

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR10-315

EDWARD S. COLLINS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 6, 2010

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT, FIRST
DIVISION [NO. CR-2008-806-1]

HONORABLE BERLIN C. JONES,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from a conviction of possession of a controlled substance with intent to deliver. Appellant's sole point for reversal is that the trial court erred in granting the State a continuance to permit the crime-laboratory chemist to be subject to confrontation regarding the report that he prepared identifying the controlled substances. We find no error, and we affirm.

Arkansas Code Annotated section 12-12-313(d)(1) (Repl. 2009) provides that laboratory reports of an evidence analysis are admissible if the report includes the written attestation of the analyst who performed the analysis. Subsection (d)(2) of that statute requires a defendant in a criminal case who desires to cross-examine a laboratory analyst regarding a laboratory report regarding evidence to notify the State at least ten days before the proceeding if the analyst's presence is requested.

Here appellant, charged with possession of crack cocaine, did not give the ten-day notice required by section 12-12-313(d)(2) but instead objected at trial to the introduction of the report of a crime-lab chemist on the grounds that it was “hearsay” and that the statutory provision allowing introduction of the report by attestation in the absence of notice was unconstitutional pursuant to *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009). The State informed the trial court that the chemist who had attested to the report was in fact under subpoena but was unavailable because he was testifying in another case that day, and asked that the trial court allow the chemist to be present for cross-examination the following day. Without ruling on the constitutional issue, the trial court noted that the case had in fact been scheduled for a two-day trial and granted the State’s request, ordering that trial be recessed and reconvened the next day. The chemist appeared at trial the next day, his report was introduced, and appellant was convicted. Appellant argues that the trial court’s action constituted a continuance that was improperly granted to the State. We disagree.

It is within the trial court’s discretion to grant or deny a motion for continuance, and we will not reverse the court’s decision absent a clear abuse of discretion. *Jared v. State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986). An appellant must also demonstrate that, as a result of the ruling on the motion for a continuance, he suffered prejudice that amounts to a denial of justice. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). Rule 27.3 of the Arkansas Rules of Criminal Procedure provides that a trial court shall grant a continuance only upon

a showing of good cause and shall take into account the request or consent of the prosecuting attorney or defense counsel, as well as the public interest in the prompt disposition of the case. In deciding whether to grant or deny a motion for a continuance to secure the presence of a witness, trial court considers (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the attendance of the witness in the event of a postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove but also that the affiant believes them to be true. *Dyer v. State*, 343 Ark. 422, 36 S.W.3d 724 (2001).

Here, the prosecuting attorney was unaware that appellant intended to bring a constitutional challenge to Ark. Code Ann. § 12-12-313(d)(1) until the day of trial when the State attempted to introduce the laboratory report. We think that, in the absence of notice to the contrary, the prosecuting attorney was entitled to rely on that statute's provision that such a report is admissible if attested to by the analyst, and that he moved for a continuance as soon as practicable. We additionally note that the requested witness was subpoenaed for trial by the State and appeared the next day, and it appears that he might have done so even sooner had not the witness been testifying in another trial when appellant made his constitutional objection. Although there was no affidavit filed, the substance of the chemist's testimony was evident in light of his report, which was before the court.

With respect to appellant's argument that the continuance was improper in the absence of an affidavit, we note that Ark. Code Ann. § 16-63-402(a) (Repl. 2005) provides that a

motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to obtain it. Here appellant, as the opposing party, did not require such an affidavit of materiality and due diligence or raise any objection at trial to its absence. In the absence of an objection at trial, any argument concerning the failure to submit such an affidavit will not be addressed on appeal. *Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005).

Affirmed.

VAUGHT, C.J., and HART, J., agree.