

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-15-00666-CV**

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**M. F., Appellant**

**v.**

**The State of Texas, Appellee**

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**FROM PROBATE COURT NO. 1 OF TRAVIS COUNTY  
NO. C-1-MH-15-001853, HONORABLE GUY S. HERMAN, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Following a bench trial, the probate court found by clear and convincing evidence that appellant M.F. was mentally ill and issued an order committing M.F. to temporary inpatient mental health services for a period not to exceed 90 days. *See* Tex. Health & Safety Code § 574.034. On appeal, M.F. contends that the probate court abused its discretion when it denied M.F.'s oral motions for continuance of the commitment hearing based on the unavailability of M.F.'s godfather to appear at the hearing as counsel for M.F. or, alternatively, as a witness for M.F. We will affirm.

**BACKGROUND**

M.F. was detained on September 15, 2015, pursuant to an application for court-ordered temporary mental health services. A final hearing was scheduled for September 23, 2015, and M.F. was notified that he would be represented by court-appointed counsel, Stanley Kerr,

and that he could retain other counsel at his own expense. The State listed Edward Ciccone (M.F.'s godfather) and three police officers as its witnesses.

On September 23, 2015, immediately before the commitment hearing, Kerr orally moved for a continuance on the ground that Ciccone, who was “an accomplished attorney in McAllen,” wanted to represent M.F. but was unavailable on the hearing date because of previously scheduled depositions. Ciccone had not filed an appearance or a sworn affidavit in the commitment proceeding. The State objected to the motion for continuance on the ground that Ciccone was a witness for the State who had testified against M.F. in the probable cause hearing and had been an advocate of the commitment “from the get go.” The State also objected on the ground that M.F. did not file a written motion for continuance. The court denied the motion. Kerr then moved for a continuance based on the unavailability of Ciccone as a witness, stating that Ciccone had indicated to Kerr that he would like to see his godson placed in an outpatient situation. The State again objected, arguing that Ciccone had every opportunity to be at the hearing and to provide testimony about his preference regarding M.F.'s commitment. The court denied the second motion for continuance.

The probate court proceeded with the commitment hearing, after which it signed an order for temporary inpatient mental health services for M.F. M.F.'s counsel filed a motion for new trial arguing that the probate court's denial of M.F.'s motions for continuance caused M.F. to be deprived of his right to “private” retained counsel and caused him to be unable to present the testimony of a “major” witness. The court denied the motion for new trial. This appeal followed.

In one issue on appeal, M.F. contends that the probate court abused its discretion when it denied M.F.'s motions for continuance.

## DISCUSSION

“A decision on a motion for continuance lies within the discretion of the trial court, and an appellate court will not disturb a trial court’s denial of a motion for continuance unless the record reveals a clear abuse of discretion.” *Thomas v. Graham Mortg. Corp.*, 408 S.W.3d 581, 595 (Tex. App.—Austin 2013, pet. denied) (citing *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002)). An abuse of discretion occurs when a trial court’s ruling is arbitrary and unreasonable, made without regard for guiding legal principles or supporting evidence. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). Similarly, a trial court abuses its discretion when it fails to analyze or apply the law correctly. *In re Sw. Bell Tel. Co.*, 226 S.W.3d 400, 403 (Tex. 2007). In exercising its discretion to deny a continuance, the trial court may take into account the entire procedural history of the case. *Ashraf v. Ashraf*, No. 03-11-00467-CV, 2012 WL 1948347, at \*6 (Tex. App.—Austin May 24, 2012, no pet.) (mem. op.).

M.F.’s motions for continuance were made orally and were not accompanied by sworn affidavits. “A motion for continuance that is not in writing or compliant with [Tex. R. Civ. P.] 251 does not preserve error.” *Robinson v. Lubbering*, No. 03-09-00655-CV, 2011 WL 749197, at \*9 (Tex. App.—Austin Mar. 2, 2011, no pet.) (mem. op.); *see also Zurita v. SVH-1 Partners, Ltd.*, No. 03-10-00650-CV, 2011 WL 6118573, at \*11 (Tex. App.—Austin Dec. 8, 2011, pet. denied) (mem. op.) (because oral motion for continuance at trial did not comply with requirements of Texas Rule of Civil Procedure 252, trial court did not abuse its discretion in denying continuance). Additionally, “when movants fail to comply with Tex. R. Civ. P. 251’s requirement that the motion for continuance be ‘supported by affidavit,’ [the appellate court will] presume that the trial court did not abuse its discretion in denying the motion.” *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986).

Because M.F.'s motions for continuance were not made in writing and were not supported by affidavits, we cannot conclude that the trial court abused its discretion by denying the requested continuance.

Even had M.F.'s motions for continuance been submitted in writing and in compliance with rules 251 and 252, denying the motions would not have constituted an abuse of discretion. "In general, absence of counsel is not good cause for a continuance." *Rehabilitation Facility at Austin, Inc. v. Cooper*, 962 S.W.2d 151, 155 (Tex. App.—Austin 1998, no pet.) (denying continuance was not abuse of discretion when party requesting continuance due to absence of counsel was adequately represented by another attorney who had been associated with case). Kerr, the attorney who had handled every aspect of M.F.'s case prior to the commitment hearing, was available and ready to represent M.F. at the hearing. Moreover, Ciccone had never filed an appearance for M.F. in the commitment proceeding. Because M.F. had adequate counsel available at the hearing, it was not an abuse of discretion to deny M.F.'s first motion for continuance based on Ciccone's unavailability to represent M.F. at the commitment hearing.

M.F. has also failed to show that the probate court abused its discretion by denying the second motion for continuance based on Ciccone's unavailability as a witness at the hearing. When the basis for a motion for continuance is "want of testimony," the party seeking a continuance must show that the testimony is material and that he has used due diligence to secure it. Tex. R. Civ. P. 252; *Fountain v. Burklund*, No. 03-01-00380-CV, 2001 WL 1584011, at \*6 (Tex. App.—Austin Dec. 13, 2001, pet. denied) (not designated for publication); *see also State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988) (failure of moving party to diligently utilize rules of civil

procedure will not authorize granting of continuance). A party moving for a continuance due to the unavailability of a witness must demonstrate that he has used due diligence to procure the witness's testimony. *See Fountain*, 2001 WL 1584011, at \*6 (failure to reserve witness and to deliver subpoena to witness demonstrates lack of due diligence). Texas Rule of Civil Procedure 252 "implies that sworn testimony may be considered an adequate substitute for a witness's personal appearance in a civil trial." *In re Commitment of Winkle*, 434 S.W.3d 300, 306 (Tex. App.—Beaumont 2014, pet. denied). In the present case, the record contains no indication of any attempt to serve a subpoena on Ciccone, to take his deposition, or to obtain a sworn affidavit from him to secure his testimony. Therefore, denying M.F.'s motion for continuance was not an abuse of discretion because "due diligence was not demonstrated by the moving party." *See Fountain*, 2001 WL 1584011, at \*6.

Additionally, M.F. was required to show that Ciccone's testimony would have been material to the outcome of the hearing. Even when there is a reasonable excuse for the witness's absence, no reversal is required if no prejudice is shown. *Green v. State*, 589 S.W.2d 160, 163 (Tex. Civ. App.—Tyler 1979, no writ); *Erback v. Donald*, 170 S.W.2d 289, 291-92 (Tex. Civ. App.—Fort Worth 1943, writ ref'd w.o.m.); *see also* Tex. R. App. P. 44.1(a)(1) ("No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of [] probably caused the rendition of an improper judgment."). When the movant has not explained how the testimony that the movant wishes to elicit from an unavailable witness is material or what is expected to be proved by the testimony, the denial of a motion for continuance is not an abuse of discretion. *Roper v. CitiMortgage, Inc.*, No. 03-11-00887-CV, 2013 WL 6465637, at \*15 (Tex. App.—Austin Nov. 27, 2013, pet. denied) (mem. op.). In this case,

M.F.'s counsel did not explain how Ciccone's anticipated testimony that he preferred that M.F. be treated in an outpatient setting would have changed the probate court's decision, especially given Ciccone's prior testimony in support of a commitment in the probable cause hearing in the same matter. It is unlikely that Ciccone's anticipated testimony as to his preferred mode of treatment for his godson would have led to a different result when the court had already reviewed the examination certifications of three psychiatrists who unanimously recommended inpatient treatment, and had heard extensive testimony from a psychiatrist who had examined M.F. Because M.F. failed to demonstrate that the omission of Ciccone's testimony prejudiced M.F., it was not an abuse of discretion to deny the continuance.

We overrule M.F.'s sole appellate issue.

### **CONCLUSION**

Having overruled M.F.'s sole appellate issue, we affirm the probate court's order for temporary inpatient mental health services.

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Scott K. Field, Judge

Before Justices Puryear, Goodwin, and Field

Affirmed

Filed: July 7, 2016