

[Cite as *State v. Benford*, 2009-Ohio-3474.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91949

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE BENFORD

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503164

BEFORE: Kilbane, J., Gallagher, P.J., and McMonagle, J.

RELEASED: July 16, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Andre Benford, appeals the trial court's denial of his motion for continuance in order to obtain new counsel. After a review of the record and pertinent law, we affirm.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} On December 11, 2007, a Cuyahoga County Grand Jury indicted appellant on a four-count indictment as follows: Counts One and Two, drug trafficking, to wit: crack cocaine, in an amount exceeding 100 grams; Count Three, possession of drugs, to wit: crack cocaine, in an amount exceeding 100 grams; and Count Four, possession of criminal tools. All four counts included a major drug offender specification pursuant to R.C. 2941.1410. The trial court determined appellant was indigent and appointed counsel.

{¶ 4} The trial was initially scheduled for March 5, 2008. At appellant's request, the trial was rescheduled for April 14, 2008. On April 14, 2008, the trial court was unavailable. On April 15, 2008, the trial court held a hearing with appellant and his counsel. Appellant requested the trial be continued so that he could obtain new counsel. Appellant specifically informed the court that he had contacted another attorney.

{¶ 5} The court was unable to substantiate appellant's claim that he had, in fact, retained new counsel. When reached by phone, a staff member at the

attorney's office appellant wanted to retain stated that no one there had ever heard of appellant before. When questioned as to why he was unhappy with his attorney, appellant stated that he felt he would have a better chance with someone recommended by his relatives. The trial court denied appellant's request for a continuance.

{¶ 6} On April 16, 2008, appellant appeared with newly retained counsel, John Frenden, Jr. The State amended Count One to omit "in an amount equal to or exceeding 100 grams," and replaced it with "in an amount equal to or exceeding 25 grams but less than 100 grams." This change removed the major drug offender specification. The remaining counts were dismissed.

{¶ 7} Appellant pled guilty to Count One and was sentenced to three years in prison. Appellant appeals, raising one assignment of error for our review:

"THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF HIS TRIAL FOR THE PURPOSE OF OBTAINING PRIVATELY RETAINED COUNSEL, BECAUSE IT DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶ 8} Appellant contends that the trial court erred in denying his motion for continuance on the day trial was scheduled in order to obtain privately retained counsel. For the following reasons, we disagree.

{¶ 9} The Sixth Amendment to the United States Constitution specifically provides that “in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.” While the Sixth Amendment does provide the right to counsel, this does not necessarily mean the defendant will have his choice of counsel. *State v. Nicholson*, Cuyahoga App. No. 89245, 2007-Ohio-6653, at ¶12, citing *Wheat v. United States* (1988), 486 U.S. 153, 159, 108 S.Ct. 1692, 1697.

{¶ 10} A trial court possesses considerable discretion in deciding whether a defendant’s motion to substitute counsel should be granted. *Nicholson* at ¶10. In order to conclude the trial court abused its discretion, there must be “more than an error of law or judgment, it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 11} When ruling on a motion for continuance, the trial court should consider “the length of the delay requested; whether other continuances have been granted; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the

circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.” *State v. Walton*, Cuyahoga App. No. 90140, 2008-Ohio-3550, at ¶ 36, citing *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078.

{¶ 12} A review of the record reveals the trial court considered the factors surrounding appellant’s request to continue, and we find that its denial of the request did not constitute an abuse of discretion.

{¶ 13} Appellant raised this issue with his assigned counsel for the first time on the day of trial. When asked why appellant was unhappy with his assigned counsel, he stated that he did not have sufficient time with counsel to prepare his case, and further, “I feel like I have a—I can’t get the word out, what you say, a better, a better chance with somebody my relatives know.” (Tr. 8.) Appellant’s court appointed counsel stated that he was prepared to proceed to trial. (Tr.7.)

{¶ 14} Appellant then informed the trial court that he had previously been in contact with the office of attorney Gary Seewald (Seewald) and that he was planning to retain him later that week. (Tr. 6.) The court attempted to verify appellant’s claim, however, no one at Seewald’s office had ever heard of appellant. (Tr. 8.)

{¶ 15} Several months had passed between appellant’s indictment and trial date. The trial date had already been rescheduled once before at the appellant’s

request, however, he never attempted to secure new counsel until the day of trial.

{¶ 16} Although appellant informed the trial judge that he believed his court-appointed counsel was eager to have him enter a plea and not try the case, counsel specifically stated that he was prepared to go forward. Counsel may have encouraged appellant to accept a plea because of the overwhelming evidence against him. Two codefendants had recently entered into pleas with the State whereby they would testify against the appellant. Further, if appellant had accepted the plea, he would have been sentenced to four years of imprisonment, as opposed to facing a possible 21-year sentence.

{¶ 17} On April 15, 2008, the State offered appellant a plea bargain whereby he would plead guilty to Count One without the major drug offender specification. All remaining counts would be dismissed, and appellant would be sentenced to four years imprisonment. However, appellant declined and the court proceeded with the hearing.

{¶ 18} After hearing arguments from appellant as to why his case should be continued, the court determined that a continuance was not warranted for the following reasons: appellant had only requested it on the day of trial; a prior continuance had already been granted; he could not point to any specific deficiencies with counsel; and he did not provide the trial court with the names of the witnesses that he requested his attorney subpoena. Further, appellant

provided no specific information as to how these failures impacted his case. There is no indication from the record that appellant suffered any harm or prejudice by the trial court's denial to continue the trial. The court then indicated to appellant that the trial would go forward on the following day.

{¶ 19} On April 16, 2008, appellant was unable to retain Seewald; however, he was able to go forward with his newly retained counsel, attorney John Frenden, Jr. (Frenden). Appellant then entered the same plea bargain, but the agreed sentence was now reduced to three years instead of the four years originally offered. When appellant appeared with Frenden, he never requested a continuance. Appellant specifically informed the court that he was satisfied with Frenden as his counsel. (Tr. 17.) Even though the record reflects that the trial court denied appellant's second request for a continuance, the matter was in fact postponed until the next day. Appellant then appeared with his new counsel, entered a plea, and received a sentence of one year less than the previously agreed four-year sentence. The record is clear that the defendant only benefitted from the denial of the continuance he requested.

{¶ 20} The mere fact that appellant would have preferred counsel recommended by his family did not entitle him to such. Appellant had ample time to retain the counsel of his choice, however, he failed to do so until the scheduled day of trial. Appellant received a three-year sentence when he was facing the possibility of 21 years in prison. Appellant has demonstrated no

harm or prejudice by the trial court's refusal to grant a continuance. In fact, the appellant's sentence was reduced by one year as a result of the denial of his request for a continuance. Based on the evidence, it was not unreasonable for the trial court to conclude that appellant was attempting to delay the proceedings. From the record, it appears as if the denial was only a benefit to appellant, not a harm or prejudice.

{¶ 21} We conclude that the trial court did not abuse its discretion in denying appellant's request for a continuance. Consequently, appellant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR