

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the matter of: P. C.

Court of Appeals No. L-08-1388

Trial Court No. 08186439 01

DECISION AND JUDGMENT

Decided: June 5, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellant.

Edward Schimmel, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, which denied appellant's motion for a second trial date continuance, granted appellee's motion to dismiss, and dismissed the underlying juvenile delinquency case without prejudice. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, the state of Ohio, sets forth the following sole assignment of error:

{¶ 3} "The trial court's refusal to grant the Appellant's request for a continuance and the subsequent dismissal of the delinquency complaint constituted an abuse of discretion."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. On September 14, 2008, a delinquency complaint for burglary was filed against P.C., Jr. On September 16, 2008, P.C., Jr. was released from detention and placed on electronic monitoring. Trial was scheduled for September 23, 2008.

{¶ 5} On September 23, 2008, a material witness properly subpoenaed by appellant failed to appear. Appellant requested a "one-time continuance" to secure the presence of the witness. While appellee did not object to a continuance of the first trial date, appellee expressly stated on the record that he would object to another trial date continuance at the next scheduled trial date if this same witness again failed to appear.

{¶ 6} The trial court granted appellant's motion for continuance, although it specifically stated on the record that it would be, "the only continuance." A second trial date was established for October 8, 2008. On October 8, 2008, the same material witness again failed to appear, despite being subpoenaed.

{¶ 7} In response to this material witness again failing to appear on the second trial date, appellant requested another trial continuance to enable the prosecution to have this witness called by the court itself, rather than the prosecution, given the likelihood that this witness would be hostile to the prosecution and create an issue for appellant if not called by the court itself to enable bilateral cross-examination. Thus, this continuance

was specifically requested, on the record, in order to have the court, rather than either party, call the witness.

{¶ 8} In the sole assignment of error, appellant maintains that the trial court abused its discretion in denying a second trial date continuance. In support, appellant asserts that the trial court's actions were unfair because it arbitrarily limited appellant to a single good cause continuance.

{¶ 9} It is black letter law that the determination of whether or not to grant a trial date continuance is encompassed within the broad discretion of the trial court. As such, an appellate court cannot reverse the denial of such a continuance absent a showing that it constituted an abuse of discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, 67.

{¶ 10} An abuse of discretion connotes more than a mere error of law or judgment. It requires demonstrating that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In conjunction with this, as recognized by this court, a reviewing court examining a disputed denial of a continuance request employs a balancing test and weighs the competing considerations. *In the Matter of N.J.*, 6th Dist. No. L-06-1093, 2006-Ohio-6628.

{¶ 11} In applying the controlling legal principles to the instant case, we first note that the trial court expressly stated on the record that its granting of the first trial date continuance due to the failure to appear of a specific properly subpoenaed witness would be, "the only continuance." In conjunction with this, appellee expressly stated that

although it did not object to the first trial date continuance, it would object to a second trial date continuance if this same witness again failed to appear.

{¶ 12} More significantly, the decision of the twice-subpoenaed witness to fail to appear and to relay personally to the prosecution that he would not cooperate in the prosecution against the defendant does not constitute, under the totality of the circumstances, affirmative proof that the ends of justice require a continuance, as is the legal “good cause” standard which must be met to warrant the continuance. In addition, it should be noted that by the prosecution’s own admission, this was a witness hostile to the state’s case. Lastly, as noted by appellee, any continuance based upon a party’s absence must be based upon some unavoidable, rather than voluntary, circumstance. *Hartt v. Munove* (1993), 67 Ohio St.3d 3. Otherwise, a trial could invariably be delayed simply by a witness voluntarily failing to appear despite proper service. Again, the absence of the witness in this case was conceded to be voluntary and not caused by an unavoidable circumstance.

{¶ 13} The specific facts and circumstances of this case, as outlined above, do not demonstrate that the trial court acted in a manner that can be properly characterized as unreasonable, arbitrary or unconscionable in its denial of a second trial continuance on the basis that the prosecution wanted the court itself to call the witness due to the repeat, voluntary failure to appear of this hostile witness.

{¶ 14} Wherefore, based upon the foregoing, appellant’s assignment of error is found not well-taken. The judgment of the Lucas County Common Pleas Court, Juvenile

Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James R. Sherck, J.
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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