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NO. COA14-636
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v. Cabarrus County
Nos. 06 CRS 54375
10 CRS 903

ANGELIA MEDLIN MOORE,
Defendant.

Appeal by defendant from judgment entered 21 November 2013
by Judge Jerry Cash Martin in Cabarrus County Superior Court.
Heard in the Court of Appeals 23 October 2014.

*Attorney General Roy Cooper, by Special Deputy Attorney
General Katherine A. Murphy, for the State.*

Franklin E. Wells, Jr. for defendant-appellant.

GEER, Judge.

Defendant Angelia Medlin Moore appeals from a judgment entered on her convictions of possession with intent to manufacture, sell, or deliver heroin, sale and delivery of heroin, and being a habitual felon. On appeal, defendant argues that the trial court abused its discretion in refusing to grant her motion for a continuance because of the refusal of defendant's sole witness to appear although subpoenaed, and the

trial court erred in sentencing defendant when she was not present in court. Because defendant had notice prior to trial that the witness did not intend to comply with the subpoena but did not move for a show cause order, defendant did not move for a continuance until the third day of trial when neither the witness nor defendant appeared in court, and defendant made no specific showing of what the witness would testify if present, we hold the trial court did not abuse its discretion in denying the motion. With respect to sentencing, we hold that defendant waived her right to be present during sentencing by failing to appear in court.

Facts

The State's evidence tended to show the following facts. On 15 January 2005, Stephanie Harmon was at the apartment of Arthur Hearn and Lisa Hamilton. At some point, defendant came to the apartment and went into the kitchen with Mr. Hearn and Ms. Hamilton. Ms. Harmon was in another part of the apartment and could not see or hear what took place in the kitchen.

Sometime after defendant left, Ms. Harmon found Mr. Hearn and Ms. Hamilton passed out in the bedroom. Ms. Harmon called 911 and administered CPR until the paramedics arrived. Mr. Hearn died at the hospital in what was later determined to be a

heroin overdose. Drug paraphernalia found in the apartment tested positive for heroin residue.

Police spoke with Ms. Harmon who admitted that she herself had sold drugs in the past and that she had used drugs with Ms. Hamilton earlier that day. After looking at photographs, Ms. Harmon identified defendant as the person who had met with Mr. Hearn and Ms. Hamilton in the kitchen.

On 18 January 2005, three days after the incident, Detective Timothy Roth of the Kannapolis Police Department interviewed defendant. After the interview, defendant signed a statement prepared by Detective Roth in which she admitted to selling heroin to Ms. Hamilton. Detective Roth did not arrest defendant at that time because he needed to conduct further investigation.

On 19 October 2006, a warrant for arrest was issued for defendant for possession of heroin with the intent to sell and deliver and for sale of heroin. Defendant was served with the warrant on 26 November 2009. On 14 December 2009, defendant was indicted for possession of heroin with the intent to sell and deliver and for sale of heroin. On 1 February 2010, defendant was also indicted for being a habitual felon.

On 5 November 2012, the State notified defense counsel that the trial was scheduled for the week of 18 November 2013, and

defense counsel prepared a subpoena for Ms. Hamilton to appear to testify. The subpoena was issued on 5 November 2013 and the Dare County Sheriff's Office served Ms. Hamilton personally on 16 November 2013, the Saturday before trial. The subpoena directed Ms. Hamilton to appear in court on 19 November 2013 at 9:30 a.m. At 8:55 a.m. on 19 November 2013, Ms. Hamilton left a message with defense counsel's office stating that she had been served but that she would not appear in court because it was too far to travel.

When Ms. Hamilton did not appear on 19 November 2013, defendant did not move for a continuance or for a show cause order. The trial proceeded, and the State rested on Wednesday afternoon, 20 November 2013. That evening, defense counsel spoke with Ms. Hamilton on the phone to remind her that she was required to testify the following day. Ms. Hamilton again informed defense counsel that she would not appear in court.

When court convened on Thursday morning, 21 November 2013, neither defendant nor Ms. Hamilton was present. Defense counsel informed the court that defendant had told him the previous evening that she was "going to go to Dare County to try to bring Ms. Hamilton down here or otherwise facilitate her traveling down here." However, defense counsel added that "I have not seen Ms. Moore this morning. I have not received any voice

messages; I've not even received any telephone calls prior to coming. . . . I cannot explain her non-appearance to the Court, Your Honor."

Defense counsel then moved for a continuance in order to obtain Ms. Hamilton's presence at trial. The State informed the court that Ms. Hamilton had made two statements to investigating officers soon after the incident that implicated defendant as the one who sold the heroin to her, but then recanted five years later. The State noted that if Ms. Hamilton testified that defendant did not sell her drugs, the State would impeach her with her prior inconsistent statements and her lengthy criminal history.

The trial court issued a show cause order for contempt for Ms. Hamilton's failure to appear in response to the subpoena, and an order for arrest of defendant pursuant to N.C. Gen. Stat. § 5A-16(b). Defense counsel then rested without presenting any evidence.

The jury returned verdicts of guilty of possession of heroin with intent to sell or deliver, selling or delivering heroin, and being a habitual felon. The trial court consolidated the cases for judgment and sentenced defendant to a presumptive-range term of 151 to 191 months imprisonment. Defendant timely appealed the judgment to this Court.

Defendant first argues that the trial court erred in denying her motion to continue. "Ordinarily, a motion to continue 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." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001).

Our Supreme Court has explained that "[c]ontinuanes should not be granted unless the reasons therefor are fully established." *State v. Rigsbee*, 285 N.C. 708, 711, 208 S.E.2d 656, 658 (1974). Therefore, a motion for a continuance should be supported by an affidavit showing the grounds for the continuance.

A continuance ought to be granted if there is an apparent probability that it will further the ends of justice. Consequently, a postponement is proper where there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts. But a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term.

State v. Gibson, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948).

The record in this case reveals that defendant subpoenaed Ms. Hamilton to appear in court at 9:30 a.m. on 19 November 2013. Ms. Hamilton left a message with defense counsel's office at 8:55 a.m. that morning stating that she had been served with

the subpoena but she did not plan to appear in court. Defendant did not move for a continuance at that time and did not take any other action to ensure Ms. Hamilton's compliance with the subpoena such as seeking a show cause order for contempt or a material witness order pursuant to N.C. Gen. Stat. § 15A-803(a) (2013). See *id.* ("[A] material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.").

The State rested the afternoon of 20 November 2013, and when the court reconvened the following morning, neither Ms. Hamilton nor defendant were present in court. Although defense counsel moved for a continuance, he did not argue that Ms. Hamilton was an essential witness to the defense or offer any information regarding what he believed Ms. Hamilton would say in any testimony. The only information regarding Ms. Hamilton's possible testimony was provided by the State, who informed the court that Ms. Hamilton had recanted her two statements to the police shortly after the crime that implicated defendant as the person who sold her heroin.

Given Ms. Hamilton's inconsistent statements and her refusal to testify under oath, it is unclear whether Ms. Hamilton's testimony would be helpful or harmful to defendant. Even assuming that she would testify that defendant did not sell her heroin, the State indicated that it planned to impeach her with her prior inconsistent statements and lengthy criminal record. Furthermore, the State presented evidence that defendant confessed to selling heroin to Ms. Hamilton, and her confession is corroborated by Ms. Harmon's testimony that defendant visited Mr. Hearn and Ms. Hamilton the day that Mr. Hearn died of a heroin overdose.

Given defendant's failure to take all possible steps to secure Ms. Hamilton's testimony, the uncertainty regarding the substance of her testimony or the probative value thereof, and the weight of the evidence against defendant, we hold that the trial court did not abuse its discretion in denying defendant's motion to continue. *Compare Rigsbee*, 285 N.C. at 711, 208 S.E.2d at 659 (holding trial court did not abuse discretion in denying motion for continuance until defense could locate witness where defendant did not inform court what witness would have testified despite having talked to witness three days before trial) *with State v. Davis*, 33 N.C. App. 736, 741, 236 S.E.2d 722, 725 (1977) (granting new trial where trial court

denied motion to continue to allow defendant to locate witness who would testify that defendant was with him at time of attempted robbery and defendant took all possible steps to secure the witness).

II

Defendant next argues that the trial court erred in sentencing defendant when she was not present in court. Because this issue involves an alleged error of law, we review it de novo.

"A defendant has a right to be present at the time the sentence was imposed." *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 9 (2005). This right "is a common law right, separate and apart from the constitutional or statutory right to be present at the trial." *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962). The right is based upon the principle that "[a]ll information coming to the notice of the court which tends to defame and condemn the defendant and to aggravate punishment should be brought to [the defendant's] attention before sentencing, and he should be given full opportunity to refute or explain it" and "to introduce any relevant facts in mitigation." *Id.* at 334, 335, 126 at 133.

In *State v. Stockton*, 13 N.C. App. 287, 292, 185 S.E.2d 459, 463 (1971), this Court held that the right to be present

when the sentence was imposed could not be waived by the defendant by his voluntary absence from trial. Subsequent to *Stockton*, however, this court enacted N.C. Gen. Stat. § 15A-1334(a) (2013) (emphasis added), which provides that "[u]nless the defendant waives the hearing, the court must hold a hearing on the sentence. Either the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing." Thus, the General Assembly acknowledged that the right to be present when a sentence is imposed may be waived by the defendant.

With respect to a defendant's right to be present at trial, this Court has held that "where the defendant voluntarily absents himself from the courtroom, and especially when he has fled the court, such conduct may be considered and construed as a waiver, and the presence of the defendant is not considered as essential to a valid trial and conviction." *State v. Turner*, 11 N.C. App. 670, 673, 182 S.E.2d 244, 245 (1971). We believe the same reasoning should apply to a defendant's voluntary absence from a sentencing hearing.

In this case, defendant failed to appear in court on the third day of trial after the State had rested its case. Although defendant had told defense counsel the prior evening that she was going to Dare County to try to find Ms. Hamilton,

she did not contact defense counsel to explain her absence in court. The trial court had no way of knowing whether defendant intended to return to court or intended to flee. Additionally, we note that the State did not present any evidence at the sentencing hearing in support of an aggravated sentence, and the trial court imposed a sentence in the presumptive range. The only evidence offered by the State at the sentencing hearing was a certified copy of defendant's criminal record maintained by the Division of Criminal Information ("DCI"), which is a valid method for proving defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(f) (2013). See *id.* ("A prior conviction shall be proved by any of the following methods: . . . [a]n original or copy of the court record of the prior conviction.") Defense counsel was provided a copy of the DCI record and concurred with the calculation of points based on the information contained therein. Under these circumstances, we hold that defendant waived her right to be present when the sentence was imposed. See *State v. Miller*, 142 N.C. App. 435, 446, 543 S.E.2d 201, 208 (2001) (trial court did not abuse its discretion in denying motion to continue sentencing hearing after defendant fled the courthouse).

No error.

Judges STROUD and BELL concur.

Report per Rule 30(e).