NO. COA06-201

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Davidson County
No. 04 CRS 58925

THOMAS KENNEDY MCMILLIAN
Defendant.

Appeal by defendant from a judgment entered 5 October 2005 by Judge Kimberly Taylor in Davidson County Superior Court. Heard in the Court of Appeals 16 October 2006.

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

Nancy R. Gaines for defendant-appellant.

BRYANT, Judge.

Thomas Kennedy McMillian (defendant), who was found guilty of possession of cocaine and having attained habitual felon status, appeals a judgment entered 5 October 2005. By his sole assignment of error, defendant contends the trial court erred in denying a continuance so he could hire counsel after he discharged his court-appointed attorney. He argues the denial of the continuance violated his right to counsel.

The record shows that at the call of defendant's case for trial, defendant stood up and made a motion to discharge his appointed attorney. When asked to state a basis for the motion,

defendant replied, "[I]f I'm going to jury trial, seems to me I'd be trying to get some character witnesses or something. My attorney, I have seen him three times in 14 months." Defendant's attorney disputed defendant's assertion but conceded defendant "has a right to represent himself if he wants to do that." The court then asked defendant whether he wanted to represent himself. Defendant responded, "Seems to me – I mean, this is my second time coming in the courtroom. I'd a done dismissed him if I could have got in the courtroom. I mean, if I got to represent myself, then I will." The court offered defendant three choices: (1) to hire a lawyer ready to try the case at 1:00 p.m. that day; (2) to stay the course with his current lawyer; or (3) to represent himself. Defendant asked, "So you ain't giving me no time to get a lawyer"? The court responded, "No, sir." Defendant replied, "I'll represent myself." The court then commenced to conduct the inquiry required by N.C. Gen. Stat. § 15A-1242. N.C.G.S. § 15A-1242 (2005). The court discharged counsel and permitted defendant to represent himself.

In moving for a continuance a party must provide proof establishing the reasons for the delay and must show material prejudice. *State v. Cody*, 135 N.C. App. 722, 726, 522 S.E.2d 777, 780 (1999). Factors the court should consider in deciding the motion include (1) whether a miscarriage of justice will result if the motion is not granted, and (2) whether, considering the complexity of the case, additional time is needed for adequate preparation. *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671,

674 (2000). Ordinarily a court's ruling upon a motion to continue is reviewed for abuse of discretion but when the motion is grounded on a constitutional right or issue, the court's ruling is "fully reviewable by an examination of the particular circumstances of each case." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). Whether grounded on a constitutional claim or not, a new trial is warranted only when the defendant is able to show that the denial of the continuance was error and that his defense was prejudiced as a result of the denial of the motion. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

Assuming, *arguendo*, defendant's statement "[s]o you ain't giving me no time to get a lawyer" constituted a motion for a continuance, we find no error. The present facts are remarkably similar to those of *State v. Montgomery*, 33 N.C. App. 693, 236 S.E.2d 390, *disc. rev. denied and appeal dismissed*, 293 N.C. 256, 237 S.E.2d 258 (1977), in which counsel retained by the defendant came fully prepared to represent the defendant at trial. At the call of the case for trial, however, the defendant moved to discharge counsel and for a continuance so he could retain new counsel. The trial court allowed defendant's motion to discharge counsel but denied his motion for a continuance. The trial court offered the defendant the option of either proceeding to trial with present counsel or without counsel. The defendant elected to proceed without counsel. In finding no error, this Court held that the defendant waived his right to counsel. We also stated that "the attempt to change counsel when the case was called for trial,

which would have resulted in the disruption and obstruction of orderly procedure in the court, must be charged to the defendant." *Id.* at 697, 236 S.E.2d at 392.

Here, the record shows that defendant was indicted on 27 September 2004. The prosecutor also stated for the record that defendant was charged on 25 August 2004, that the first date in court was 25 October 2004, and that seven court dates were set in the interim between then and the date trial began, 4 October 2005. Defendant's counsel also stated to the court that he had been representing defendant for fourteen months, had reviewed discovery with defendant, had talked to defendant more than three times, and had investigated the possible defenses offered by defendant but "the evidence did not pan out." Only four witnesses testified for the State, namely, two law enforcement officers, defendant's probation officer, and a State Bureau of Investigation chemist. The State's evidence shows defendant ran from the two law enforcement officers who were attempting to serve an arrest warrant issued for him by his probation officer. The officers apprehended defendant and found a rock of crack cocaine on defendant's person. The chemist confirmed that the substance was cocaine. Defendant's sole witness testified that defendant told him that he possessed the substance. Given this overwhelming evidence of defendant's guilt, it took the jury less than fourteen minutes of deliberation to return with a verdict.

The courts "will vigilantly resist any manipulation by parties or their counsel . . . to 'disrupt or obstruct the orderly progress

of the court,' (citation omitted), under the guise of generalized, unsupported, or otherwise nonmeritorious motions to continue." *Rogers*, 352 N.C. at 126, 529 S.E.2d at 676 (quoting *State v. McFadden*, 292 N.C. 609, 615, 234 S.E.2d 742, 747 (1977)). The present case falls within this category.

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).