NO. COA12-342
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 08 CRS 227700-06,
08 CRS 227712-16,
08 CRS 227720-27

GARY CLYDE KEEVER,
Defendant.

On writ of certiorari to review judgments entered 20 April 2011 by Judge H. William Constangy in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2012.

*Roy Cooper, Attorney General, by Harriet F. Worley, Assistant Attorney General, for the State.*

*Charlotte Gail Blake, for defendant-appellant.*

MARTIN, Chief Judge.

Defendant Gary Clyde Keever sought review by petition for writ of certiorari of judgments entered upon jury verdicts finding him guilty of six counts of obtaining property by false pretenses in violation of N.C.G.S. § 14-100, seven counts of

making untrue statements or omissions of a material fact in connection with the offer or sale of a security in violation of N.C.G.S. § 78A-8(2), six counts of engaging in fraud or deceit in connection with the offer or sale of a security in violation of N.C.G.S. § 78A-8(3), one count of transacting business as a dealer or salesman in this State who was not registered under the North Carolina Securities Act in violation of N.C.G.S. § 78A-36(a), and one count of selling a security in this State that was not registered under the North Carolina Securities Act in violation of N.C.G.S. § 78A-24. We find no error.

The evidence presented at trial tended to show that between 2001 and 2007, defendant offered "investment opportunities" to seven individuals, each of whom was told that monies invested with defendant would be pooled with monies of other investors to buy mortgage notes at discounted rates, and that such notes would be serviced for a term of six months or one year, during which time each investor would receive quarterly or annual interest payments. Then, upon the expiration of the specified service terms of the notes, the formerly-discounted notes would be sold back to financial institutions at face value for a profit, which would be disbursed to the investors, along with each investor's principal investment stake. The seven individuals invested principal amounts with defendant ranging

from $10,000.00 to $150,000.00 per investor. Although defendant made at least one interest payment to most of the seven investors——whether nominal or in accordance with a portion of the returns that were promised at the time the investments were originally made——defendant never returned the principal investments to any of the seven individuals. Additionally, defendant did not inform the investors that he would use their investment funds for his personal expenses. Further, defendant had not disclosed to any of the investors that he had a prior felony criminal conviction at the time each invested with him, and each investor stated that, if defendant had made such a disclosure, none of them would have chosen to invest with him.

In February 2006, pursuant to a complaint filed with the securities division of the North Carolina Department of the Secretary of State, an investigation was initiated concerning allegations against defendant with respect to pooled investments purportedly used to buy mortgage notes. In late 2007, David Rose, a law enforcement agent with the securities division, took over the investigation. Although Agent Rose is not a forensic accountant, he reviewed bank records related to defendant for twelve accounts from three different banks for the years 2001 through 2007. By correlating the items of deposit, wire transfer confirmations, and checks written on the accounts with

each of the twelve bank statements seized, Agent Rose concluded that only two of defendant's twelve accounts were related to the transactions that were the subject of the investors' complaints. Agent Rose also determined that defendant was not registered to sell securities in the State of North Carolina, and that no securities had been registered to be sold with respect to defendant in this State.

In 2009, defendant was indicted by a grand jury for multiple counts of securities fraud and obtaining property by false pretenses and, on 4 October 2010, the grand jury returned superseding indictments on the same charges. In June 2010, defendant's appointed counsel withdrew and another counsel was appointed in her place, at which time defendant's newly-appointed counsel was provided with all of the State's discovery to-date.

On 14 December 2010, the prosecutor, defense counsel, and Agent Rose met for a pretrial readiness conference, at which time defense counsel was notified that Agent Rose would be conducting an independent review of defendant's financial records based on the materials that had already been provided to defendant in discovery on or before October 2010. For his review, the agent compiled a "simple addition and subtraction" spreadsheet for each of the two accounts at issue, tallying all

deposits greater than or equal to $1,000.00 and all expenditures or debits greater than or equal to $500.00 for the specified time periods. He then classified each of the itemized transactions into different categories to describe the source of the funds for each deposit and the destination of each expenditure. As a result of his review, Agent Rose found no evidence that defendant used the funds he received from the seven individual investors between 2001 and 2007 to purchase, service, or sell any mortgage notes, and concluded that the funds defendant received from the investors were "used to pay returns to other investors, [and were] . . . used for [defendant's] personal and living expenses." On 7 February 2011, Agent Rose provided a report to the State which detailed his findings; this same report was provided to defense counsel the following day.

Although the matter was set for trial on 7 March 2011, upon defendant's motion, the matter was continued until 4 April 2011. On 4 April, defendant again moved to continue the proceedings, this time on the grounds that the forensic accountant who was helping the defense team prepare for trial "resigned abruptly" two weeks prior to the start of trial and defendant needed additional time to prepare. The trial court denied defendant's motion. On 20 April 2011, the jury returned guilty verdicts on

twenty-one of the charged offenses and the trial court sentenced defendant to three consecutive terms of 116 to 149 months imprisonment. This Court allowed defendant's petition for writ of certiorari seeking review of the court's April 2011 judgments.

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Defendant first contends the trial court deprived him of his right to effective assistance when it denied his 4 April 2011 motion to continue because defense counsel "did not have the assistance of a forensic accountant to help him prepare [defendant's] defense with a full understanding of the financial records involved." Because the record before us belies defendant's claims, we disagree.

"In most circumstances, 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), *appeal after new trial on other grounds*, 161 N.C. App. 345, 587 S.E.2d 906 (2003). "If, however, a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *State v. Smith*, 310 N.C. 108, 112, 310 S.E.2d 320, 323 (1984). "To establish a constitutional violation, a defendant

must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993); *see also State v. Searles*, 304 N.C. 149, 153–54, 282 S.E.2d 430, 433 (1981) (providing that "what constitutes a reasonable length of time for defense preparation must be determined upon the facts of each case"). "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.'" *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337 (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986)). "If the defendant shows that the time allowed his counsel to prepare for trial was constitutionally inadequate, he is entitled to a new trial unless the State shows that the error was harmless beyond a reasonable doubt." *Id.*

We first note that, although the record contains *a* motion to continue, it does not contain *the* motion to continue that is the subject of defendant's issue on appeal. Instead, the motion included in the record before us is defendant's 22 February 2011 motion that sought to delay the start of the trial set to begin on 7 March 2011, which motion was granted by the trial court. Since neither the challenged motion to continue nor its

accompanying affidavit is included in the record before us, our review of this issue on appeal is necessarily limited to a review of the transcript of the 4 April 2011 hearing on the motion.

At the hearing, defense counsel alleged that Agent Rose "used the[] work product" of the forensic accountant who was originally assigned to the case from the Department of the Secretary of State "to develop [his] opinion." Consequently, defendant asserted that, due to his accountant's resignation, he needed time to hire another forensic accountant to advise the defense with respect to its cross-examination of Agent Rose. However, Agent Rose testified on *voir dire* that he did not rely on any prior analyses of defendant's financial records to inform his own analysis of defendant's accounts, that he compared his results with those from the forensic accountant's 2008 report *only after* his own analysis was completed in February 2011, and that he planned to testify at trial only to the results of his own analysis based on the same information that was provided to defendant in discovery on or before October 2010.

Defense counsel further opined at the hearing that, after the "abrupt[]" resignation of the defense team's forensic accountant two weeks before the beginning of defendant's trial on 4 April 2011, counsel could not "wrap [his] brain around

[defendant's financial] records . . . in a way to provide effective assistance of counsel for [defendant]." However, defense counsel concedes that, before resigning on 24 March 2011, the defense team's forensic accountant had worked on defendant's case "for several months" and "reviewed everything," including all of defendant's financial records that were provided to defendant on or before October 2010, as well as Agent Rose's analysis that was provided to defendant on 8 February 2011. Moreover, Agent Rose testified that his analysis consisted only of compiling a "simple addition and subtraction" spreadsheet for two of defendant's bank accounts, which tallied deposits greater than or equal to $1,000.00 and expenditures or debits greater than or equal to $500.00, and organized the itemized transactions into four or five different categories of Agent Rose's own making to describe the source of each deposit and the destination of each expenditure. Thus, no skill other than the ability to perform simple arithmetic was necessary to understand Agent Rose's analysis. Therefore, after a close examination of the record before us, we are not persuaded that, as a consequence of the resignation of defendant's forensic accountant almost three weeks *after* the trial was originally set to begin, the trial court's denial of defendant's 4 April 2011 motion to continue caused his counsel

to have "inadequate time to prepare" for trial. *See Tunstall*, 334 N.C. at 332, 432 S.E.2d at 338. Accordingly, we overrule this issue on appeal.

Defendant next contends the trial court "had no jurisdiction" to enter its judgments against defendant on 20 April 2011, because the court session in which defendant's trial was heard was set to expire on 15 April 2011[1] and the trial court did not extend the court session in accordance with the requirements of N.C.G.S. § 15-167. We disagree.

A trial court may extend a session of court at the trial judge's discretion

> [w]henever a trial for a felony is in progress on the last Friday of any session of court and it appears to the trial judge that it is unlikely that such trial can be completed before 5:00 P.M. on such Friday, the trial judge may extend the session as long as in his opinion it shall be necessary for the purposes of the case . . . .

N.C. Gen. Stat. § 15-167 (2011). When a trial judge so decides to continue a session, in order to comply with the requirements of N.C.G.S. § 15-167, the judge "shall cause an order to such

[1] Although the original session of court for defendant's trial was set to expire on Friday, 8 April 2011, because the parties were not finished presenting their respective cases, the trial court recessed court and entered an order extending the court session to Friday, 15 April 2011, in accordance with the requirements of N.C.G.S. § 15-167. The court's extension of the original session from 8 April to 15 April is not challenged by defendant on appeal.

effect to be entered in the minutes, which order may be entered at such time as the judge directs, either before or after he has extended the session." *Id.* Nonetheless, even where a "record does not contain a written order specifically referencing [N.C.G.S. §] 15-167 and stating that the session was extended thereunder," a court can still "effectively extend the court session." *See State v. Locklear*, 174 N.C. App. 547, 550, 621 S.E.2d 254, 256 (2005). This Court has determined that, where an examination of the record reveals that a trial court made "repeated announcements in open court without objection from defendant" "clearly referenc[ing] the extension of the session," such statements are sufficient to comply with the requirements of N.C.G.S. § 15-167 and "effectively extend the court session." *See id.* at 550–51, 621 S.E.2d at 256–57.

In the present case, at the end of the day on Friday, 15 April 2011, although the parties had finished presenting their respective cases to the jury, the jury had not yet heard closing arguments, received its charge and instructions from the court, or began its deliberations. Thus, because the trial was still ongoing, the court decided to extend the session to allow the case to continue. Although the parties agree that the court did not enter a written order extending the session beyond 15 April 2011, our review of the transcripts reveals that the

court made several statements in open court "clearly referenc[ing]" its extension of the court session. *See id.* at 550, 621 S.E.2d at 256. For instance, on Friday, 15 April, the court addressed the jury as follows:

> Ladies and gentlemen, the lawyers and I have been working diligently through the lunch hour that you've all had. We still have more work to do on the record. We're not going to have time today to finish and get the jury instructions to you as well as the arguments of the lawyers to conclude this case. So we have a lot of work to do on the record which we'll be doing for the rest of the afternoon. We're going to let you all go home at this time. Come back at 10:00 o'clock Monday morning. At that time you will hear the arguments, the closing arguments of the lawyers, the jury instructions from me, and then you will go back to select your foreperson and begin your deliberations in this case.
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> . . . I hope you have a good weekend. Be back here at 10:00 o'clock on Monday morning. We will start at 10:00 o'clock with the closing arguments of the attorneys. Have a good weekend.

A further review of the transcripts from Monday, 18 April, through Wednesday, 20 April, shows that, at the open and close of court, the court similarly referenced its extension of the court session each day in open court with counsel and the jury. Although "it would have been the better practice for the trial court [in the present case] to expressly set forth in the

minutes a formal order extending the court session" after the session expired on 15 April 2011, as it had done the week prior, we hold that the trial court satisfied the requirements of N.C.G.S. § 15-167 by making its "repeated announcements in open court without objection from defendant" and "effectively extend[ed]" the session of court through 20 April 2011. *See Locklear*, 174 N.C. App. at 550–51, 621 S.E.2d at 256–57. Accordingly, we overrule this issue on appeal.

No error.

Judges GEER and STROUD concur.

Report per Rule 30(e).