

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001430-MR

KEVIN GAMBLIN

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 12-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Kevin Gamblin appeals the McLean Circuit Court's judgment convicting him of second-degree possession of a forged instrument; theft by deception under \$10,000.00; and of being a first-degree persistent felony offender (PFO-1st). After a careful review of the record, we affirm because the circuit court did not err in denying Gamblin's motion for a continuance.

Gamblin was indicted on charges of: (Count 1) Second-degree possession of a forged instrument; (Count 2) theft by deception under \$10,000.00; and (Count 3) PFO-1st. He was appointed counsel, but on the day his jury trial was scheduled to begin, Gamblin moved for a continuance on the ground that his nephew, an attorney in Boston, had offered the day before trial to retain private counsel for him after Gamblin spoke with his nephew on the telephone and told him that he was not satisfied with the defense that his appointed counsel was going to present, and that he wanted a different defense presented to the jury. The court heard arguments on the matter, but ultimately denied Gamblin's motion for a continuance, reasoning as follows:

Given that the defendant's motion was made on the morning of trial, to grant his request for a continuance would inconvenience this Court, the Commonwealth, witnesses and members of the jury panel. Further, the defendant's "need" for a continuance is primarily the result of his own inaction in the months leading up to the scheduled trial. He cited no sufficient excuse for not retaining private counsel prior to the morning of trial. Finally, to justify a continuance in order to locate new counsel, a defendant must show a complete breakdown of communications with current counsel, a conflict of interest, or prejudice to legitimate interests. *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991) (overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)) (no showing by defendant to support continuance). The defendant has made no such showing here. Thus, his motion should be denied.

The Commonwealth then provided Gamblin an offer on a plea of guilty, which stated that if Gamblin entered guilty pleas to the charges, the

Commonwealth would recommend sentences of five years of imprisonment each for counts one and two, enhanced by his PFO-1st status by six and one-half years each for a total of eleven and one-half years each for the two counts, to be served concurrently. The Commonwealth also offered that if Gamblin paid \$5,681.60 in restitution to the clerk for the benefit of the Ward Implement Company by the time of his final sentencing, the Commonwealth would agree to a total sentence for Gamblin of ten years of imprisonment. The Commonwealth's offer also agreed that Gamblin's guilty plea would be conditioned on his right to appeal the denial of his motion for a continuance.

Gamblin moved to enter a conditional guilty plea in accord with the Commonwealth's offer on a plea of guilty. The circuit court accepted his conditional guilty plea, noting that Gamblin's plea was conditioned on his right to appeal the denial of his motion for a continuance. The court sentenced Gamblin to five years each on counts one and two, enhanced by his PFO-1st status by six and one-half years each, for a total of eleven and one-half years of imprisonment each on counts one and two, in accord with the plea agreement. The sentences were ordered to run concurrently. Additionally, because Gamblin had not paid the \$5,681.60 in restitution, he was ordered to pay it within sixty days of his release from incarceration.

Gamblin now appeals, contending that the circuit court erred in denying his motion for a continuance. We review a circuit court's order denying a motion for a continuance for an abuse of discretion. *See Guffey v. Guffey*, 323

S.W.3d 369, 371 (Ky. App. 2010). A court has broad discretion in controlling the disposition of the cases on its docket and in determining whether to grant a continuance. *See Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004). This, however, involves a “weigh[ing of] competing interests and maintain[ing] an even balance.” *Id.* A court should consider several factors when deciding whether to grant a continuance:

- 1) The length of delay;
- 2) Whether there have been any previous continuances;
- 3) The inconvenience to the litigants, witnesses, counsel, and the court;
- 4) Whether the delay is purposeful or caused by the [movant];
- 5) The availability of competent counsel, if at issue;
- 6) The complexity of the case; and
- 7) Whether denying the continuance would lead to any identifiable prejudice.

Anderson v. Commonwealth, 63 S.W.3d 135, 138 (Ky. 2001) (internal quotation marks and citation omitted).

In the present case, Gamblin asked the court for two weeks to retain private counsel, which is not a long delay. Additionally, Gamblin had not requested any prior continuances. Nonetheless, it would have been an inconvenience to the Commonwealth, the court, the jury, the witnesses, and

counsel because Gamblin moved for a continuance on the day trial was scheduled to begin.

The Commonwealth contends that the delay was caused by Gamblin's inaction, and the circuit court agreed with this contention. Gamblin explained to the circuit court that he had contacted his nephew in Boston, who was an attorney, the day before trial to tell him that he was unhappy with the defense strategy his appointed counsel was planning to present. His nephew allegedly then told Gamblin that he would find and pay for private counsel for Gamblin, and the nephew told Gamblin to request a two-week continuance to allow time for private counsel to be retained and to meet with Gamblin before the next court date. Thus, Gamblin asserts that the delay was not purposeful or caused by him because he learned the day before trial that his nephew would pay to retain private counsel for him.

The circuit court noted, however, that Gamblin had proceeded as an indigent defendant, so counsel had been appointed for him. The court concluded that Gamblin's testimony that his nephew would pay to retain private counsel for him was insufficient evidence to find that Gamblin could afford to retain an attorney; thus, the court still considered him to be indigent. The circuit court informed Gamblin that he could have taken steps to contact his nephew at an earlier date and, as such, the delay was caused by Gamblin's inaction. We agree.

The Commonwealth also argues that Gamblin had competent counsel available to try the case, *i.e.*, his appointed counsel. The circuit court told Gamblin

during the hearing that his appointed counsel was very capable of representing Gamblin. We have no reason to conclude otherwise.

Gamblin does not contend this is a complex case. Thus, this is not at issue.

Finally, Gamblin alleges that the denial of his motion for a continuance resulted in prejudice to him because his family was able to pay for him to have private counsel, but he was denied the right to have private counsel of his choosing. The Commonwealth asserts that Gamblin had not “demonstrated a breakdown of communication with [appointed] counsel or a conflict of interest with [appointed] counsel.” Thus, the Commonwealth argues that Gamblin has not shown that “his legitimate interests” were prejudiced. We find that Gamblin’s assertion that his nephew would locate and pay to retain private counsel for him is speculative, and it may even be perceived as a strategy to delay his trial. *See Shegog v. Commonwealth*, 142 S.W.3d 101, 106 (Ky. 2004). The circuit court found that appointed counsel was providing good representation to Gamblin. Additionally, as the circuit court found, Gamblin could have contacted his nephew to hire a private attorney and gather all of the necessary witnesses long before the day prior to the beginning of trial. Thus, the circuit court did not abuse its discretion in denying Gamblin’s motion for a continuance.

Furthermore, “[t]o warrant substitution of counsel, appellant must show: (1) complete breakdown of communications between counsel and himself, (2) a conflict of interest, or (3) that his legitimate interests are being prejudiced.”

Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). Gamblin simply has not made the requisite showing to be entitled to a substitution of counsel. Consequently, the circuit court did not err.

Accordingly, the order of the McLean Circuit Court is affirmed.

ALL CONCUR.

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