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NO. COA05-1114

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 04 CRS 53803

MICHAEL SINCLAIR MOSELY

Appeal by defendant from judgment entered 9 December 2004 by Judge James Baker, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 11 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Meredith Jo Alcoke, for the State.

Belser & Parke, P.A., by David G. Belser and Al Messer for defendant.

LEVINSON, Judge.

Michael Sinclair Mosely (defendant) appeals from judgment entered upon his conviction for possession of cocaine with intent to sell or deliver. We find no error.

The relevant facts may be summarized as follows: On 27 March 2004, Officer Geoff Rollins and other law enforcement personnel from the Asheville Police Department executed an undercover drug operation at the Hillcrest Apartments in Asheville, North Carolina. While undercover officers attempted to buy crack cocaine, Rollins waited in an unmarked van as part of a "takedown team" that was charged with arresting suspects who sold crack to the undercover

officers. Rollins' team received a call to arrest a suspect who had sold cocaine to an officer near Building 12 of the Hillcrest Apartments. After a description of the suspect was provided, Rollins and his team proceeded in an unmarked van towards Building 28, where Rollins saw the defendant standing in the vicinity of Building 26 or Building 28. While Rollins recognized the defendant as someone who was banned from this public housing complex, he was unable to identify the defendant as the suspect who had purchased cocaine from the undercover officers.

As law enforcement officers exited their van, Rollins witnessed the defendant immediately throw an object behind himself. Rollins quickly ran towards the defendant and ordered him to the ground. A few minutes thereafter, Rollins found a paper towel containing 16 small "tan rocks" which he believed to be cocaine. Another officer searched the defendant and found \$548 in cash.

At trial, Rollins identified the defendant as the person he arrested for possession of cocaine with intent to sell or deliver and second degree trespass of the Hillcrest Apartments. Although Rollins testified there were 15-20 people in the area, he nevertheless saw the defendant throw an object to the ground.

Lieutenant Kevin West, who commanded the undercover operation, recorded the scene of defendant's arrest with a personal video camera. A synopsis of the arrest report taken by Rollins and signed by Lieutenant West did not include the video recording. The video was admitted into evidence and shown to the jury.

The defendant presented testimony from several witnesses who

were either residents or former residents of the Hillcrest Apartments. Robena Majias testified that there were many people at the apartment complex before the police arrived. She also testified that, while defendant was being held on the ground, the officers searched for 30 to 45 minutes before they transferred him to a police van. Natalie Boseman testified that the police discovered the cocaine in the front porch area near her apartment - not close to where the defendant was standing. She "tried to tell" the police that the drugs did not belong to defendant. Monica Harrison witnessed the arrest and testified that while defendant was being held on the ground, the officers searched for 15 minutes and "found something and put it on Mike." Monica Harrison's son, Marlon, testified that he was walking around the apartments with a beer and that when the police arrived, he got down on the ground. He testified that he and the defendant were on the ground for 10 to 15 minutes.

Defendant was convicted of possession of cocaine with intent to sell or deliver. Defendant admitted his status as an habitual felon and also pled guilty to second degree trespass. It is from the conviction of possession of a controlled substance with intent to sell or deliver that defendant appeals, contending that the trial court erred by (1) denying his motion to continue, and (2) refusing to exercise its discretion before denying the jury's request to review a transcript of Rollins' testimony.

In his first argument on appeal, defendant contends that the trial court denied his motion to continue in violation of his right

to due process protected under the Sixth and Fourteenth Amendments to the United States Constitution and the parallel guarantees contained in Article I §§ 19 and 23 of the North Carolina Constitution. We disagree.

In the instant case, the State's videotape recording depicted the defendant's arrest. The video was first provided to defendant on 29 November 2004, the original date of the trial. Defendant made a motion to continue based upon his contention that he required time to identify potential witnesses depicted on the tape. In a 1 December 2004 order, the trial judge granted defendant's motion to continue so that he could have additional time to view the videotape and otherwise prepare for trial. The trial court ordered that the parties be ready for trial the week of 6 December 2004. On 6 December 2004, defendant orally moved for another continuance. He argued that because defense counsel did not have adequate time to review the videotape to identify and interview potential witnesses, the defendant would be prejudiced and deprived of, *inter alia*, the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the parallel guarantees contained in Article I §§ 19 and 23 of the North Carolina Constitution. The trial court denied defendant's oral motion to continue, reasoning that the defendant had not been prejudiced because the tape had already been in the defendant's possession for one week.

Traditionally, the decision to grant or deny a continuance rests within the discretion of the trial court. However, that discretion does

not extend to the point of permitting the denial of a continuance that results in a violation of a defendant's right to due process. This Court has long held that when a motion for a continuance is based on a constitutional right, the issue presented is an issue of law and the trial court's conclusions of law are fully reviewable on appeal.

State v. Tunstall, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993)
(citations omitted).

[T]he constitutional guarantees of assistance of counsel and confrontation of witnesses include the right of a defendant to have a reasonable time to investigate and prepare his case, but no precise limits are fixed in this context, and what constitutes a reasonable length of time for defense preparation must be determined upon the facts of each case.

State v. Searles, 304 N.C. 149, 153-54, 282 S.E.2d 430, 433 (1981).

To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, 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. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). "[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986). "[A] postponement is proper if there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts." *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (quoting *State v. Gibson*, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948)).

In *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972), the accused wished to continue the case so she could attempt to elicit evidence from additional witnesses. The Supreme Court held that the trial court did not err in denying defendant's motion to continue because "neither defendant nor her counsel revealed to the court the name of a single witness defendant allegedly had at her home which she desired to subpoena. What she [defendant] expected to prove by these witnesses must be surmised." *Id.* at 208, 188 S.E.2d at 303. In making its decision, the Court noted that "[c]ontinuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds." *Id.* (quoting *State v. Stepney*, 280 N.C. 306, 312, 185 S.E.2d 844, 848 (1972)); see also *Searles*, 304 N.C. at 155, 282 S.E.2d at 434 (holding that the trial court did not err by denying defendant's motion to continue in order to have time to locate a potential material witness where "defendant's oral motion . . . made on the date set for trial, was not supported by some form of detailed proof indicating sufficient grounds for further delay").

In the instant case, the defendant failed to articulate how the granting of a second continuance would have helped him better prepare an adequate defense. Although the defendant had already been granted one continuance and the videotape had been in his possession from 29 November 2004 through 6 December 2004, the defendant did not supply an affidavit or otherwise show sufficient grounds to support a second continuance. The defendant did not

identify one potential witness on the videotape, or articulate the necessity of having one or more of the persons depicted on the videotape testify. Finally, we observe that the defendant presented a substantial defense, offering the testimony of four witnesses. These witnesses' testimony presented a differing version of facts than those proffered by the State, and sought to negate the inference that defendant threw the package to the ground. This assignment of error is overruled.

In his second argument on appeal, defendant contends that the trial court erred when it refused to exercise its discretion before denying the jury's request for a transcript of Officer Rollins' testimony. This argument lacks merit.

In the instant case, the trial court responded in the following manner to the jury's request to review a transcript of Rollins' testimony:

The Court: Members of the jury, in my discretion, I'm not going to direct our Court Reporter to attempt to prepare a typewritten transcript of that testimony and then have that prepared and delivered to you. Certainly, that could be done, but in my discretion, I'm not going to attempt to have that done. I am going to instruct you, though, to rely on your collective recollections of the officer's testimony and all of the witnesses' testimony in determining the facts of the case and apply to those facts the law.

In addition, the trial court responded as follows in response to the defendant's objection to the denial of the jury's request to view the transcript:

The Court: . . . The transcript certainly could be prepared and I could have our Court

Reporter go in and prepare the written transcript of that testimony. It is in my authority to do so. And we could have the jury then stop what they are doing while that's being prepared, and we could hold up everything while that's being done. . . . In my discretion . . . I'm not about to start having transcripts of all witnesses' testimony prepared. . . . The request is denied. They have heard the testimony. They have the ability to rely on their collective recollection.

The jury's review of the evidence and testimony presented is controlled by N.C. Gen. Stat. § 15A-1233 (2005) which states, in pertinent part, that:

(a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Our Supreme Court has held that a trial court does not commit reversible error by denying a jury request to review testimony of a particular witness when "[i]t is clear from [the] record that the trial court was aware of its authority to exercise its discretion and allow the jury to review the [expert's] testimony." *State v. Lee*, 335 N.C. 244, 290, 439 S.E.2d 547, 571 (1994). However, this Court has found reversible error when a trial court's comments indicate that the court misunderstood its authority to allow a review of a witness' testimony or failed to exercise discretion in

this regard. For instance, the Supreme Court concluded in *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980), that the trial court's comment to the jury that "the transcript was not available to them was an indication that [it] did not exercise [its] discretion to decide whether the transcript should have been available under the facts of this case. The denial of the jury's request as a matter of law was error." *Id.* at 511, 272 S.E.2d at 125.

In the instant case, it is clear from the record that while the trial court was well aware of its authority to provide a transcript, it decided that the jury would, instead, rely upon its recollection of the evidence. Hence, the record reflects that the trial court thoughtfully considered, yet in its discretion denied, the jury's request for a transcript of Officer Rollins' testimony pursuant to G.S. § 15A-1233. This assignment of error is overruled.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).