimes takes up to years to get people served.

And the other thing is I've got 13 good citizens here. Even if I were to continue it to another date in the future, you know, and try to get them all back here at the same date would be probably a difficulty."

The court thus denied appellant's request to continue the trial. On December 2, 2008, the jury found appellant guilty of receiving stolen property and forgery. The trial court sentenced appellant to serve two, twelve-month consecutive terms of imprisonment.

This appeal followed.

{¶ 7} Appellant’s two assignments of error raise the related issue of whether the trial court abused its discretion by denying his motion for a continuance. We therefore consider them together.

{¶ 8} In his first assignment of error, appellant asserts that the trial court abused its discretion by denying his motion for a continuance. In particular, he asserts that the court failed to consider the factors the Ohio Supreme Court articulated in State v. Unger (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078. In his second assignment of error, appellant contends that the trial court improperly considered the witness’s credibility when determining whether to grant a continuance.

{¶ 9} R.C. 2945.02 governs the continuance of a trial in a criminal case and states:

No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance.

No continuance shall be granted for any other time than it is affirmatively proved the ends of justice require.

The decision regarding a motion to continue is left to the “broad, sound discretion” of the trial court. Unger, 67 Ohio St.2d at 67; see, also, State v. Lorraine (1993), 66 Ohio St.3d 414, 423, 613 N.E.2d 212. Consequently, absent an abuse of discretion, a reviewing court will not disturb the trial court’s decision. The term “abuse of discretion” connotes more than an error of law or of judgment; rather, the term implies that the court’s attitude is unreasonable, arbitrary or unconscionable. See, e.g., State v. Montgomery (1991), 61 Ohio St.3d 410, 413, 575 N.E.2d 167; see, also, Unger, 67 Ohio St.2d at 67, quoting Ungar v. Sarafite (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 11

L.Ed.2d 921 (“There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.”). Furthermore, when applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. See, e.g., Savage v. Correlated Health Serv., Ltd. (1992), 64 Ohio St.3d 42, 55, 591 N.E.2d 1216.

{¶ 10} When ruling on a motion for a continuance, trial courts should weigh the court’s right to control its own docket and the public’s interest in the prompt and efficient dispatch of justice against the potential prejudice to the defendant. Unger, 67 Ohio St.2d at 67. A court should also consider: (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to litigants, witnesses, opposing counsel and the court; (4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; (5) whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and (6) any other relevant factors. *Id.*; see, also, State v. Conway 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶147.

{¶ 11} Many courts have held that a trial court does not abuse its discretion by overruling a motion to continue in order to permit a defendant to locate a witness.¹ Of

¹ See State v. Franklin, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26 (finding that trial court did not abuse its discretion by refusing to grant a continuance when murder defendant’s arson expert died two days before defense began presentation of its case; delay in middle of trial would have placed jurors out of court’s control for great deal of time, and defense called another expert who had inspected home with expert who died); State v. Sheppard, Guernsey App. No. 06CA33,

most relevance to the case sub judice, in State v. Wright, Summit App. No. 22314, 2005-Ohio-2158, at ¶10, the court determined that the trial court did not abuse its discretion by denying a continuance request in order to locate a witness when the witness was not served with the subpoena. The Wright court further noted that the court had granted the defendant a short continuance in order to locate the witness and that when the defendant requested the second continuance, she failed to indicate how much time she would need to procure the witness. The court further observed that the witness's testimony would have been cumulative.

{¶ 12} In the case at bar, we similarly conclude that the trial court did not abuse its discretion by denying appellant's request for a continuance. As in Wright, in the case sub judice the witness was not served with the subpoena. Once defense counsel learned that the witness did not appear for trial, the court granted a short continuance in order to locate the witness. Defense counsel did attempt to locate the witness, but could not. The court then denied a further continuance reasoning that defense

2007-Ohio-2022 (concluding that trial court did not abuse its discretion by denying motion to continue when witness failed to appear for trial because witness's testimony would have been cumulative); State v. Moore, Trumbull App. No. 2003-T-28, 2004-Ohio-3542 (concluding trial court did not abuse its discretion by denying continuance request when defendant did not estimate how long it would take to locate witness, defendant was not sure of name of the witness he was looking for, defendant did not offer a reason why he was looking for this witness, and defendant did not request a continuance at commencement of trial); State v. King, Wood App. No. WD-02-055, 2003-Ohio-3986 (upholding denial of continuance when nothing in the record suggested that a longer continuance would have secured the witness's appearance); see, also, State v. Maske (Sept. 5, 1995), Stark App. No. 1995CA98 ("To justify a continuance in order to locate a witness, the moving party must show that the witness would have given substantial favorable evidence, and the witness was available and willing to testify.").

counsel could not articulate the length of time needed to secure the witness's presence, that the witness had not been served with the subpoena, and that the jury had been seated and had heard most of the testimony. The court further noted the impracticality of releasing the jury for an indefinite period of time and then attempting to re-assemble the jury upon defense counsel's location of the witness. Here, the court carefully balanced the need for the prompt resolution of the case and the efficient administration of justice against appellant's right to present a defense. Under these circumstances, we cannot conclude that the trial court abused its discretion.

{¶ 13} We also disagree with appellant that the trial court failed to consider the Unger factors. Although the trial court did not explicitly and specifically articulate those factors, we find no requirement that it do so. The record reveals, however, that the court did consider appropriate factors. The trial court is not required to explicitly outline the Unger factors on the record.

{¶ 14} We also disagree with appellant that the trial court improperly considered the absent witness's credibility when it ruled on the motion to continue. Appellant noted on the record that the witness's credibility would be an issue for the jury, and the trial court agreed. Thus, we do not believe that the court improperly considered this witness's credibility when ruling on his motion to continue.²

{¶ 15} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's two assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

² We express no opinion whether a trial court may actually consider a potential

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

witness's credibility when ruling on a motion to continue.

