

[Cite as *State v. Dixon*, 2010-Ohio-3974.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

KIMBERLY C. DIXON

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 10 CA 2

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Juvenile Juvenile Division, Case No.
E2009-026

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 23, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Appellant Kimberly C. Dixon appeals her conviction and sentence on one misdemeanor count of Contributing to the Unruliness of a Minor.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} Appellant Kimberly C. Dixon was charged in a Complaint filed April 14, 2009, with one misdemeanor count of Contributing to the Unruliness of a Minor, regarding truancy issues concerning her child.

{¶4} This matter came forward for a bench trial on October 28, 2009.

{¶5} At about the same time, the minor child, who was the subject of this case was being arraigned on an unruly charge before a magistrate in a neighboring court room. The child's case was delayed because her attorney could not be present and she became emotional in the hallway. Due to the commotion with the child, a member of the court staff asked the family members in the hall to leave.

{¶6} After the State rested in Appellant's case, Appellant called Lillian Wolfe as a witness. (T. at 42). Ms. Wolfe is Appellant's mother and the grandmother of the truant juvenile. (T. at 78-79). When Ms. Wolfe was called, court personnel advised the court that there had been "an emotion¹ with the granddaughter and Lillian has left." Id. Appellant had not subpoenaed Ms. Wolfe to testify. (T. at 42).

{¶7} At the conclusion of the trial, the lower court twice inquired of the parties if there was "(a)nything further?" (T. at 67, 69). Counsel for Appellant responded in both instances "No, Your Honor." Id.

¹ It is possible that the court staffer may have said "commotion" instead of "emotion".

{¶8} At the conclusion of the trial, the court found Appellant guilty.

{¶9} A sentencing hearing was held on December 3, 2009. By Judgment Entry filed January 5, 2010, the trial court sentenced Appellant to ninety (90) days incarceration, with the jail term suspended and Appellant placed on community control for a period of two (2) years.

{¶10} Appellant filed an appeal and this matter is now before this Court for consideration. Appellant's sentence was stayed pending appeal.

{¶11} Appellant's sole Assignment of error is as follows:

ASSIGNMENT OF ERROR

{¶12} "THE DEFENDANT WAS DENIED A FAIR TRIAL AND THE ABILITY TO PRESENT EVIDENCE IN HER FAVOR AS A RESULT OF ACTIONS BY COURT PERSONEL [SIC] IN EXCUSING A WITNESS FROM THE DEFENSE WITHOUT THE CONSENT OF THE DEFENSE."

I.

{¶13} Appellant claims that she was denied a fair trial because she did not have the opportunity to present the testimony of Lillian Wolfe. We disagree.

{¶14} Upon review, we find that upon learning that Ms. Wolfe was no longer present in the hallway outside of the courtroom, Appellant did not ask for a recess to attempt to contact Ms. Wolfe, or a continuance of the case to allow her to compel her testimony. We further find that Appellant failed to proffer what Ms. Wolfe's purported testimony would have been. Instead, Appellant proceeded with her case. It is therefore unclear what action Appellant believes the trial court should have taken in this matter.

{¶15} If Appellant is arguing that the trial court should have ordered a continuance of the trial sua sponte, the grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078. As the United States Supreme Court stated in *Unger v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921: “There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.”

{¶16} In *State v. Clements*, the Second District Court of Appeals held that a trial court's refusal to grant a continuance to a defendant after a subpoenaed defense witness failed to appear for trial did not prejudice the defendant where the defendant failed to reveal what the nature of the witness' testimony would have been, show whether it would have been relevant and material to the defendant's defense, or give the trial court any assurance that the witness could be located within a reasonable period of time. *State v. Clements* (1994), 98 Ohio App.3d 797, 800, 49 N.E.2d 912.

{¶17} In the case sub judice, Appellant did not even request a recess, let alone a continuance. Further, like the defendant in the *Clements* case, Appellant failed to provide the trial court with any indication of the nature or relevancy of Ms. Wolfe's testimony or the amount of time that may be necessary to contact her, and unlike *Clements*, the witness in the case was not even under subpoena.

{¶18} Again, Appellant did not make any request to the trial court in this case. Based upon the record before this Court, we find that Appellant has failed to show prejudice, and we cannot say that the trial court abused its discretion when it proceeded with the trial in this matter.

{¶19} Based upon the above, the sole assignment of error is denied.

{¶20} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, Licking County, Ohio is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

JUDGES

