



## Case Summary

Appellant-Defendant Floyd S. Burnworth appeals his conviction for Non-Support of a Dependant, as a Class D felony,<sup>1</sup> alleging the trial court abused its discretion in denying his motion to continue. We reverse and remand for a new trial.

### Facts and Procedural History

On October 28, 2008, the State initially filed the charge, and the trial date of May 4, 2009, was set on April 7, 2009. On May 1, 2009, Burnworth filed a Motion to Continue the May 4, 2009 bench trial because his counsel was informed two days prior to filing the motion that Burnworth's therapist had made an independent evaluation of Burnworth's ability to work based on his mental health. His counsel had known since April 6, 2009, that Burnworth had been seeing this particular therapist. The motion alleged the therapist was not available to testify on May 4, 2009, and included a letter from the therapist stating his opinion that Burnworth was unable to work or function appropriately in the community due to his mental health disorders. The motion to continue additionally noted that the State did not oppose the motion. The trial court denied the motion.

Burnworth renewed his request for a continuance at the beginning of the bench trial,<sup>2</sup> and the motion was again denied. After the bench trial, consisting of testimony of three witnesses, the trial court concluded that Burnworth was guilty, indicating that Burnworth had not met his burden to prove that he was unable to pay child support. Burnworth now appeals.

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<sup>1</sup> Ind. Code § 35-46-1-5.

<sup>2</sup> Burnworth waived his right to a jury trial.

## Discussion and Decision

According to Indiana Trial Rule 53.5, a trial court shall grant a continuance upon motion and “a showing of good cause established by affidavit or other evidence.” “A trial court’s decision to grant or deny a motion to continue a trial date is reviewed for an abuse of discretion, and there is a strong presumption the trial court properly exercised its discretion.” Gunashekar v. Grose, 915 N.E.2d 953, 955 (Ind. 2009). “An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the trial court.” Barber v. State, 911 N.E.2d 641, 646 (Ind. Ct. App. 2009).

As explained in Barber v. State:

Every defendant has the fundamental right to present witnesses in his or her own defense. This right is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. At the same time, while the right to present witnesses is of the utmost importance, it is not absolute. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

Id. (quotations and citations omitted) Furthermore, a trial court has the discretion to exclude belatedly disclosed witnesses but it is limited to instances where there is evidence of bad faith on the part of counsel or a showing of substantial prejudice to the State. Id. Pursuant to a defendant’s right to compulsory process under the Sixth Amendment to the federal constitution and Article 1, Section 13 of the Indiana Constitution, there is a strong presumption in favor of allowing testimony of witnesses. Id. Generally, the remedy for a late-disclosed witness is to provide a continuance rather than disallowing testimony. Id.

Barber is instructive as to the facts before us. Barber was arrested and charged with several counts relating to her leaving the scene of an accident and driving while intoxicated. Id. at 643. Initially, counsel for Barber requested two continuances of the trial due to difficulty in identifying potential witnesses supporting Barber's defense. Id. at 644. The trial court granted both motions. On the day of trial, Barber requested a third continuance, alleging that two days earlier, a Saturday, two witnesses essential to Barber's defense of involuntary intoxication were located. Noting that it had set a strict deadline for a finalized witness list and because the date had past, the trial court denied the motion. Id. at 645. During the bench trial, Barber testified in her own defense that, while she was at the American Legion on the night in question, she left her drink unattended for periods of time, she only consumed one drink and there was a distinct point when she could not remember anything. Based on these circumstances, Barber believed that someone at the America Legion, unbeknownst to Barber, had slipped a drug into her drink. Id. The trial court found Barber guilty.

On appeal, this Court held that the trial court abused its discretion in denying Barber's third motion to continue because there was no evidence that defense counsel acted in bad faith in seeking the continuance, the witnesses had just been located that weekend, an earlier continuance request indicated that there were several other possible witnesses yet to be identified, and defense counsel provided an offer of proof that one of the new found witnesses had a similar experience as Barber on the same night. Id. at 646-47. Furthermore, the only prejudice that the State alleged was that if notified earlier that it would have called

off its four witnesses (two civilians and two officers) that arrived for trial. Id. at 647. Thus, the considerations of “Barber’s right to present a defense, the strong presumption in favor of allowing the testimony of even late-disclosed witnesses, the lack of substantial prejudice to the State, and the resultant prejudice to Barber,” supported the reversal and remand for a new trial. Id.

The same result is warranted here. Burnworth had the burden of proving his inability to pay the outstanding support at the time it came due. See Ind. Code § 35-46-1-5(d) (“It s a defense that the accused person was unable to provide support.”). The basis of his inability was the effect his mental health had on his capacity to work. His mother testified at the bench trial that in 2007 Burnworth had started displaying erratic behavior, such as staying in his room all day, watching a blank computer screen and yelling to someone in an empty room. His mother took Burnworth to counselors and doctors for assistance with his condition. During two of these visits, Burnworth was involuntarily committed twice. Burnworth began to reside with his mother and provided his mother with power of attorney rights over him. His mother also assisted him in applying for Social Security disability benefits, food stamps and Medicaid. At the time of trial, Burnworth was receiving Medicaid benefits but the application for disability benefits was still pending. Burnworth was prescribed medication to treat his mental health issues.

The bench trial occurred only three months after Burnworth was arrested. There is no evidence of bad faith on the part of counsel for Burnworth. This was the first requested continuance and it was made immediately after it was discovered that Burnworth’s therapist

had made an independent evaluation as to the effect of Burnworth's mental health on his ability to work. The letter from Burnworth's therapist that was attached to the motion indicated that the therapist had diagnosed Burnworth with specific mental health disorders and opined that these conditions prevented Burnworth from working or functioning appropriately in the community. This evidence was crucial to developing the inability to pay as a defense of and was not cumulative of the other evidence presented.

Potential prejudice to the State based on a continuance is not a consideration here as the State did not oppose the motion. However had the State objected, the prejudice would have been minimal as it only called two witnesses at the bench trial. Furthermore, the motion was filed one business day before the bench trial, providing the State ample time to notify the witnesses of a new trial date. Unlike Barber, the trial court here did not provide any explanation as to why it denied the motion to continue. As there is no evidence of bad faith on the part of Burnworth's counsel or prejudice to the State in delaying the trial, we conclude that the trial court abused its discretion in denying the motion to continue.

Reversed and remanded for a new trial.

BAKER, C.J., and ROBB, J., concur.