

AFFIRMED; Opinion Filed September 28, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-01143-CR

No. 05-16-01153-CR

No. 05-16-01154-CR

No. 05-16-01155-CR

No. 05-16-01156-CR

BRANDON KEITH SKILLMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 380th Judicial District Court
Collin County, Texas**

Trial Court Cause Nos. 380-81221-01, 380-80792-05, 380-80793-02, 380-80794-02, and 380-82037-02

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Myers

Appellant Brandon Keith Skillman brings this appeal from his convictions for aggravated sexual assault of a child, indecency with a child by contact, indecency with a child by exposure, and sexual assault of a child. In two issues, he argues the trial court erred by denying his first motion for continuance and denying his motion for new trial without holding a hearing. We affirm.

BACKGROUND AND PROCEDURAL HISTORY

Appellant entered a non-negotiated plea of guilty to two aggravated sexual assault of a child offenses (cause numbers 380-82037-02 & 380-80792-02, appellate cause numbers 05-

16-01153-CR & 05-16-01156-CR), indecency with a child by contact (cause number 380-80793-02, appellate cause number 05-16-01154-CR), indecency with a child by exposure (cause number 380-81221-01, appellate cause number 05-16-01143-CR), and sexual assault of a child (cause number 380-80794-02, appellate cause number 05-16-01155-CR).

The day before the sentencing hearing, which was held on March 27, 2003, appellant's trial counsel filed a first motion for continuance requesting the case be continued so that counsel could secure an expert witness. At the sentencing hearing, counsel explained that he needed more time to have appellant evaluated by a psychiatrist or sex therapist. The trial court responded that it was going to conduct the hearing, and if it needed to hear more evidence before determining appellant's sentence, it would grant the continuance. After hearing testimony from one of the victim's mothers, appellant's father, and appellant, the trial court sentenced appellant to seventy-five years' confinement for the two aggravated sexual of a child offenses, twenty years' confinement for the indecency with a child by contact and the sexual assault offenses, and ten years' confinement for the indecency with a child by exposure offense. Appellant filed a motion for new trial, arguing there was new evidence from a psychiatrist or sex therapist and that trial counsel was ineffective for failing to secure the psychiatrist or sex therapist to testify at the sentencing hearing. The motion was overruled by operation of law.

Appellant appealed his convictions. However, appellant, who was represented by counsel, did not file a brief. On January 13, 2004, we affirmed the convictions without briefing. *See Skillman v. State*, Nos. 05-03-01031-CR, 05-03-01032-CR, 05-03-01033-CR, 05-03-01034-CR, & 05-03-01035-CR, 2004 WL 51925 (Tex. App.—Dallas Jan. 13, 2004, no pet.) (mem. op., not designated for publication) (per curiam).

Appellant then filed an application for writ of habeas corpus alleging, among other things, that his appellate counsel was ineffective for abandoning the appeals in these cases. On

July 27, 2016, the Texas Court of Criminal Appeals granted appellant an out-of-time appeal, on the basis that he was denied his right to a meaningful appeal. *See Ex parte Skillman*, Nos. WR–85,014–01, WR–85,014–02, WR–85,014–03, WR–85,014–04, & WR–85,014–05, 2016 WL 4013840 (Tex. Crim. App. July 27, 2016) (not designated for publication). The court ordered that should appellant wish to prosecute an appeal, he must take affirmative steps to file written notices of appeal in the trial court within 30 days after the court’s mandate issues. *See id.* Appellant has done so.

DISCUSSION

In his first issue, appellant contends the trial court reversibly erred by denying his first motion for continuance requesting more time to secure an expert witness.

We review a trial court’s ruling on a motion for continuance for an abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). To establish an abuse of discretion, the appellant must show that he was actually prejudiced by the denial. *Id.*

Article 29.06 of the Texas Code of Criminal Procedure requires a first motion for continuance on the account of the absence of a witness to state (1) the name of the witness and his residence, if known, or that his residence is not known; (2) the diligence which has been used to procure his attendance; (3) the facts which are expected to be proved by the witness; (4) the witness is not absent by the procurement or consent of the defendant; (4) the motion is not made for delay; and (5) there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. TEX. CODE CRIM. PROC. ANN. art. 29.06. A motion for continuance must show on its face the materiality of the absent testimony. *See Harrison v. State*, 187 S.W.3d 429, 434 (Tex. Crim. App. 2005). Mere conclusions and general averments are not sufficient for the trial court to determine the materiality of the absent testimony. *See id.*

Appellant's motion for continuance filed in these cases stated as follows:

[Appellant's] Attorney has failed to secure the advice, counsel and evaluation of a psychologist and has also failed to secure an evaluation by one qualified to examine [appellant]'s propensity for sexual conduct and to determine the appropriate course of therapy and counseling necessary for [appellant]'s recovery. Both such individuals are crucial to the evaluation by the Court in setting an appropriate sentence for [appellant].

This Motion is not made for the purpose of delay, but so that justice may be served.

This is the sum total of the stated justification for the continuance. But such a bare assertion of the need for an expert did not allege any actions taken to procure the witness, why he was unable to request expert assistance sooner, or the facts he expected the witness to prove. Appellant acknowledges that the lack of diligence on the part of trial counsel in securing a psychologist or a licensed sex offender treatment provider makes it difficult for him to prevail on this issue, and we agree. We also note that appellant filed his first motion for continuance on the day before the sentencing hearing. The requirement that a motion for continuance based on the absence of a witness must state "the diligence which has been used to procure [a witness's] attendance" has been interpreted to mean not only diligence in procuring the presence of the witness, but diligence as reflected in the timeliness with which the motion for continuance was presented. *See Dewberry v. State*, 4 S.W.3d 735, 756 (Tex. Crim. App. 1999); *Stevenson v. State*, No. 05–15–01348–CR, 2017 WL 474464, at *4 (Tex. App.—Dallas Feb. 6, 2017, no pet.) (mem. op., not designated for publication).

We conclude, therefore, that the trial court did not abuse its discretion by denying appellant's first motion for continuance. *See Gonzales v. State*, 304 S.W.3d 838, 844 (Tex. Crim. App. 2010) (trial court did not abuse its discretion by denying a motion for continuance where defendant did not attempt to explain why he could not have requested an expert prior to first day of trial); *Nwosoucha v. State*, 325 S.W.3d 816, 826–87 (Tex. App.—Houston [14th

Dist.] Nov. 4, 2010, pet. ref'd) (trial court did not abuse its discretion by denying motion for continuance where defendant did not allege facts she expected expert to prove). We overrule appellant's first issue.

In his second issue, appellant contends the trial court erred by denying his motions for new trial without holding a hearing. Appellant argues the trial court abused its discretion by denying his motions for new trial without conducting a hearing because the motions alleged new evidence had been discovered, and the trial court could not rule on the motions without holding a hearing.

The purposes of a new trial hearing are (1) to determine whether the case should be retried, or (2) to complete the record for presenting issues on appeal. *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009). Such a hearing is not an absolute right. *Id.* But a trial court abuses its discretion by failing to hold a hearing if the motion and accompanying affidavits (1) raised matters that are not determinable from the record, and (2) establish reasonable grounds showing that the defendant could potentially be entitled to relief. *Id.* A motion for new trial must be supported by an affidavit specifically setting out the factual basis for the claim. *Id.*

In this case, however, applicant did not support his motions for new trial with any affidavit setting out the factual basis for his claims. Appellant references affidavits that were filed as part of his application for writ of habeas corpus in support of his claim that the trial court abused its discretion by not conducting a hearing, but these affidavits were not part of appellant's motions for new trial and cannot, therefore, be considered by this Court. *See, e.g., Mallet v. State*, 9 S.W.3d 856, 865 (Tex. App.—Fort Worth 2000, no pet.) (neither trial court nor court of appeals could consider affidavits not properly before the trial court at the time motion for new trial was filed). Because appellant did not support his motions for new trial with an affidavit or affidavits specifically setting out the factual basis for his claims, the trial court did not abuse its

discretion by not conducting a hearing before the motions were overruled by operation of law. See *Hobbs*, 298 S.W.3d at 199; *Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994); *Mallet*, 9 S.W.3d at 867–68. We overrule appellant’s second issue.

We affirm the trial court’s judgments.

/Lana Myers/
LANA MYERS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BRANDON KEITH SKILLMAN, Appellant

No. 05-16-01143-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District
Court, Collin County, Texas

Trial Court Cause No. 380-81221-01.

Opinion delivered by Justice Myers. Justices
Francis and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 28th day of September, 2017.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BRANDON KEITH SKILLMAN, Appellant

No. 05-16-01153-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District
Court, Collin County, Texas

Trial Court Cause No. 380-80792-02.

Opinion delivered by Justice Myers. Justices
Francis and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 28th day of September, 2017.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BRANDON KEITH SKILLMAN, Appellant

No. 05-16-01154-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District
Court, Collin County, Texas

Trial Court Cause No. 380-80793-02.

Opinion delivered by Justice Myers. Justices
Francis and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 28th day of September, 2017.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BRANDON KEITH SKILLMAN, Appellant

No. 05-16-01155-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District
Court, Collin County, Texas

Trial Court Cause No. 380-80794-02.

Opinion delivered by Justice Myers. Justices
Francis and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 28th day of September, 2017.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BRANDON KEITH SKILLMAN, Appellant

No. 05-16-01156-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District
Court, Collin County, Texas

Trial Court Cause No. 380-82037-02.

Opinion delivered by Justice Myers. Justices
Francis and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 28th day of September, 2017.