Cite as 2011 Ark. App. 731

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR11-537

	Opinion Delivered November 30, 2011
MICHAEL TYRONE DOTSON APPELLANT	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [CR-2004-163]
V.	HONORABLE GARY COTTRELL, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

DAVID M. GLOVER, Judge

In December 2004, appellant Michael Tyrone Dotson entered a negotiated plea of guilty to the offense of possession of marijuana with intent to deliver; he was sentenced to a two-year term of imprisonment with an additional eight-year suspended imposition of sentence (SIS). The State filed a petition to revoke Dotson's SIS in December 2010, alleging that he had committed the new offense of domestic battery.

A hearing was held on the revocation petition on February 16, 2011. The State attempted to introduce a copy of the transcript from the City of Alma showing Dotson's conviction for third-degree domestic battery, but Dotson objected on the basis that an uncounseled conviction could not be used to revoke his SIS.[1]

[1]This conviction was not entered into evidence and it is not included in the addendum.

The State then requested a continuance in order to secure the domestic-battery victim's presence to testify. Dotson again objected on the basis that the hearing had already begun. The trial court inquired if Dotson's counsel had been in contact with the State regarding his defense to the revocation petition, and counsel responded that the general defense was that a battery did not occur and that the conviction could not be used. Dotson's counsel argued that the State announced that it was ready for the hearing, to which the trial court commented, "They were kidding, though." The trial court ruled that, based upon the circumstances, it considered this a new event and granted the State's request for a continuance until February 24. Dotson's ex-wife was present at the February 24 hearing and testified to the events surrounding the domestic-battery conviction. Dotson also testified, denying his ex-wife's version of events; however, the trial court credited her testimony over that of Dotson and revoked his SIS, sentencing him to a thirty-month term of imprisonment.

Dotson now appeals the revocation. He does not challenge the sufficiency of the evidence to support the revocation; rather, he argues that the trial court abused its discretion in granting the State's motion for continuance. Specifically, he makes four subarguments, asserting that the State's lack of diligence was the only reason for the continuance; that the State failed to file the proper affidavit required pursuant to Arkansas Code Annotated section 16-63-402; that the trial court was prejudiced in its decision to grant the State's motion for a continuance; and that the grant of the continuance violated his Fifth Amendment protection against double jeopardy. We affirm.

Lack of Diligence

Dotson first argues that the State's lack of diligence was the only reason the trial court granted the continuance. In *Collins v. State*, 2010 Ark. App. 653, at 2–3 (citations omitted), this court set forth our standard of review with regard to continuances:

> 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. 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. 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, a 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.[2]

In the present case, when Dotson objected to the introduction of the district-court conviction, the State simply asked for a continuance to procure the victim of the domestic battery—Dotson's ex-wife—so that she could testify as to the altercation, which she did. In granting the State's request, the trial court asked defense counsel about Dotson's defense, and defense counsel said that his general defense was that a battery did not occur;

[2]The fourth consideration in deciding whether to grant or deny a motion for continuance is addressed in Dotson's next point on appeal.

the trial court then stated that it considered this to be a new event as far as the case was concerned and granted an eight-day continuance.

Dotson, citing *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994), argues that Arkansas case law has held that a lack of diligence alone is sufficient cause to deny a continuance. In that case, the supreme court affirmed the denial of the continuance by the trial court. In this case, the trial court granted the State's request for a continuance. As the State points out, even though lack of diligence is sufficient to deny a request for continuance, it does not require denial of the request. Under these facts, and given our standard of review, we cannot say that the trial court abused its discretion in granting the State's motion for its short continuance.

Affidavit Required by Arkansas Code Annotated § 16-63-402

In addition to our rules of criminal procedure, Arkansas Code Annotated section 16-63-402(a) (Repl. 2005) sets forth additional requirements when a continuance is requested due to the absence of evidence or a witness:

> 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. If the motion is for an absent witness, the affidavit must show what facts the affiant believes the witness will prove and not merely show the effect of the facts in evidence, that the affiant himself believes them to be true and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement.

We need not address this argument because Dotson never argued to the trial court that the State had not filed an affidavit in accordance with Arkansas Code Annotated

section 16-63-402(a). In the absence of an objection at trial, any argument concerning the failure to submit such an affidavit will not be addressed on appeal. *Collins*, *supra* (citing *Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005)).

Prejudice from Trial Court's Decision to Grant Continuance

Dotson argues that the trial court's decision to grant the State's request for a continuance exhibited bias toward the State. In support of this argument, he recites the colloquy between his counsel and the trial court in which his counsel objected to the continuance on the basis that the State announced that they were ready for the hearing and the trial court replied, "They were kidding, though." However, Dotson made no objection to this statement, and he did not ask the trial court to recuse based on any perceived bias. Arguments raised for the first time on appeal will not be considered by this court. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004).

Double Jeopardy

For his final point on appeal, Dotson argues that as a result of the trial court's abuse of discretion in granting the State's motion for continuance rather than dismissing the case, he was twice put in jeopardy of losing his liberty for the same offense. We disagree.

This court addressed this issue in *Lawrence v. State*, 39 Ark. App. 39, 46–48, 839 S.W.2d 10, 14-15 (1992) (citations omitted):

> The double jeopardy clause protects defendants in criminal proceedings against multiple punishments or repeated prosecutions for the same offense. Jeopardy denotes "risk," which in the constitutional sense is traditionally associated with a criminal prosecution. It has been held that the risk to which the double jeopardy clause refers is not present in proceedings that are not "essentially

criminal." The Supreme Court has observed that probation revocation, like parole revocation, is not a stage of a criminal prosecution, even though it does result in the loss of liberty. Consequently, a person on probation is not entitled to the "full panoply of rights" afforded a defendant in a criminal prosecution.

Our supreme court has dealt with the issue of double jeopardy in the context of revocation proceedings in the case of *Townsend v. State*, 256 Ark. 570, 509 S.W.2d 311 (1974). In *Townsend*, while the appellant was under a suspended sentence, he was charged with the offenses of burglary and grand larceny. Based on these charges, the State also filed a petition to revoke the appellant's suspended sentence. At trial, the appellant was granted a directed verdict of acquittal, as the trial court found that the testimony of an accomplice had not been sufficiently corroborated. At the subsequent revocation hearing, it was stipulated that the court could consider the accomplice's testimony taken at trial, and the trial court revoked the suspended sentence on the basis of that testimony. On appeal from the revocation, the appellant contended that he was placed in double jeopardy, arguing that the revocation hearing constituted a second trial on the charges for which he had been acquitted. The supreme court, however, did not agree that former jeopardy barred revocation after an acquittal on the underlying charges. In so holding, the court observed that "[a] revocation of a suspension is in the nature of a revocation previously extended," and reasoned that "Townsend was not given an additional sentence following the revocation hearing; rather, the court only directed that he be required to serve the full sentence that had been rendered several years earlier." Inasmuch as it is a fundamental concept that reprosecution of a defendant following an acquittal is barred by double jeopardy, it is implicit in the court's holding that former jeopardy does not apply to revocation proceedings. We consider the decision in *Townsend* instructive, even though the scenario differs in that there the revocation followed an acquittal, whereas here the revocation preceded the trial. We find this distinction immaterial for the reason that double jeopardy either applies to revocation proceedings, or it does not. If it does not apply to revocation, it makes little difference whether revocation precedes or follows a criminal prosecution.

. . . .

As said by the court in *State v. Quarles*, [761 P.2d 317 (1988)]:

> With the exception of *Snajder* [246 N.W.2d 665 (Wis. 1976)], these courts uniformly hold that, although a defendant is at risk at a probation or parole hearing, the risk does not rise to the level of being "put in jeopardy" in the

> constitutional sense because the revocation hearing is not equivalent to a criminal prosecution; in other words, the hearing is not a proceeding which could result in a conviction. The purpose of a revocation hearing is not to punish a criminal for violation of the law, but rather to determine whether he has violated the conditions of his probation. The court's authority to revoke probation does not depend on whether the defendant's probationary conduct is criminal. Rather, the function of the court at the probation revocation hearing is to determine whether to impose or execute a sentence for an offense of which the defendant has already been convicted and for which probation was granted.

Because a revocation proceeding is not equivalent to a criminal prosecution, and the purpose of a revocation hearing is not to punish a person for violation of the law but rather to determine whether a violation of the terms of probation has occurred, double jeopardy does not apply to a revocation hearing, and Dotson's argument is without merit.

Affirmed.

HART and MARTIN, JJ., agree.