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NO. COA07-1559

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

STATE OF NORTH CAROLINA

v.

Henderson County  
Nos. 06 CRS 52534  
06 CRS 643

WILLIAM PERRY DUNCAN, III

# Court of Appeals

Appeal by defendant from judgment entered 18 May 2007 by Judge James U. Downs in Henderson County Superior Court. Heard in the Court of Appeals 30 June 2008.

*Attorney General Roy Cooper, by Special Deputy Attorney General Daniel L. Madison, for the State.*

# Slip Opinion

*Michael E. Casterline, for defendant-appellant.*

CALABRIA, Judge.

William Perry Duncan, III ("defendant") appeals from the judgments entered upon a jury verdict finding him guilty of possession of precursor chemicals with intent to manufacture methamphetamine and upon his guilty plea to attaining the status of an habitual felon. We find no error.

At trial, on 18 May 2007, in Henderson County Superior Court, the State produced evidence that defendant, his girlfriend Cynthia Hicks ("Hicks"), and other residents in their rooming house received a two-week eviction notice in April 2006, after a new landlord

purchased the building. On the effective date of the eviction, 1 May 2006, Michael Bane ("Bane") was helping defendant and Hicks move their belongings.

After learning there was a disturbance and possible gunshots at the rooming house, the property manager called 911, and then asked defendant to wait until the police arrived. Defendant ignored her request and proceeded to leave in a van. As defendant started backing down the driveway, the property manager tried to stop him by placing a garbage can behind the van. As defendant continued to back into the garbage can and the property manager, the police arrived and parked behind the van.

Police officers ordered defendant, Hicks and Bane to exit the van. After searching them, the officers seized a small metal tin from the defendant's pockets. The tin held two baggies which appeared to contain controlled substances. Later, a forensic chemist identified their contents as 0.18 gram of methamphetamine hydrochloride and pulverized pseudoephedrine tablets. After arresting all three of the van's occupants, officers observed items in a canvas bag in the van's backseat which caused them to suspect that the van was a methamphetamine lab. Bane informed officers that he and his wife were storing items in his son's bedroom for defendant and Hicks following their eviction, and he consented to a search of his home. Police later searched the van, which was registered to Mrs. Bane, and found a number of items that could be used to manufacture methamphetamine along with a jar of liquid which contained methamphetamine.

Bane testified that he met defendant about three weeks prior to the date in question. On one occasion in defendant's apartment, Bane saw defendant put his hand into a jar of clear liquid. He said defendant explained he was draining his filters and that he was making methamphetamine. Bane and his wife agreed defendant and Hicks could stay with them and store their belongings for a couple of days after their eviction. Bane borrowed his wife's van to help the couple move their belongings to his son's bedroom. Although Bane helped load items into the van, he denied seeing any of the suspicious items or being aware that any of the items used in the manufacture of methamphetamine were placed in the van. He said that the charges against him had been dropped or never brought against him. Bane said he had been addicted to crack cocaine and was a drug addict in recovery. He also testified to having a criminal record.

Mrs. Bane stated that defendant and Hicks were acquaintances of her husband, but she did not know them. She had agreed that defendant and Hicks could store their possessions for a couple days in their home.

The jury returned a verdict finding defendant guilty of the possession of precursor chemicals. The jury found defendant not guilty of seven other charges, however, defendant also pled guilty to attaining the status of an habitual felon. The Honorable James U. Downs sentenced defendant to a minimum term of 133 months and a maximum term of 169 months in the North Carolina Department of Correction. Defendant appeals.

#### I. Motion to Continue

In his sole argument on appeal, defendant contends the trial court erred by denying his motion for a continuance after the State notified him shortly before trial of additional witnesses. He argues the trial court's ruling violated his constitutional rights by denying him effective assistance of counsel. We disagree.

"The appellate standard of review of the denial of a motion to continue is abuse of discretion, unless the denial raises a constitutional issue." *State v. Barkley*, 144 N.C. App. 514, 523, 551 S.E.2d 131, 137, *appeal dismissed*, 354 N.C. 221, 554 S.E.2d 646 (2001). "Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new trial only upon a showing by defendant that the denial was erroneous and that this case was prejudiced thereby." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981).

In the case *sub judice*, defendant was arraigned at trial on charges of possession of a precursor chemical, manufacturing methamphetamine, trafficking by transportation of methamphetamine, trafficking by possession of methamphetamine, maintaining a vehicle to keep controlled substances, misdemeanor assault with a deadly weapon, misdemeanor injury to real property, misdemeanor possession of stolen goods, driving while license revoked or suspended, and attaining the status of an habitual felon. The State moved for joinder of all of the indictments, and the trial court allowed the motion.

Following the joinder, defense counsel moved "to continue this matter as to the late notice of two witnesses by the State."

Defense counsel stated he "was just given notice this morning of it. As of last week [defense counsel had] specifically inquired as to these witnesses, and was told they would not be here for trial." Defense counsel had previously filed a request for voluntary discovery with the State on 27 December 2006. The State informed the trial court that their office had been attempting to serve Bane or his wife with a subpoena and that they had located him "earlier this week, or late last week or over the weekend." After speaking with both witnesses by telephone on the day preceding the start of trial, the State provided defense counsel with the substance of Mr. Bane's statements in written form. The trial court then denied defendant's motion to continue.

Defendant did not assert any constitutional grounds for a continuance in the trial court, and he may not do so now for the first time on appeal. See *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005). Nor does defendant's supporting assignment of error refer to any constitutional error. See *State v. Pendleton*, 175 N.C. App. 230, 231-32, 622 S.E.2d 708, 709 (2005). We therefore review the trial court's ruling only for abuse of discretion.

Defendant served a request for voluntary discovery upon the State pursuant to N.C. Gen. Stat. § 15A-902(a) (2007). "To the extent that discovery authorized in this Article is voluntarily made in response to a request or written agreement, the discovery is deemed to have been made under an order of the court . . . ." N.C. Gen. Stat. § 15A-902(b). As a result, the State was required to:

Give the defendant, at the beginning of jury selection, a written list of the names of all

other [non-expert] witnesses whom the State reasonably expects to call during the trial. . . . If there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result were not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

N.C. Gen. Stat. § 15A-903(a) (3) (2007). The State complied with the statutory requirements by informing defendant of the two additional witnesses prior to jury selection along with the substance of Bane's statements. See *id.* In addition, the State also provided the trial court with an explanation for not having done so earlier. Because the State's disclosure of the two witnesses to defendant was timely, the trial court did not err by denying defendant's motion for a continuance.

Assuming defendant had properly preserved his constitutional claim, he nevertheless would have been unable to show prejudice as a result of the denial of his motion to continue. The testimony of the two witnesses was immaterial to the one charge of which defendant was found guilty by the jury. See *State v. Morgan*, 359 N.C. 131, 145, 604 S.E.2d 886, 895 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). The trial court did not abuse its discretion by denying defendant's motion to continue. This assignment of error is overruled.

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b) (6) (2007), we deem them abandoned and need not address them.

No error.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).