

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

State of Ohio

Court of Appeals No. WM-09-015

Appellee

Trial Court No. 09 CR 065

v.

Wayne F. Harris, Jr.

DECISION AND JUDGMENT

Appellant

Decided: July 30, 2010

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney,
for appellee.

Stacey Burns, for appellant.

* * * * *

COSME, J.

{¶ 1} This appeal arises out of the trial court's denial of appellant's motion to continue his jury trial and its decision to provide appellant with a summary of the presentence investigation report. Because we conclude that neither of those decisions

constituted error, we affirm the judgment of the Williams County Court of Common Pleas.

I. BACKGROUND

{¶ 2} On April 21, 2009, defendant-appellant, Wayne Harris, Jr., broke into the Bryan Wash & Fill, a car wash and gas station located in Bryan, Ohio, cracked a safe, and stole cash and other items of value. On May 20, 2009, the Williams County Grand Jury returned a nine-count indictment of appellant. Three of those counts are unrelated to the break-in of the Bryan Wash & Fill, and one of the counts was dismissed by the state before trial. As relevant here, appellant was charged as follows: Count IV, breaking and entering; Count V, theft; Count VI, petty theft; Count VII, safecracking; and Count VIII, possessing criminal tools.

{¶ 3} On Monday, August 17, 2009, the day before trial commenced, appellant's counsel requested a continuance on grounds that he received a packet of discovery from the prosecutor on Friday, August 14, 2009, containing "a CD of over ten hours of telephone conversation" and that it was "not possible to go over the calls and still adequately prepare for the trial." The trial court denied the continuance on August 18, 2009, the day of trial. On August 19, 2009, the jury found appellant guilty of Counts IV through VIII of the indictment.

{¶ 4} On August 20, 2009, the trial court filed its judgment entry of conviction and ordered a presentence investigation report to be prepared by the Adult Probation Department. A summary of the report was made available to appellant's counsel prior to

sentencing. On September 14, 2009, the trial court sentenced appellant to ten months on Count IV, ten months on Count V, six months on Count VI, sixteen months on Count VII, and eight months on Count VIII, with Counts IV, V, VII and VIII to be run consecutive with each other and concurrent with Count VI. On September 21, 2009, the court journalized its sentencing order.

{¶ 5} It is from this judgment that appellant appeals.

II. DENIAL OF CONTINUANCE

{¶ 6} In his first assignment of error, appellant asserts:

{¶ 7} "The trial court abused its discretion when it denied the defendant's motion to continue the trial."

{¶ 8} Appellant argues that the trial court's denial of the continuance was unreasonable because his counsel was prohibited from adequately preparing for trial. Specifically, appellant contends that his counsel was forced to spend an exorbitant amount of time reviewing the telephone recordings that were furnished by the state just four days before trial and that this late disclosure "interfered with his ability to prepare for the trial."

{¶ 9} We disagree.

{¶ 10} A trial court has broad discretion in ruling upon a motion for continuance. *State v. Thompson*, 6th Dist. No. WD-06-034, 2007-Ohio-2665, ¶ 38. "An appellate court will not find error "unless it clearly appears, from all the facts and circumstances, that there has been an abuse of discretion, operating to the prejudice of the party in the

final determination of the case." *State v. Sipes*, 5th Dist. No. CA-A-04-0014, 2008-Ohio-6627, ¶ 62, quoting *Garrett v. Garrett* (1977), 54 Ohio App.2d 25, 34.

{¶ 11} Nevertheless, the right of due process requires that "a defense counsel be afforded the reasonable opportunity to prepare his case." *State v. Sowders* (1983), 4 Ohio St.3d 143, 144. The Supreme Court of Ohio has recognized: "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." *State v. Unger* (1981), 67 Ohio St.2d 65, 67, quoting *Unger v. Sarafite* (1964), 376 U.S. 575, 589.

{¶ 12} Accordingly, the Ohio Supreme Court in *Unger* adopted a balancing test in which a trial court's right to control its own docket and the public's interest in an efficient judicial system are weighed against any potential prejudice to the defendant. *Id.* at 67. Among other factors, a court should consider "the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *Id.* at 67-68. See, also, *In re S.R.*, 6th Dist. No. OT-09-024, 2010-Ohio-3073, ¶ 22.

{¶ 13} Having examined all the facts and circumstances that existed at the time the request for a continuance was denied in this case, we cannot conclude that the trial court

abused its discretion. In his motion for a continuance, appellant's counsel represented to the trial court that it was "not possible to go over the calls and still adequately prepare for the trial." However, when questioned by the court on the day of trial, appellant's counsel proclaimed his client's readiness to proceed and was unable to identify any specific matter for which he needed additional time to prepare:

{¶ 14} "THE COURT: Now, with respect to your remaining argument, Mr. Brenner, that the time you spent this weekend listening to the tapes diverted your limited time resources away from other things. What specifically were you wanting to do that you otherwise would have done?"

{¶ 15} "MR. BRENNER: Your honor, there's nothing specific. I know my client is ready for trial today. I just feel that it is a requirement on my part to file the motion simply because it did take time away from other things.

{¶ 16} "THE COURT: All right. The motion for continuance is denied."

{¶ 17} Considering defense counsel's inability to explain why he needed additional time to prepare for trial and what else he wished to do in furtherance of an adequate defense, we fail to see how there was anything presented by appellant in the way of potential prejudice for the trial court to consider in evaluating his request for a continuance.

{¶ 18} Moreover, appellant has not demonstrated any actual prejudice resulting from the denial of the continuance. Although he continues to insist on appeal that his counsel was prohibited from preparing an adequate defense, appellant has still not

identified or even alleged that there is any particular evidence, argument, or defense that he was unable to present at trial due to the purported lack of preparation time. In the absence of such a showing, the denial of a continuance, even if erroneous, will not provide a basis for the reversal of a conviction on appeal. *In re Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, ¶ 34; *State v. Claytor* (1991), 61 Ohio St.3d 234, 241; *State v. Starks*, 9th Dist No. 23622, 2008-Ohio-408, ¶ 11; *State v. Amason* (Nov. 17, 1999), 1st Dist. No. C-980910; *Roseman v. Village of Reminderville* (1984), 14 Ohio App.3d 124, 127.

{¶ 19} Accordingly, appellant's first assignment of error is not well-taken.

III. SUMMARY OF PRESENTENCE INVESTIGATION REPORT

{¶ 20} In his second assignment of error, appellant asserts:

{¶ 21} "The sentencing court denied the appellant due process of law at the sentencing hearing."

{¶ 22} Appellant argues that his due process rights were violated when the trial court provided his counsel with only a summary of the presentence investigation report and, he claims, imposed sentence in reliance on portions of the report that were never disclosed to him or his counsel. Relying on *Gardner v. Florida* (1977), 430 U.S. 349, and *Lankford v. Idaho* (1991), 500 U.S. 110, both death penalty cases, appellant contends that he "was not afforded the right to explain or deny what was in the pre-sentence investigation." According to appellant, the holdings in *Gardner* and *Lankford* "should

not be construed to apply only to death penalty cases since notice is a fundamental right implicit in all criminal cases."¹

{¶ 23} It does not appear from the transcript of the sentencing hearing that appellant objected to having received only a summary of the presentence investigation report or otherwise raised the issue of full disclosure. Having failed to raise the argument below, appellant may not advance it for the first time on appeal. See *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus; *State v. Robinson*, 7th Dist. No. 09 MO 6, 2010-Ohio-2698, ¶ 21; *Vales v. Akron Metro. Hous. Auth.*, 9th Dist. No. 24818, 2009-Ohio-6954, ¶13.

{¶ 24} In any event, this court has already considered the issue and concluded that "the *Gardner* holding requiring full disclosure [of a presentence investigation report] applies only to death penalty cases where rehabilitation is no longer an issue." *State v. Roberson* (2001), 141 Ohio App.3d 626, 631. Since then, we have twice disposed of similar arguments based on our decision in *Roberson*. See *State v. Bond*, 6th Dist. No. L-05-1039, 2006-Ohio-470, ¶ 8; *State v. Gonzales* (June 15, 2001), 6th Dist. No. WD-00-077. Appellant's reliance on *Lankford* adds nothing new to the discussion. The holding in *Lankford* does not relate to the disclosure of information in a presentence investigation report and it does not purport to apply beyond the capital sentencing context

¹The authority and requirements for issuing a summary of the presentence investigation report in lieu of full disclosure are set forth R.C. 2951.03(B). Appellant does not argue that the trial court's decision as to the withholding of information in the report or the content of its summary is in violation of the statute. He argues only that full disclosure is required pursuant to *Gardner* and *Lankford*.

any more than the holding in *Gardner*. In both cases, the Supreme Court emphasized that notice or disclosure requirements take on special importance in the capital sentencing context, finding that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner*, 430 U.S. at 357; *Lankford*, 500 U.S. at 125.

{¶ 25} Accordingly, appellant's second assignment of error is not well-taken.

IV. CONCLUSION

{¶ 26} The judgment of the Williams County Court of Common Pleas is affirmed.

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

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

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: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.