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NO. COA05-1344

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v.

Buncombe County  
No. 04 CRS 63018

CHRISTOPHER THAXTON,  
Defendant.

Appeal by Defendant from judgment entered 29 March 2005 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 6 June 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Floyd M. Lewis, for the State.*

*Haakon Thorsen for defendant-appellant.*

WYNN, Judge.

When a transcript of prior proceedings is needed for an effective defense or appeal, the State must, as a matter of equal protection, provide an indigent defendant with a transcript.<sup>1</sup> In this case, Defendant argues that the trial court erroneously denied his motion to continue to obtain a copy of the transcript from his first trial. As the trial court had previously found that the transcript was necessary for defense counsel to adequately prepare

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<sup>1</sup> *Britt v. North Carolina*, 404 U.S. 226, 227, 30 L. Ed. 2d 400, 403 (1971).

for trial, we must hold the trial court erred by denying the motion to continue.

On 30 September 2004, Defendant Christopher Thaxton was issued a citation for second-degree trespass and resisting a public officer. From guilty verdicts on both charges in District Court, Buncombe County, Defendant appealed to superior court. Hugh Harris was appointed to represent Defendant. Defendant's trial during the 7 February 2005 term of Superior Court, Buncombe County, resulted in a mistrial because the jury deadlocked.

On 14 February 2005, Superior Court Judge Philip Ginn granted Defendant's motion to continue trial until 14 March 2005, "[s]o defense can obtain transcript of [first] trial. Transcript necessary to adequate[ly] prepare for trial." On 15 March 2005, Judge Ginn granted Defendant's motion to continue trial until 28 March 2005, and ordered the transcript of the first trial be produced to Defendant. On 28 March 2005, Judge Ginn denied Defendant's motion to continue and to produce transcript. Following trial which began on 28 March 2005, the jury found Defendant not guilty of resisting a public officer and guilty of second-degree trespass. The trial judge, Superior Court Judge James U. Downs, sentenced Defendant to fifteen days imprisonment but suspended the sentenced and placed him on thirty-six months unsupervised probation.

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On appeal, Defendant argues that the trial court erred in denying his motion to continue in violation of his constitutional right to equal protection. We must agree.

The standard of review of a trial court's ruling on a motion for a continuance,

is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

*State v. Jones*, 172 N.C. App. 308, 311-12, 616 S.E.2d 15, 18 (2005) (quoting *State v. Taylor*, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001)). Further, to establish that the denial of a continuance motion was prejudicial,

a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. 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. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (quoting *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

The issue presented here is one of law because the State must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when that transcript is needed

for an effective defense or appeal. *Britt*, 404 U.S. at 227, 30 L. Ed. 2d at 403. *Britt* does not require that a free transcript of a prior trial must always be provided; however, when the trial court acts in such a manner so as to deny an indigent defendant a transcript it must determine (1) whether the transcript is necessary for the preparation of an effective defense, and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript. *State v. Rankin*, 306 N.C. 712, 716, 295 S.E.2d 416, 419 (1982). Neither the record nor the transcript of the trial contains any indication that the trial court found the transcript was not necessary for the preparation of an effective defense, or that an alternative device was available which was the substantial equivalent to a transcript. In fact, the record shows that Judge Ginn had previously found that the "[t]ranscript [was] necessary to adequate[ly] prepare for trial."

Based upon the record before us, we are compelled to find the trial court's denial of a continuance without the findings required by our Supreme Court in *Rankin* was a violation of Defendant's equal protection rights under the Fourteenth Amendment to the United States Constitution. See *State v. Reid*, 312 N.C. 322, 323, 321 S.E.2d 880, 881 (1984) (requiring the defendant to be retried without providing him with a transcript of his first trial is error entitling the defendant to a new trial); *State v. Wells*, 73 N.C. App. 329, 330-31, 326 S.E.2d 129, 131 (1985) (the trial court erred in denying the defendant's motion to continue because the ruling

denied the defendant the opportunity to obtain a transcript of his first trial); *State v. Jackson*, 59 N.C. App. 615, 617-18, 297 S.E.2d 610, 612 (1982) (the trial court erred in denying the defendants' motion to continue because the ruling denied the defendants an effective use of the transcript of their first trial as they had less than twenty-four hours to review it). We, therefore, award Defendant a new trial.

New trial.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).