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2015 IL App (3d) 130502-U

Order filed July 6, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0502
SERGIO SHAKURR HERRON,)	Circuit No. 12-CF-593
Defendant-Appellant.)	Honorable Stephen A. Kouri, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice McDade and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion by denying defendant's motion for a continuance.

¶ 2 A jury found defendant, Sergio Shakurr Herron, guilty by accountability of armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)).¹ Defendant appeals, contending the trial court abused its discretion in denying his request for a continuance. We reverse and remand for further proceedings.

¶ 3 **FACTS**

¶ 4 On June 19, 2012, defendant was charged by indictment with armed robbery by accountability (720 ILCS 5/18-2(a)(2) (West 2012)). Codefendant, Robert Nunn, was charged by indictment with, *inter alia*, a charge of armed robbery during which Nunn personally discharged a firearm (720 ILCS 5/18-2(a)(4) (West 2012)). The charges arise from an alleged robbery of Brandon Mitchell and Kelin Drummond by defendant and Nunn. Drummond was shot and killed by Nunn during the incident.

¶ 5 Shortly after the indictment, private counsel entered an appearance on behalf of defendant. The matter was set for pretrial hearing on September 21, 2012, and jury trial on October 1, 2012. At the pretrial hearing, defendant was granted a continuance, a scheduling conference was set to October 26, 2012, and the jury trial was reset to November 5, 2012. At the October 26 scheduling conference, defendant asked to continue the matter to November 5, 2012, to have a hearing on Nunn's motion to sever defendant and Nunn's trials. At the November 5 hearing, Nunn's motion to sever was granted and the scheduling conference and trial were continued to December 28, 2012, and January 7, 2013, respectively. Nunn's trial was held December 18, 2012.

¹ The jury deadlocked on two charges of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2012)) and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2012)). These charges are not relevant to the instant appeal.

¶ 6 At the next scheduling conference, defendant presented a motion for a change of venue. The court set the motion for hearing on the day of defendant's trial. The trial court took defendant's motion for a change of venue under advisement. The parties agreed to set the matter for pretrial on March 22, 2013, and for jury trial on April 8, 2013. On January 14, 2013, defendant's motion for change of venue was denied.

¶ 7 At the scheduling conference on March 22, 2013, defense counsel made an oral request for a continuance for additional time to review the transcripts from Nunn's trial. The trial court questioned the need for additional time when the transcripts had already been prepared and were ready to be picked up by defense counsel. The trial court stated it was frustrated by defense counsel's multiple continuances which "clogg[ed]" up the court's trial docket and indicated that it would still like to proceed on the previously scheduled date. However, the court later agreed to grant an extension to any day except May 20.

¶ 8 At first, the court agreed to the State's suggestion to reschedule to May 10, 2012. In response, defense counsel asked to have the trial set for May 21. Then, the court offered June 17. However, defense counsel responded that he was, "ready now." As a result, the previously scheduled trial date was not changed.

¶ 9 On the day of the trial, defense counsel made an oral request for a continuance because, based on his review of the transcripts from Nunn's trial, he needed to obtain more information in order to lay the foundation for the introduction of certain social media exchanges between Nunn and Mitchell. The exchanges allegedly occurred the day of the incident and reveal that Mitchell had been inquiring to Nunn about purchasing a firearm.

¶ 10 Defense counsel argued the social media messages were critical to the defense because the State's theory of the case was that defendant and Nunn lured Mitchell and Drummond under

the pretense of selling them cannabis in order to rob them. According to defense counsel, the social media messages revealed that Mitchell actually messaged Nunn to purchase a firearm rather than cannabis. It was defense counsel's theory that the social media messages negated the State's theory because they suggested Mitchell and Drummond arranged to meet Nunn to purchase a firearm but, instead, Drummond shot Nunn in an attempt to rob defendant and Nunn. Defense counsel explained to the court that based on the evidentiary ruling in Nunn's case and his independent research, additional time was needed to obtain the information necessary to authenticate Mitchell as the sender of the messages and ensure the admission of the messages at trial.

¶ 11 In Nunn's trial, Mitchell denied messaging Nunn through social media to purchase a firearm. Further, Mitchell denied having access to the social media account sending the alleged messages. Instead, Mitchell testified he met Nunn by chance to purchase cannabis and defendant and Nunn robbed Mitchell and Drummond during the exchange. The court in Nunn's case did not allow the social media exchanges between Nunn and Mitchell into evidence because defense counsel was unable to lay the foundation to establish their authenticity.²

¶ 12 Initially, the trial court denied defense counsel's request for continuance because it found that the social media information had been available since September 2012. Defense counsel argued that the information had not been in the file and it was only after reading Nunn's trial transcript that he discovered "an actual Facebook address given that we could relate everything to." The court stated that defense counsel was "never ready," and that he filed "everything minutes before the trial" and that if the court gave defense counsel a new date there would be more filings.

² We note the same judge presided over both defendant's and Nunn's trials.

¶ 13 After a recess, the court repeated its reasons for denying defense counsel's request for a continuance. The court noted sufficient information had been in the case file since September 21, 2012, to prompt an earlier investigation of these exchanges. The court also explained that in this case and in other cases where defense counsel was the attorney, the court would receive multiple filings on the day of trial, which often resulted in continuances that clogged the court's trial docket.

¶ 14 During the ensuing trial, Mitchell testified for the State. Mitchell denied meeting with Nunn and defendant to purchase a gun. Mitchell also denied exchanging messages with Nunn over social media. According to Mitchell, he and Drummond drove together to the south side of Peoria to purchase cannabis from Nunn. Mitchell testified he texted a cell phone number he had for Nunn about purchasing cannabis previously, but had not received a response from Nunn. Mitchell stated he and Drummond had been driving around when, by coincidence, they saw Nunn and stopped their vehicle. Nunn was with defendant at the time and both Nunn and defendant entered the vehicle.

¶ 15 Once defendant and Nunn were in the vehicle, Mitchell saw defendant hand Nunn a gun, which Nunn pointed at Mitchell's head. Mitchell believed he was being robbed and threw \$150 in cash into the backseat of the vehicle, heard a gunshot, exited the vehicle, and ran to a nearby school. Mitchell heard more shots as he was fleeing.

¶ 16 Nunn testified for the defense and asserted he and Mitchell exchanged social messages on the day of the occurrence.

¶ 17 Prior to closing arguments, the trial court precluded defense counsel from arguing that the encounter involved the sale of a gun, because defense counsel failed to introduce the social media exchanges between Nunn and Mitchell. In response, defense counsel noted that he could

have produced the social media exchanges had the trial court granted his request for a continuance.

¶ 18 Ultimately, the jury found defendant guilty of armed robbery and the trial court sentenced defendant to 24 years' imprisonment. Defendant's subsequent motion for a new trial was denied.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant argues that the trial court abused its discretion when it denied defense counsel's request for a continuance so that counsel could obtain the evidence needed to lay a foundation for the introduction of social media messages into evidence at trial. Upon examining the factors set out in *People v. Walker*, 232 Ill. 2d 113, 131 (2009), we agree.

¶ 21 We review a trial court's decision to deny a motion for continuance for an abuse of discretion. *People v. Chapman*, 194 Ill. 2d 186, 241 (2000). The determination of whether a trial court abused its discretion depends on the facts and circumstances of each case. *Walker*, 232 Ill. 2d at 125. In making this determination, a trial court may consider the following: (1) the movant's diligence; (2) the defendant's right to a speedy, fair, and impartial trial; and (3) the interest of justice. *Id.* Other factors that might be considered include whether defense counsel was unable to prepare for trial because she had been held to trial in another case, the history of the case, the complexity of the matter, the seriousness of the charges, docket management, judicial economy, and inconvenience of the parties and witnesses. *Id.* at 125-26.

¶ 22 In *Walker* the trial court "completely failed" to exercise its discretion by denying a continuance without any consideration of the facts and circumstances of the case. *Walker*, 232 Ill. 2d at 126. Defense counsel explained she was unprepared to proceed to trial as a result of trying two cases on two previous days. *Id.* at 126-31. In response, the trial court found the reason offered by counsel as "irrelevant" and implied that, like many other attorneys, defense

counsel was engaging in delay tactics. *Id.* at 117-18. In finding the trial court abused its discretion, the supreme court noted that the trial court failed to make a record of the factors it considered in denying the continuance and further explained that it was improper for the trial court to base its ruling on perceived delay tactics of other attorneys in unrelated matters. *Id.* at 128-29.

¶ 23 We begin by reviewing the trial court's consideration of defense counsel's supposed lack of diligence. In our view, the trial court's explicit reliance on the fact the social media information had been in the file for months is misplaced. When defense counsel asked for a continuance on the day of trial, the trial court denied the request citing the fact that the social media information had been in the file long enough to prompt an earlier investigation. However, the trial court failed to acknowledge that the address of Mitchell's social media account had not been in the file since September but was subsequently revealed during Nunn's trial. The information was critical because the Nunn transcripts also revealed that Mitchell denied sending the messages to Nunn.³ Nunn was unable to argue that the parties met for the sale of a firearm because he was unable to lay the foundation to introduce the social media exchanges with Mitchell. Based on defense counsel's research and the evidentiary ruling in Nunn's trial, it became apparent to defense counsel that he needed to obtain independent evidence from the social networking website administrators or from a search of the computer of the person who allegedly created the profile to authenticate that Mitchell was the individual sending messages to Nunn. Defense counsel would not have become aware of this fact until he obtained the Nunn

³ We take judicial notice of the record in Nunn's case. This court allowed defendant's uncontested motion to take judicial notice of the Nunn record. The State's objection to this request in its brief is untimely.

transcripts two weeks before trial. Examining the totality of the circumstances, we hold that the first *Walker* factor (movant's diligence) supports a finding that the trial court abused its discretion in denying defendant a continuance.

¶ 24 In light of above facts and holding, we find that the second and third *Walker* factors (defendant's right to a speedy, fair, and impartial trial and the interest of justice) also support a finding that the trial court abused its discretion in denying a defendant a continuance. Failure to allow a defendant to present a complete defense severely impugns any notion of a fair trial or the interest of justice.

¶ 25 Upon review, we find the remaining *Walker* factors support our finding the trial court abused its discretion.⁴ The history of the case does not reveal a pattern of delay on the part of defendant. In fact, the previous continuances had been by agreement or uncontested. We note the State raised no objection to the final requested continuance and we emphasize the fact that the trial court's willingness to continue the trial at the previous scheduling conference demonstrates that an additional continuance would not inconvenience the parties and witnesses. Further, the complexity involved in authenticating social media messages supports granting additional time to ensure defendant is provided with the opportunity to present evidence in his defense. The severity of the armed robbery and murder charges also weigh in favor of granting a continuance. Finally, a final, brief, continuance in this case would promote judicial economy in that it would allow defendant an opportunity to present evidence in his defense.

⁴ The record does not contain any discussion of whether defense counsel's preparation was affected by being on trial in another matter on the previous day. Thus, we cannot make any conclusion as to this factor.

¶ 26 We also find significant the trial court's improper reliance on defense counsel's conduct in unrelated matters when it ruled on the request for continuance. The trial court specifically referenced defense counsel's conduct in other cases, attributed those actions to defendant, and denied the continuance in defendant's case. Like the *Walker* court, "[w]e cannot condone that whatever displeasure the court had with defendant's counsel *** was visited upon defendant." *Walker*, 232 Ill. 2d at 128. Also like the court in *Walker*, the trial court in the instant case failed to make "a sufficient record to establish that a defendant has been afforded a fair process." *Id.* at 129.

¶ 27 In light of all the above factors, we find the trial court abused its discretion in denying defendant's motion for continuance.

¶ 28 Because the contents of the social media messages go to the heart of the charges in this case, we find the trial court's refusal to grant the continuance was not a harmless error. "Fundamental justice requires that the defendant have every opportunity to controvert the State's proof." *People v. Melock*, 149 Ill. 2d 423, 465 (1992). "Where it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, a resulting conviction will be reversed." *Walker*, 232 Ill. 2d at 125 (quoting *People v. Lewis*, 165 Ill. 2d 305, 327 (1995)).

¶ 29 Here, the trial court's refusal to grant the continuance prevented defense counsel from introducing evidence tending to controvert the State's theory of the case. Specifically, the evidence regarded whether the individuals met by chance for the purchase of cannabis that lead to a robbery by Nunn, or whether the individuals met for a prearranged purchase of a weapon in which Drummond attempted to rob defendant and Nunn. Significantly, defense counsel was prohibited from making an argument during closing statements as to the latter theory because he

was unable to introduce the messages into evidence. Further, the evidence, if authenticated, could be used to impeach the testimony of a key State witness. Accordingly, we find defendant's right to a fair trial was prejudiced by the trial court's refusal to grant additional time to obtain evidence needed to authenticate the social media exchanges.

¶ 30 Finally, we reject the State's contention that the trial court exercised its discretion in denying the motion for continuance because the motion was not in writing. See 725 ILCS 5/114-4(a) (West 2012) (stating "[t]he defendant or the State may move for a continuance. If the motion is made more than 30 days after arraignment the court shall require that it be in *writing* and supported by affidavit" (emphasis added)). The State made no objection to defense counsel's oral continuance request and the trial court did not base its ruling on defense counsel's failure to submit the request in writing. Moreover, an abuse of discretion may be found even in the absence of a written motion and supporting affidavit. See *People v. Peruscini*, 188 Ill. App. 3d 803, 807 (1989). We also reject the State's contention that defendant failed to meet any of the statutory grounds for requesting a continuance. The statute's catch-all provision providing the court with the authority to grant a motion on any other grounds if it finds "the interests of justice so require" (725 ILCS 5/114-4(d) (West 2012)) is sufficient grounds to grant the continuance.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Peoria County is reversed and remanded for further proceedings.

¶ 33 Reversed and remanded for further proceedings.