

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2007AP760-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2004CT1046

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENT S. SNYDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Brent Snyder was arrested for driving while intoxicated. Snyder then failed to show up for numerous court appearances and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

waited nearly two years to obtain counsel. After finally obtaining counsel approximately one month before the date of the trial, Snyder requested a continuance claiming that he did not have adequate time to prepare. The circuit court denied the continuance and, after a trial to the court, found Snyder guilty. Snyder appeals, claiming that the circuit court's denial of continuance was an abuse of discretion. He relies on *State v. Wollman*, 86 Wis. 2d 459, 470, 273 N.W.2d 225 (1979), which describes several factors to be considered in deciding whether to grant a continuance. We affirm the circuit court's decision. Trial courts are given a large amount of discretion when ruling on motions for continuance. Their decisions should be reversed only if it can be shown that prejudice resulted from an arbitrary decision. This was not the case here. In fact, many of the factors from the *Wollman* test support the trial court's decision.

¶2 On November 25, 2004, Snyder was arrested for driving while intoxicated and with a prohibited alcohol concentration.² Snyder failed to attend his initial appearance on December 13, 2004. Snyder was then granted a continued initial appearance, which he also failed to attend. As a result, a warrant for his arrest was issued. On October 9, 2006, Snyder was arrested and made an appearance. Nearly two years after his arrest, on October 20, 2006, Snyder obtained counsel. A plea and sentencing hearing was set for October 31, 2006, and a trial date was set for November 16, 2006. On the same day in which Snyder

² We remind the Fond du Lac district attorney that although WIS. STAT. § 809.19(3)(a)2. states that the respondent need not include a statement of the case in its brief, it does not exempt the respondent from including appropriate references to the record if a statement of facts is included. We remind both parties that the appendices to their briefs are supposed to contain "trial court record entries," § 809.19(2)(a) and (3)(b), not documents that are not part of the record below.

obtained counsel, the prosecution sent Snyder all discovery then in its possession.³ After receiving this discovery, Snyder asked the court by letter for a continuance of the trial date. No response to this letter is in the record.

¶3 On October 31, 2006, Snyder once again failed to appear before the court, this time for the plea and sentencing hearing.⁴ The court rescheduled the hearing for November 6. However, this hearing was rescheduled and finally took place on November 13. At this hearing, Snyder's attorney noted that he had just received "a disk" from the prosecution. Despite the fact that the November 13 hearing occurred just three days before trial, Snyder's attorney did not even mention the request for continuance. In fact, the transcript from that hearing demonstrates that Snyder's attorney approved of the November 16 trial date. However, when the day arrived, there was discussion of the continuance request that had been made by letter, which the court ultimately denied. Snyder appeals, arguing that his continuance request should have been granted.

¶4 Trial courts are given a large amount of discretion in ruling on a movant's continuance request because they are best suited to assess the specific circumstances presented. *United States v. Farr*, 297 F.3d 651, 655 (7th Cir. 2002). Therefore, a trial court's discretionary decision must be upheld unless there is a showing "that the denial of the continuance was arbitrary, and that actual

³ The only evidence in support of the State's claim on this point is a letter contained in the State's appendix but not, so far as we can tell, in the record. However, Snyder did not file a brief in reply to the State's, and we deem the point admitted. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (matters not refuted deemed admitted).

⁴ It appears this particular failure to appear may have been the result of a misunderstanding between Snyder's attorney and the court.

prejudice resulted.” *United States v. Withers*, 972 F.2d 837, 845 (7th Cir. 1992) (citing *United States v. Turk*, 870 F.2d 1304, 1307 (7th Cir. 1989)). The mere denial of a continuance does not automatically give rise to a constitutional claim. *Wollman*, 86 Wis. 2d at 469.

¶5 There is no mechanical test to determine if denial of a continuance request violated due process; however, in *Wollman*, the supreme court applied a six-factor test that is helpful for determining if there has been a due process violation. *Wollman*, 86 Wis. 2d at 470. These factors include: 1) the length of delay requested; (2) whether lead counsel has associates prepared to try the case in his or her absence; (3) whether other continuances had been requested and received by the defendant; (4) convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay is for a legitimate reason, or whether its purpose is dilatory; and (6) other relevant factors. *Id.* Other factors courts have considered include the amount of time available for preparation, the defendant’s role in shortening the time for preparation, and the availability of discovery from the prosecution. *United States v. Miller*, 327 F.3d 598, 601 (7th Cir. 2003). The trial court is to use the factors in order to properly balance the defendant’s rights against the public interest in efficient administration of justice. *See Wollman*, 86 Wis. 2d at 470.

¶6 Snyder argues that many of the factors are favorable to him and that, as a result, the trial court erred in not granting a continuance. First, Snyder argues that the amount of time requested was reasonable because he left it up to the court to determine an appropriate length of delay. Furthermore, Snyder correctly points out that he had not been granted any previous continuances of the trial date. Snyder also argues that his continuance request was for legitimate reasons because he did not have time to arrange for a particular witness to attend the trial and did

not receive all of the prosecution's discovery until three days before trial. Finally, Snyder argues that due process has been violated because his request for a continuance was denied in retaliation for his previous failures to appear.

¶7 We take issue with Snyder's claims about some of the *Wollman* factors. While Snyder is correct in his assertion that the court had not previously granted a continuance, Snyder certainly did manage to delay the proceedings repeatedly and over a long period. Snyder's claim that he was deprived of his "lynchpin" witness (who had to work on the day of trial) also rings hollow; it appears from the record that he first talked to this witness about testifying "[a] couple days" before the scheduled trial. It was up to Snyder to arrange for or subpoena the witness' attendance; his failure to do so is not a "legitimate reason" for delaying the trial. Finally, we disagree with Snyder's characterization of the lower court's action as "punishing" him for failing to appear in earlier proceedings. As *Miller* makes clear, a defendant's role in shortening preparation time is a relevant consideration in whether to grant a continuance. *Miller*, 327 F.3d at 601. We see no "punishment" in the court's action, simply a recognition of the fact that any prejudice to Snyder by the denial of a continuance was of his own making.⁵

¶8 Further, a number of the *Wollman* factors support the trial court's decision to deny Snyder's motion for continuance. For instance, granting the request for continuance would result in inconveniences to other parties, not the

⁵ Further, we note that we are not establishing any sort of "bright line rule" that any failure to appear, no matter how trivial, will justify refusing a later request for continuance. That so-called rule is of Snyder's invention; we are simply upholding the circuit court's discretionary decision based upon the particular facts of this case.

least of which are the witnesses and jurors. *See Wollman*, 86 Wis. 2d at 470. It would undoubtedly be an inconvenience to them if the trial were to be rescheduled on such short notice. Another factor is whether there was sufficient reason for delay. *Id.* Here, the principal reason for the requested delay was Snyder's tardiness in obtaining a lawyer and his failure to line up his own witnesses.

¶19 Finally, it is important to note that the prosecution gave Snyder all discovery in its possession on the same day in which Snyder obtained counsel. The only discovery that came later was a video of the arrest, and that was because it was not in the prosecutor's possession at the time. The prosecution was merely fulfilling the statutory duty to amend its discovery once more evidence came into its possession. Moreover, Snyder says not one word about how late possession of the video hampered his defense. For this and all of the other reasons discussed above, we cannot conclude that the circuit court's denial of Snyder's continuance motion was arbitrary.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

