



In the Missouri Court of Appeals Eastern District

DIVISION FIVE

STATE OF MISSOURI,)	ED104743
)	
Respondent,)	Appeal from the Circuit Court of
)	St. Francois County
v.)	14SF-CR00709-01
)	
RICHARD D. GRAY,)	Honorable Randall L. Head
)	
Defendant.)	Filed: October 30, 2018

OPINION

Richard D. Gray (“Defendant”) appeals his judgment of conviction for first-degree involuntary manslaughter in violation of Section 565.024 RSMo Cum. Sup. 2008 and second-degree assault in violation of Section 565.060 RSMo Cum Supp. 2006. Defendant asserts multiple points on appeal relating to alleged errors at trial. Defendant also filed a supplemental point on appeal challenging the trial court’s denial of his motion to continue an evidentiary hearing to consider newly discovered evidence as mandated by this court upon remand. We reverse and remand.

BACKGROUND

On the evening of January 16, 2013, Defendant, Kasey Stevens, her brother Michael Petty, her boyfriend Robert Radford, and Radford’s friend Dale Ingram spent the evening drinking. When Radford passed out, Stevens took the keys to his van so she, Ingram, and

Defendant could buy drugs. As they were driving, the van skidded through a turn and rolled over. Some unknown time later, in the early morning of January 17, 2013, Missouri Highway Patrol Corporal Andrew Woods was dispatched to the single-vehicle accident scene. Upon arrival he observed a van upside down and two individuals ultimately identified as Defendant and Stevens lying outside the van. There was another individual trapped in the van later identified as Ingram. Defendant and Stevens were unconscious and bleeding. They received medical treatment at the scene and were ultimately transported via helicopter to a trauma center in St. Louis County. Stevens died from her injuries at the hospital. Corporal Woods spoke to Ingram at the scene. Ingram informed him Defendant was driving and lost control of the van.

Defendant was released to the St. Francois County jail after a lengthy stay in a rehabilitation center. When Corporal Woods met Defendant at the jail, he gave conflicting reports about whether he was driving. Initially, Defendant told Corporal Woods that Petty was driving the van. He also said, "It wasn't me. I ain't going to lie to you. I got nothing to hide." However, he later said, "I think maybe I might have drove. I don't know. I might be going nuts." According to Corporal Woods, Defendant seemed incoherent and confused when they spoke at the jail.

Defendant was charged with first-degree involuntary manslaughter and second-degree assault. At trial, the defense strongly disputed that Defendant was, in fact, driving the van the night of the accident. There was significant testimony from witnesses, including accident reconstructionists for both the State and Defendant, as well as other fact witnesses who testified about potential evidence that Petty was actually driving that night. A jury convicted Defendant of both counts and he was sentenced to fifteen years in prison for each count, the sentences to be served concurrently. Defendant appealed his conviction.

While his appeal was pending, Defendant filed a motion with this court to remand the case to the trial court to consider newly discovered evidence. Defendant alleged that in May 2017, after the time available to file a motion for new trial, Defendant learned of a witness named Jill Johnson who claimed she overheard a conversation in which Petty, Stevens' brother, admitted he was driving the van the night of the accident. Johnson signed an affidavit, swearing to the details of the conversation, which was filed as an exhibit to the motion to remand. On October 5, 2017, our court granted the motion and remanded the cause to the trial court. In the order and mandate we stated that “[t]he trial court shall conduct a hearing on whether the newly discovered evidence warrants a new trial.”

The trial court initially set the matter for hearing on January 29, 2017. Following one continuance due to a scheduling conflict, the matter was set for March 12, 2018. Defendant's investigator recorded an interview with Johnson on February 21, 2018, during which she reiterated both the facts as set forth in her affidavit and her willingness to cooperate. Counsel for Defendant subsequently issued a subpoena for her to appear at the March 12 hearing. On March 9, 2018, a second motion for continuance was filed for additional time to serve Johnson with the subpoena. The trial court called the matter on March 12, 2018 and heard the motion for continuance, which was denied. Defendant's supplemental motion for new trial was then denied without hearing the newly discovered evidence. The present appeal alleging trial error, as well as, error in the court's actions on remand follows.

DISCUSSION

Defendant asserted three points in his initial June 9, 2017 brief. He claimed the trial court erred in denying his motion to suppress because blood drawn while he was unconscious at the hospital absent a warrant violated his Fourth Amendment rights. Defendant also claimed the

trial court erred in denying the motion to suppress statements he made to Trooper Woods while Defendant was in jail following the accident because the State failed to establish Defendant knowingly and intelligently waived his right to remain silent. Finally, Defendant argued the trial court erred in sustaining the State's objection excluding the testimony of Robert Fucetola, M.D. regarding Defendant's general intelligence.

Defendant filed a supplemental brief, arguing that the trial court abused its discretion in denying his motion for a continuance to allow him to present the newly discovered evidence. Our review of this supplemental point is dispositive. Therefore, we do not consider Defendant's initial points on appeal.

Standard of Review

"The decision to grant a continuance is within the sound discretion of the trial court." *State v. Edwards*, 116 S.W.3d 511, 535 (Mo. banc 2003) (internal citations omitted). We will reverse the trial court's decision in this regard only upon a strong showing the court abused its discretion and prejudice resulted. *Id.*

Analysis

If a defendant is seeking a continuance based upon the absence of a witness, he must provide the trial court with facts sufficient to show the attendance or testimony of an absent witness can be procured within a reasonable time. *State v. Churchir*, 658 S.W.2d 35, 37 (Mo. App. E.D. 1983) (citing *State v. Oliver*, 572 S.W.2d 440, 445 (Mo. banc 1978)). If a continuance would not likely result in the presence of the witness, we will not find an abuse of discretion in the trial court's denial of the request. *Id.*

Here, the supplemental record unequivocally shows Johnson executed an affidavit swearing to the details of the conversation she overheard during which Petty said he was driving

the van on the night of the accident. Johnson also participated in a recorded interview with Defendant's investigator less than a month before the scheduled hearing. Defendant's counsel produced the affidavit and transcript of the interview and stated Johnson "seemed to be willing to cooperate and come testify today." However, the investigator was unable to serve her with a subpoena. Given this court's mandate and the record reflecting Johnson's cooperation, we find the denial of Defendant's first request for additional time to secure Johnson's presence at the hearing is unreasonable, and therefore an abuse of discretion.

Moreover, the denial of Defendant's motion for continuance was prejudicial. As previously noted, there was a significant question at trial whether Defendant was, in fact, driving the van on the night of the accident. The State presented evidence from witnesses, including an accident reconstructionist, that Defendant was the driver. Petty himself also testified at trial.¹ He stated he was not driving, was not a passenger, and was not present at the scene of the accident.

The defense strongly disputed the State's evidence. Defendant's reconstructionist testified the physical evidence was inconclusive as to who was driving. Defendant also presented testimony from one witness who stated she observed another man in the van with Defendant, Ingram, and Stevens prior to the accident. Another witness testified she saw Petty at the hospital shortly after Defendant was admitted, and he was sporting several injuries including a cut across the bridge of his nose, two black eyes, and his arm in a homemade sling.

In light of this conflicting evidence, Johnson's statement that she overheard Petty confess he was driving the van the night of the accident was highly relevant and may have bolstered the other testimony from Defendant's witnesses regarding Petty's involvement, allowing the jury to

¹ He testified under the name Michael Sibole. He stated he changed his name following a divorce.

weigh the credibility of Petty’s own testimony. However, the trial court denied Defendant’s first request for a continuance to serve a subpoena to secure Johnson’s presence and testimony at the hearing. The denial was prejudicial because this newly discovered evidence could have been so material as to warrant a new trial.

Finally, we note the trial court was without authority to act other than as directed in our order and mandate upon remand. *See State ex rel. Yerington v. LePage*, 139 S.w.3d 219, 221 (Mo. App. S.D. 2004) (internal citation omitted). We required Defendant to file a motion for new trial based on the new evidence and the trial court to “conduct a hearing on whether the newly discovered evidence warrants a new trial,” in our order and mandate. We also noted if the motion for new trial was denied, “the denial may be alleged as error in the pending appeal.” *State v. Cook*, 307 S.W.3d 189, 192-93 (Mo. App. E.D. 2010). The trial court failed to conduct such a hearing, and instead concluded the proceedings once it denied Defendant’s motion for continuance. The trial court was required to follow the directions of this court, and failed to reasonably do so here. Thus, we must grant Defendant’s supplemental point on appeal. We reverse the court’s decision to deny the continuance and remand the cause for the required hearing.

CONCLUSION

The judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.



Lisa P. Page, Chief Judge

Colleen Dolan, J., and Ted House, Sp.J., concur.