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NO. COA10-730

NORTH CAROLINA COURT OF APPEALS

Filed: 15 February 2011

STATE OF NORTH CAROLINA

v.

Cleveland County
Nos. 08 CRS 51034-35

JOHNNY LEE POSTON, JR.

Appeal by Defendant from judgments entered 18 February 2010 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 7 February 2011.

Attorney General Roy Cooper, by Assistant Attorney General Rebecca E. Lem, for the State.

J. Edward Yeager, Jr. for Defendant.

STEPHENS, Judge.

I. Procedural History and Evidence

On 1 March 2008, officers of the Shelby Police Department cited Defendant Johnny Lee Poston, Jr. for misdemeanor breaking and entering, carrying a concealed weapon, possession of marijuana, and possession of drug paraphernalia. Defendant was convicted in district court, appealed, and a trial *de novo* was held in Cleveland County Superior Court on 18 February 2010.

At trial, the State presented evidence tending to show that on 1 March 2008, at approximately 2:00 a.m., police officers responded to a call that Defendant was kicking his sister's front door.

Responding officers saw Defendant running down the street and chased Defendant, but lost sight of him. Officers searched the area and noticed that the door of a house on a nearby street was ajar. Defendant was found inside the house and arrested. Upon searching Defendant after his arrest, officers found a pocketknife, rolling papers, and marijuana. Defendant was not the owner of the house and did not have permission to be inside the house. Defendant did not present any evidence at trial.

After deliberations, the jury returned its verdict finding Defendant guilty of misdemeanor breaking or entering, possession of drug paraphernalia, and misdemeanor possession of marijuana. The trial court entered judgment upon the jury verdict and consolidated Defendant's convictions into two judgments. The court sentenced Defendant to a term of 120 days imprisonment for his conviction for breaking and entering and a consecutive sentence of 30 days imprisonment for his two drug convictions. Defendant gave notice of appeal in open court.

II. Discussion

Defendant first argues the trial court erred in denying his motion to continue made immediately before trial. We disagree.

In determining whether to grant a motion to continue, the trial court shall consider, *inter alia*, the following factors:

- (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

N.C. Gen. Stat. § 15A-952(g) (2009). Generally, "a motion to continue is addressed to the sound discretion of the trial court, and absent a manifest abuse of that discretion, the trial court's ruling is not reviewable." *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 674-75 (2000).

[A]n abuse of discretion is established only upon a showing that a court's actions are manifestly unsupported by reason. Further, we have emphasized that any ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

State v. T.D.R., 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (internal citations and quotation marks omitted). "However, when a motion to continue raises a constitutional issue, . . . the trial court's ruling is 'fully reviewable by an examination of the particular circumstances of each case.'" *Rogers*, 352 N.C. at 124, 529 S.E.2d at 675 (quoting *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). "[T]he 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." *Id.*

Defendant has not asserted that the denial of his motion to continue affected a constitutional right. Thus, we review the trial court's decision for abuse of discretion and, upon that review, find none.

Before trial, Defendant moved the court to continue the trial to allow Defendant time "to get his girlfriend here in court . . . as a witness for him." Defendant now argues that, since he "had been incarcerated for all but a few days prior to the case being called for trial[,] " his motion should have been granted. We disagree.

Defendant had been represented by counsel in this case for approximately 17 months prior to the case being called for trial. Moreover, the case had been on the trial calendar for approximately a week and half before it was called for trial. Defendant's trial counsel stated that he had consulted with Defendant regarding the case at the district court proceedings as well as on the Friday and Monday before the trial, which was held on Thursday, 18 February 2010, but that Defendant had not previously informed him of the witness. Defendant himself told the court, "I can come up with some witness if I got to. Because I got to get a chance to defend myself on this." The trial court offered Defendant the opportunity to contact the witness on the telephone to see if the witness could come to court that day. Defendant declined to do so.

Defendant argues that the trial court's inquiry into whether the witness had been available at the district court level was an abuse of discretion because "the issue should have been whether [Defendant] had a reasonable opportunity to obtain the assistance of necessary witnesses." However, the trial court's inquiry into the witness's prior availability was to determine if trial counsel had notice of the witness's existence and, thus, was directly

related to whether Defendant had a reasonable opportunity to secure the witness prior to trial.

Based on these facts, we agree with the trial court that Defendant had ample opportunity to secure the purported missing witness prior to his case being called for trial. Accordingly, we cannot say the trial court abused its discretion in denying Defendant's motion to continue. *See Searles*, 304 N.C. at 154-55, 282 S.E.2d at 433-34 (holding a motion to continue was properly denied when eight weeks had passed between appointment of counsel and trial and the defendant gave the trial court only the nickname of a potential witness and made no showing of why the witness was necessary to his defense).

Defendant next argues the trial court committed reversible error in failing to ensure that Defendant understood his right to testify. Defendant contends that he did not knowingly and intelligently waive his right to testify on his own behalf. We are not persuaded.

Our Supreme Court has "never required trial courts to inform a defendant of his right to testify or to make an inquiry on the record regarding his waiver of the right to testify." *State v. Smith*, 357 N.C. 604, 618, 588 S.E.2d 453, 463 (2003) (citation omitted), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819 (2004). Moreover, "absent a defendant's indication that he wished to testify, it cannot be said that the trial court denied defendant of his right." *Id.* at 619, 588 S.E.2d at 463.

Here, at the close of the State's evidence, Defendant's trial counsel informed the court that the defense would not be presenting any evidence. The trial court then asked Defendant if his trial counsel had explained that Defendant had a right to testify, and Defendant replied yes. The court further informed Defendant that he did not have any burden of proof and that, should he choose to testify, the State would be able to cross-examine him and ask him about his criminal record. The court also told Defendant that if he chose not to testify, the jury would be instructed not to consider Defendant's silence at trial during its deliberations. Defendant responded that he understood the trial court's questions and that he had spoken with his trial counsel about whether or not he should testify at trial. The following colloquy then occurred between Defendant and the trial court:

THE COURT: After talking over this with your lawyer, did you make a decision about whether to testify or not?

THE DEFENDANT: I don't understand what you - you saying.

THE COURT: Okay, did you make - did you decide to testify or not to testify?

THE DEFENDANT: Well, I'm just going to say it to you like this. I don't even think I know why I'm in here being charged with this situation with no people involved in it and stuff like that and they trying to, you know, railroad me up on something I don't even have - know nothing about. Because I don't even know about the law about nothing.

THE COURT: Okay. Well, I mean, did you decide whether or not you were going to get up on the witness stand?

THE DEFENDANT: Yes, sir.

THE COURT: All right, then, are you going to testify or not testify?

THE DEFENDANT: I'm just going to leave it like it is.

THE COURT: All right -

THE DEFENDANT: I don't understand what's going on anyways.

THE COURT: All right, thank you, sir.

Defendant argues that his statement, "I don't understand what's going on anyways" is a clear indication that he did not knowingly and intelligently waive his right to testify. However, the trial court clearly apprised Defendant of his right to testify and the ramifications thereof. Defendant stated he understood he had a right to testify and that he had discussed whether or not he should testify on his own behalf with his trial counsel. Defendant chose not to testify at trial, and it is clear that Defendant's lack of understanding, if any, did not regard his right to testify but rather why he was charged with the crimes. Accordingly, we hold the trial court did not err in failing to ensure that Defendant understood his right to testify on his own behalf.

NO ERROR.

Judges ERVIN and BEASLEY concur.

Report per Rule 30(e).