

ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR07-1295

VICTOR M. MELANCON,
APPELLANT

V.

STATE OF ARKANSAS,
APPELEE

Opinion Delivered MAY 28, 2008

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
[NO. CR-2002-965 and CR-2003-951 A]

HONORABLE J. MICHAEL
FITZHUGH, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Victor Melancon appeals the revocation of his suspended sentence by a Sebastian County Circuit Court, at which time he was sentenced to eight years in the Arkansas Department of Correction. His sole point on appeal is that the trial court erred in denying his motion for a continuance. We affirm.

On October 29, 2003, appellant pleaded guilty to possession of cocaine and possession of marijuana with intent to deliver, for which he was sentenced to two years' imprisonment and an additional eight years' suspended imposition of sentence. Notice of his parole was filed on November 29, 2004. On May 9, 2007, the State filed a petition to revoke appellant's suspended imposition of sentence, alleging that he had violated the conditions of his suspended sentence by possessing a firearm on April 2, 2007. An amended petition to revoke

was filed on September 6, 2007, which added allegations of refusal to submit to arrest, fleeing apprehension, and driving with a suspended license.

A hearing was held on the petition on September 24, 2007, at which time appellant informed his appointed counsel and the circuit court that he wanted to hire private counsel. He also asserted that he had not been given notice of the hearing. The circuit court denied his motion for a continuance, proceeded with the hearing, and subsequently revoked his suspended sentence. The judgment and commitment order was filed on September 24, 2007, and appellant filed a timely notice of appeal on October 5, 2007.

Standard of Review and Applicable Law

The appellate courts of this state review the grant or denial of a motion for continuance under an abuse-of-discretion standard. *See Lagrone v. State*, 90 Ark. App. 183, 204 S.W.3d 568 (2005). An appellant must not only demonstrate that the circuit court abused its discretion by denying the motion for a continuance but also must show prejudice that amounts to a denial of justice. *Id.* Arkansas Rule of Criminal Procedure 27.3 provides that a circuit 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. Factors that must be considered by a circuit court in granting or denying a motion for a continuance include: (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. *Id.*

Appellant alleges that the circuit court abused its discretion when it refused to grant his request for a continuance in order to hire a private attorney. Appellant claims that he presented evidence to the circuit court that he had not met with his appointed attorney and had not received notice of the hearing until a few days before the set date. His appointed public defender informed the circuit court that he learned that appellant had bonded out of jail only upon attempting to visit him at the jail the day before the hearing.¹ The circuit court judge indicated that notice of the hearing was mailed to appellant at the detention center where he was incarcerated, on August 9, 2007.² Appellant contends that he never received the notice; however, nothing in the record indicates that the notice was returned.

Appellant cites *Thorne v. State*, 269 Ark. 556, 601 S.W.2d 886 (1980), acknowledging that the right to choose counsel may not be manipulated or subverted to obstruct the orderly procedures of the Court or to interfere with the fair, efficient and effective administration of justice. In each situation the court must look at the particular circumstances of the case at bar and the issue must be decided on a case by case basis. *Id.* It is therefore necessary to examine all of the surrounding facts and circumstances of this case. Various factors considered in *Thorne* included: (1) whether there was adequate opportunity for the defendant to employ counsel; (2) whether other continuances have been requested and granted; (3) the length of

¹The record is void of any information related to appellant bonding out of the detention center. The judgment and commitment order indicates that he received thirty-four days' credit, but it does not indicate when he was arrested on the petition to revoke.

²The record indicates that notice of the hearing was filed on August 9, 2007, and mailed the same day to the public defender's office, along with a copy to appellant at the Sebastian County Detention Center.

the requested delay; (4) whether the requested delay is for legitimate reasons; (5) whether or not the motion for a continuance was timely filed; (6) whether or not the defendant contributed to the circumstances giving rise to the request for a continuance; (7) whether or not the reason for the discharge of existing counsel was solely for the purpose of obtaining a continuance; (8) whether the request is consistent with the fair, efficient and effective administration of justice; (9) whether denying the continuance resulted in identifiable prejudice to the defendant's case of a material or substantial nature; (10) and in case of a pro se proceeding where a proper waiver of counsel existed, whether or not the accused had sufficient time to prepare for his defense. Appellant points out that no single factor is a prerequisite to granting a continuance, but also acknowledges that these and other factors are the legitimate subject of the court's attention when a continuance is requested.

In the instant case, appellant claims that he never met with his appointed public defender and never received notice of the hearing. He points out that his appointed attorney was unaware of his whereabouts and provided no evidence that the public defender's office did anything to notify appellant of the scheduled hearing. Appellant contends that the circuit court resorted to speculation in determining that appellant had, in fact, received notice of the hearing.

Appellant argues that his inability to prepare for the hearing, which resulted in an eight-year prison sentence, is identifiable prejudice. He requested a continuance of only one week in order that he might obtain and meet with counsel to discuss his case. Appellant

maintains a continuance of that length is consistent with the fair, efficient, and effective administration of justice.

A defendant's right to counsel of choice is grounded in the Sixth Amendment to the United States Constitution, and is also guaranteed by Art. 2, § 10, of the Arkansas Constitution. See *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003). While constitutionally guaranteed, the right to counsel of one's choosing is not absolute, and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice. *Id.* Once competent counsel has been obtained, the delay involved in changing counsel must be balanced against the public's interest in the prompt dispensation of justice. *Id.* If such a change would require the postponement of trial because of inadequate time for a new attorney to properly prepare a defendant's case, the circuit court may consider the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to defendant. *Caswell v. State*, 63 Ark. App. 59, 973 S.W.2d 832 (1998).

We hold that no abuse of discretion occurred. On the day of the hearing on the State's amended petition to revoke, appellant informed both his appointed public defender and the circuit court that he wanted to hire private counsel and claimed he had insufficient notice of the hearing. Interestingly, a certificate of indigency was filed on August 8, 2007, thereby appointing a public defender to his case. Notice of appellant's hearing was filed of record and mailed to the public defender's office on August 9, 2007. While there is no

evidence in the record of any action taken by the public defender's office in assuring that appellant received notice, it is appellant's burden to show prejudice that amounts to a denial of justice. He has failed to prove that he did not receive notice.

Appellant offered no explanation why he had not previously hired counsel, who he intended to hire, how he would pay for them, or why he was dissatisfied with his appointed public defender. When balanced against the facts that his appointed counsel was ready and willing to move forward with the hearing and that several subpoenaed witnesses were present in the courtroom ready to testify, the circuit court was within its discretion to deny the request for a continuance.

Affirmed.

HART and MARSHALL, JJ., agree.