NO. COA01-508

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Johnston County
No. 99 CRS 50507

DARRELL VINSON

Appeal by defendant from judgment entered 8 November 2000 by Judge Jack Thompson in Superior Court, Johnston County. Heard in the Court of Appeals 13 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

Michael J. Reece for the defendant-appellant.

WYNN, Judge.

On 8 November 2000, a jury found defendant guilty of the first-degree murder of his girlfriend's father resulting in a sentence of life in prison without parole. The sole issue on appeal is whether the trial court erroneously denied defendant's motion to continue his trial and thereby rendered the assistance of his counsel ineffective. We answer: No.

N.C. Gen. Stat. § 15A-952(g) (1999) sets forth the factors a trial court should consider in determining whether to grant a continuance:

> (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;
>
> (2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation; and
>
> (3) Whether the case involves physical or sexual child abuse when a victim or witness is under 16 years of age, and whether further delay would have an adverse impact on the well-being of the child.
>
> (4) Good cause for granting a continuance shall include those instances when the defendant, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly or the Rules Review Commission.
>
> [A] motion for a continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent a gross abuse . . . It is equally well established, however, that, when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case.

See also State v. Searles, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). "Generally, the denial of a motion to continue, whether a constitutional issue is raised or not, is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error." *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000).

The right to effective assistance of counsel is guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States

Constitution and Sections 19 and 23 of Article I of the North Carolina Constitution. *See* U.S. Const. Amends. V, VI, XIV, N.C. Constit. Art. I, Sections 19, 23 (1999).

> It is implicit in these guarantees that an accused have a reasonable time to investigate, prepare and present his defense. However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case.

State v. Harris, 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976). The defendant must "be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony." *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)).

In *United States v. Cronic*, the Supreme Court of the United States noted that the right to effective assistance of counsel "is recognized . . . because of the effect it has on the ability of the accused to receive a fair trial." 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984), *See also State v. Rogers*, 352 N.C. 119, 125, 529 S.E.2d 671, 675 (2000) (addressing the propriety of a trial court's refusal to allow a defendant's attorney additional time for preparation). While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, our Supreme Court has recognized that prejudice is presumed "without inquiry into the actual conduct of the trial when the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 336

(1993) (citation omitted).

Moreover, to establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. *State v. Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337. "To demonstrate that the time allowed was inadequate, the defendant must show 'how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.'" *State v. Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337 (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986)). Our Courts have consistently held that assignments of error regarding motions for continuance that are not adequately supported by affidavits or other proof are without merit. *See State v. McCullers*, 341 N.C. 19, 460 S.E.2d 163 (1995); *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981); *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

In the present case, on 5 October 2000, defendant moved the trial court to discharge his court-appointed-counsel, James Ethridge. The trial court heard from defendant and Mr. Ethridge, who joined in defendant's motion. The record reveals that Mr. Ethridge had seen defendant seven times over a period of one year since defendant's indictment. The trial court pointed out to defendant during the hearing on the motion to discharge that Mr. Ethridge had practiced law for twenty years and was recognized as competent to try murder cases. At the hearing, Mr. Ethridge said he spent as much time with this case as he had spent with other

cases. However, defendant claimed that Mr. Ethridge had only one substantive conversation with him regarding the case. The record also indicates, Mr. Ethridge went over all discovery with defendant. Additionally, the State indicated during the hearing that it was prepared to proceed with trial. The trial court inquired of defendant if the trial court granted his motion, if he would be ready to try the case the week of 6 November, and if he felt that he would have sufficient time to discuss the case and prepare his defense before 6 November. Defendant answered that he would be ready.

Following that hearing, the trial court granted the motion terminating Mr. Ethridge as counsel for defendant and appointing in his stead, Craig James. On 31 October 2000, when Mr. James appeared before the trial court and moved for a continuance of the case from 6 November 2000, the trial court asked the State for a synopsis of what the State's case tended to show. The State indicated that it had approximately ten witnesses to call, which included the medical examiner and ballistics expert. The State also forecasted evidence from fingerprint and DNA analyses. Mr. James stated that he needed more time to develop evidence with respect to alleged injuries sustained by defendant, and to talk with the officers involved in the investigation. Following the trial court's denial of the motion to continue, Mr. James stated that he had diligently attempted to prepare for the case and that in his opinion, he would be ineffective as trial counsel if forced to proceed.

At the call of the case for trial on 6 November 2000, Mr. James renewed his motion for a continuance. The trial court's inquiry revealed that Mr. James had been licensed three and one half years, and had represented indigent defendants for less than that time. While he had defended felony cases, he assisted in one homicide case while in law school and never had sole responsibility for a homicide defense. Mr. James stated to the trial court, "I basically had 30 days to prepare for a case of this magnitude . . . I have diligently sought to prepare for this case and, in my opinion, there are still some things that I could follow up on to hopefully have a better defense for my client." The trial court found that "approximately one month is a reasonable time in which to be properly prepared for the trial of a case such as this and such has been proffered to me."

Our examination of the facts of this case reveal that defendant failed to provide any "form of detailed proof indicating sufficient grounds for further delay." *State v. Searles*, 304 N.C. 149, 155, 282 S.E.2d 430, 434 (1981). He did not establish a foundation to show that there was insufficient time for preparation of his defense; plus, he did not present evidence of how his case would have been better prepared with more time. Indeed, defendant was initially represented by Mr. Ethridge, a very experienced criminal attorney, who was prepared for trial. Defendant argues that Mr. Ethridge filed no pre-trial motions; however, he fails to show that pre-trial motions were necessary in his case. The record shows that Mr. Ethridge met with defendant seven times over a one-

year period and went over discovery with defendant six weeks before the trial was calendered and was ready to proceed to trial. Moreover, Mr. Ethridge met with Mr. James to go over the case before giving him defendant's file.

In support of his argument, defendant relies on *State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000), where our Supreme Court reversed the defendant's conviction and death sentence and remanded the case for a new trial on the grounds that little or no trial preparation had been conducted. However, while there are some similarities in *Rogers* and in the present case, the present case includes a simpler fact pattern, and significantly this defendant was not tried capitally. Like the attorneys in R*ogers*, Mr. James argued that he did not have sufficient time to prepare for the case; however, the present case involved a single eyewitness to the murder of one victim which occurred over a very brief period of time. In contrast, *Rogers* involved two defendants and many eyewitnesses to testify about different events occurring over several time periods. And unlike *Rogers* which was a capital proceeding with aggravating circumstances, the subject case involves a defendant who was found guilty of first-degree murder and sentenced to life in prison.

In summation, we hold that defendant has made no showing that any aspect of the trial would have been different had a continuance been granted, and nor has he shown that thirty-two days preparation time for substitute counsel was constitutionally inadequate or materially prejudicial. Thus, we find that defendant failed to

establish a constitutional violation. *See State v. Tunstall*, *supra*. We also find no manifest abuse of discretion by the trial court for denying defendant's motion for continuance.

No error.

Judges MCGEE and TYSON concur.

Report per Rule 30(e).