

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 00109
	:	
TROY LUMPKIN	:	<u>OPINION</u>
	:	
Defendant-Appellant		

CHARACTER OF PROCEEDING: Criminal Appeal from Licking County Court of Common Pleas Case No. 2009 CR 0143

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 28, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Edwards, P.J.*

{¶1} Appellant, Troy Lumpkin, appeals a judgment of the Licking County Common Pleas Court convicting him of trafficking in crack cocaine in the vicinity of a juvenile (R.C. 2925.03(A)(1)(C)(4)(c)), trafficking in crack cocaine (R.C. 2925.03(A)(1)(C)(4)(c)), possession of crack cocaine (R.C. 2925.11(A)(C)(4)(c)), possession of drug paraphernalia (R.C.2925.14(C)(1)), possession of marijuana (R.C. 2925.11(A)(C)(3)(a)), having weapons under disability (R.C. 2923.13(A)(3)), two firearm specifications (R.C. 2929.14(D) & R.C. 2941.141) and three forfeiture specifications (R.C. 2941.1417 & R.C. 2981.02). He was sentenced to 14 ½ years incarceration. Appellee is the state of Ohio.

#### STATEMENT OF FACTS AND CASE

{¶2} On March 18, 2009, officers from the Central Ohio Drug Task Force sent a confidential informant to purchase crack cocaine from appellant in a controlled buy at 8 West Postal Avenue in Newark, Ohio. The informant called appellant and an agreement was made for the purchase of two \$100.00 rocks of crack cocaine. The informant was wired with a recorder and given \$200.00 in recorded buy money in order to make the purchase.

{¶3} The informant went to 8 West Postal Avenue, where he purchased crack cocaine from appellant. At the time of the purchase, the police detective monitoring the transaction saw a juvenile on the porch next door, approximately 30 feet from the scene of the drug transaction.

{¶4} Officers obtained a search warrant for 8 West Postal Avenue. The informant then made a second call to appellant to arrange to buy more crack cocaine. The purpose of the call was to ensure that someone was present in the residence when

the warrant was executed. The informant arranged to buy \$150.00 of crack from appellant. Officers then searched the residence, where they found crack cocaine, a loaded .45 caliber semiautomatic handgun and a loaded 9 mm revolver under the couch, a scale and razor blade, a jar full of cash and marijuana. Officers found \$1,344.00 in cash in appellant's pockets, including the \$200.00 of recorded buy money from the earlier transaction with the confidential informant.

{¶5} Appellant was indicted by the Licking County Grand Jury with trafficking in crack cocaine in the vicinity of a juvenile, trafficking in crack cocaine, possession of crack cocaine, possession of marijuana, possession of drug paraphernalia, and having weapons under disability, with two firearm specifications and a forfeiture specification for the money.

{¶6} Appellant entered a plea of not guilty to the charges on April 7, 2009. His original trial counsel filed a motion to withdraw on July 16, 2009, which was granted the same day, and new counsel was appointed on July 20, 2009. On August 17, 2009, the day before trial, counsel filed a motion to continue. The motion alleged in pertinent part:

{¶7} "In recent weeks, Defense Counsel has been to see the Defendant several times at the Licking County Jail to review discovery and trial strategy.

{¶8} "The Defendant claims to have additional information related to witnesses in this case that he has requested Counsel investigate."

{¶9} The court overruled the motion, finding that the case had been scheduled for trial for the third time, the most recent date with more than a month's notice while appellant was represented by his current counsel.

{¶10} Appellant waived jury trial on the weapons under disability charge and the forfeiture specification. Those charges, along with the possession of marijuana charge which is a minor misdemeanor, were tried to the court, while the remaining charges were tried to a jury. He was convicted on all charges and sentenced to a total term of incarceration of 14 ½ years. He assigns a single error on appeal:

{¶11} “THE TRIAL COURT COMMITTED HARMFUL ERROR AND ABUSED ITS DISCRETION IN DENYING THE APPELLANT’S REQUEST FOR A CONTINUANCE OF THE JURY TRIAL HEREIN.”

{¶12} Appellant argues that the court erred in denying his motion to continue because counsel did not have time to review discovery, interview witnesses and prepare an adequate defense. He argues that in addition to the confidential informant and the state’s other lay witness to the transaction, Brandy Deboise, there were at least three other people in the residence at the time of the transaction which counsel did not have adequate time to find and interview.

{¶13} The decision to grant or deny a motion to continue is a matter entrusted to the broad discretion of the trial court. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9, 615 N.E.2d 617. Ordinarily a reviewing court analyzes a denial of a continuance in terms of whether the court has abused its discretion. *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841; *State v. Wheat*, Licking App. No. 2003-CA-00057, 2004-Ohio-2088. Absent an abuse of discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. An abuse of discretion connotes more than a mere error in law or judgment; it implies an arbitrary, unreasonable, or unconscionable attitude on the part of

the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶14} In evaluating whether the trial court has abused its discretion in denying a continuance, appellate courts apply a balancing test that takes into account a variety of competing considerations:

{¶15} "A court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078.

{¶16} In *Wheat*, supra, the appellant argued that the trial court erred when it failed to continue his trial to secure witnesses he had subpoenaed. This Court found no abuse of discretion because the request for a continuance did not demonstrate the amount of time necessary to secure the attendance of the witnesses, or the nature of their testimony. 2004-Ohio-2088 at ¶21. Citing *State v. Brooks* (1989), 44 Ohio St.3d 185, 542 N.E.2d 636, we held that because defense counsel failed to proffer what the desired testimony of the absent witnesses would have been and how it was relevant to the defense, we could not find prejudice from the denial of the motion to continue. *Id.* at ¶22-24.

{¶17} In the instant case, while appellant now argues that there were three witnesses to the transaction which counsel did not have time to locate and interview, in

his motion to continue he gave the trial court no indication that he was attempting to locate these witnesses, nor did appellant proffer to the court what the testimony of these witnesses would have been or how they were material or relevant to the defense. The motion merely generally asserted that appellant claimed to have information related to witnesses in the case which he wanted counsel to investigate. The motion asked for a "brief continuance" without giving the court any indication as to the length of the delay requested to secure this additional information. As noted by the trial court, counsel had been appointed nearly a month earlier, and the trial had already been scheduled three times. The motion for a continuance was not filed until the day before trial and recited that counsel had been meeting with appellant "in recent weeks." No reason was given for waiting until the day before trial to file the motion. The evidence was uncomplicated and straightforward, related to a single controlled drug buy and a search of the residence pursuant to a warrant following the controlled buy. Appellant has not demonstrated prejudice from the court's denial of his motion to continue, and the court did not abuse its discretion in overruling the motion.

{¶18} The assignment of error is overruled.

{¶19} The judgment of the Licking County Common Pleas Court is affirmed.

By: Edwards, P.J.

Wise, J. and

Delaney, J. concur

s/Julie A. Edwards

s/John W. Wise

s/Patricia A. Delaney

JUDGES

JAE/r0401

