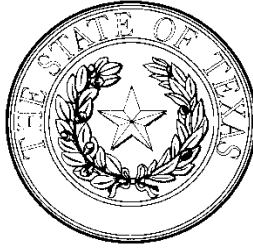


Opinion issued July 22, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00862-CR

KASSI SATRECE DONAHOE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 278th District Court
Grimes County, Texas
Trial Court Case No. 15575

MEMORANDUM OPINION

Pursuant to a plea agreement, appellant, Kassi Satrece Donahoe, pleaded guilty to the state jail felony offense of endangering a child. *See* TEX. PEN. CODE ANN. § 22.041(b), (c), (d) (1) (Vernon Supp. 2009). The trial court deferred adjudication of appellant's guilt and placed her on community supervision for three

years. Based on the State's later-filed motion to adjudicate, the trial court revoked appellant's community supervision, found appellant guilty, and sentenced her to one year in state jail. In one issue, appellant contends that the trial court abused its discretion by denying her motion for continuance.

We affirm.

Background

Appellant was charged by indictment with the offenses of manslaughter, endangering a child, and negligent homicide for the 2003 drowning death of her less than two-year-old daughter. The indictment alleged that appellant had left her daughter unattended in a bathtub resulting in the child's death. Appellant entered into a plea agreement with the State whereby she pleaded guilty to the state jail felony offense of endangering a child. Pursuant to the State's recommended punishment, on October 14, 2005, appellant was placed on deferred adjudication community supervision for three years.

On March 7, 2006, the State filed a "Motion to Adjudicate Guilt and Revoke community supervision." The State asserted that appellant violated the terms and conditions of her community supervision (1) by committing the offense of theft on December 15, 2005, (2) by failing to pay court-ordered fees, and (3) by failing to provide proof that she had undergone a psychological evaluation.

The trial court conducted a hearing on the motion. The court did not adjudicate appellant's guilt, but did permit appellant to transfer oversight of her community supervision to Tarrant County, where she was residing.

On February 1, 2007, the State filed a second motion to adjudicate appellant's guilt and revoke her community supervision. The State amended the motion on September 5, 2007. The State contended that appellant violated the conditions of her community supervision (1) by failing to report to her supervision officer for 11 months from October 2006 through August 2007; (2) by failing to provide proof that she had submitted to a psychological evaluation; and (3) by failing to pay required costs and fees. The State also cited the 2005 theft offense as a ground for adjudication. The trial court set the motion to be heard on September 17, 2007.

On September 5, 2007, Stephen Gustitis filed a notice with the trial court stating that he was the attorney representing appellant. On September 13, 2007, Gustitis filed a motion for continuance on appellant's behalf. Gustitis requested that the trial court continue the hearing on the motion to adjudicate. He explained that he had "only learned of the September 17, 2007 setting this week (September 11, 2007)." The trial court denied the motion for continuance by written order the same day that it was filed.

The trial court conducted the hearing on the motion to adjudicate on September 17, 2007. The State offered the testimony of probation officer Shakaria Maxey, who supervised appellant's community supervision. Maxey's testimony addressed the violations of appellant's community supervision as alleged in the State's motion to adjudicate.

Maxey testified that appellant had failed to report to appellant's supervision officer from October 2006 through July 2007, as required under the conditions of her community supervision. Maxey testified that appellant had satisfied the other two conditions of community supervision cited by the State as grounds for adjudication. Specifically, since the motion to adjudicate was filed, appellant had paid certain required fees and costs and had undergone a psychological evaluation. Maxey testified that appellant had completed the required psychological evaluation the week before the hearing. Maxey further testified that a report of the psychological evaluation had not yet been completed because the evaluator needed to obtain appellant's psychiatric medical records.

At the end of the hearing, the trial court granted the State's motion by revoking appellant's community supervision and finding her guilty of endangerment of a child. The trial court stated on the record that it had found that appellant was an "absconder"; that is, that appellant had not complied with her

community supervision conditions by failing to report to her supervising probation officer.

The trial court then asked appellant if she had evidence to offer regarding punishment. Appellant's counsel informed the court that his client had no punishment evidence but that he would offer argument regarding sentencing.

In his argument, counsel requested the trial court to wait to decide punishment until the court had received appellant's psychological evaluation. Counsel argued that the court must have considered the evaluation to be important because it had made the evaluation a condition of appellant's community supervision. Counsel also argued that the evaluation would provide the trial court with "a comprehensive view" of the case and give the court "deeper insight" into appellant's "situation." Counsel had earlier alluded that appellant may have psychological issues as indicated by Maxey's testimony that appellant was undergoing a "sex change operation." Counsel asserted that the report would assist the court in understanding why appellant did not comply with the reporting condition of community supervision.

The trial court implicitly denied appellant's oral request to continue sentencing by sentencing appellant to one year in state jail.

This appeal followed. In one issue, appellant asserts that “the trial court abuse[d] its discretion and den[ied] Appellant due process of law by failing to grant the Motion for Continuance filed by trial counsel.”

Motion for Continuance

We review a trial court’s ruling on a motion for a continuance for abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007).

From her briefing, it is not clear whether appellant intends to challenge the trial court’s September 13, 2007 denial of her written motion for continuance or her oral motion for continuance made during the sentencing phase at the motion to adjudicate hearing. Although she references the filing of her motion for continuance, appellant’s argument on appeal centers on the trial court’s implicit denial of her request to continue sentencing until the written psychological evaluation had been completed and provided to the court. We will discuss each motion in turn.

The record shows that, in her written motion for continuance, appellant did not request the trial court to continue the motion to adjudicate hearing on the ground that the written psychological evaluation had not been completed. Instead, appellant sought a continuance on the ground that her counsel had not received timely notice of the hearing. Appellant does not raise the timeliness argument on appeal. In short, appellant’s argument on appeal does not match the grounds

asserted in her written motion for continuance. Hence, appellant has not shown that the trial court abused its discretion by denying her written motion for continuance, which was filed and denied several days before the adjudication hearing.

With respect to the oral motion for continuance made during the sentencing phase of the hearing, appellant points out that she was entitled to offer evidence in mitigation of punishment. She contends that, by denying her oral motion for continuance to allow time for the completion of the evaluation, the trial court denied her right to due process.

Contrary to appellant's contention, the trial court did not deny appellant's right to present evidence during the punishment phase. The record shows that the trial court asked appellant if she had evidence to present. Appellant stated that she had no evidence to present. Instead, appellant orally requested the trial court to continue sentencing until it had reviewed the psychological evaluation.

The Court of Criminal Appeals has made clear that an oral motion for continuance, such as that made by appellant, preserves nothing for review. *See Anderson v. State*, 301 S.W.3d 276, 279 (Tex. Crim. App. 2009); *see also Dewberry v. State*, 4 S.W.3d 735, 755 (Tex. Crim. App. 1999). The court recently clarified that there is no "equitable" or "due process" exception to this rule. *See*

Lizcano v. State, No. AP-75879, 2010 WL 1817772, at *22 (Tex. Crim. App. May 5, 2010).

Furthermore, when a continuance is sought after trial begins, the movant must establish that the delay is needed because of “some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated” and which caused her surprise. *See* TEX. CODE CRIM. PROC. ANN. art. 29.13 (Vernon 2006). Here, appellant was not surprised by the psychological evaluation. She was aware of the evaluation and could have either subpoenaed the evaluator to testify at the hearing or included her request for a continuance based on the lack of the psychological evaluation in a written motion for continuance. The record does not show that appellant did either.

Lastly, to establish an abuse of discretion, appellant must show that she was prejudiced by the denial of her motion for continuance. *See Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996). Appellant has not shown, beyond her bare assertions, that the trial court’s denial of her oral request for a continuance prejudiced her.

We conclude that appellant has not shown that the trial court’s denial of her motions for continuance was an abuse of discretion. We overrule appellant’s sole issue.

Conclusion

We affirm the judgment of the trial court.

Laura C. Higley
Justice

Panel consists of Justices Keyes, Hanks, and Higley.

Do not publish. TEX. R. APP. P. 47.2(b).