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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-25

No. COA20-8

Filed 16 February 2021

Rowan County, Nos. 19 CRS 50489, 756

STATE OF NORTH CAROLINA

v.

MARCUS ADAM DIPIETRO

Appeal by defendant from judgments entered 10 July 2019 by Judge Richard S. Gottlieb in Rowan County Superior Court. Heard in the Court of Appeals 13 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy C. Johnson, for the State.

Dylan J.C. Buffum for defendant-appellant.

ZACHARY, Judge.

¶ 1

Defendant Marcus Adam DiPietro appeals from judgments entered upon his convictions for malicious conduct by a prisoner, assault on a law enforcement officer inflicting physical injury, assault on a government official, and attaining the status of habitual felon. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

¶ 2

On 6 February 2019, Sergeant Andrew Rowland and Deputy James Corriher of the Rowan County Sheriff's Office conducted a traffic stop of a Jeep Cherokee SUV after determining that the Jeep was displaying a license plate that was assigned to a minivan. The driver, Defendant, provided an identification card to Deputy Corriher. Deputy Corriher asked Defendant and the other occupants of the Jeep to exit the vehicle and obtained their consent to pat them down for weapons. Deputy Corriher asked Defendant to sit on the push bar on the front of his patrol vehicle while Sergeant Rowland searched the Jeep.

¶ 3

As Sergeant Rowland searched the vehicle, Deputy Corriher checked the identification card he was given and discovered that Defendant was not the individual identified thereon. Sergeant Rowland informed Deputy Corriher that he found drug paraphernalia and a wallet during his search of the vehicle. In the wallet, Deputy Corriher noticed a different identification, with Defendant's actual name and date of birth. Deputy Corriher informed Defendant that he was under arrest for, *inter alia*, providing fictitious information to a law enforcement officer. Deputy Corriher then handcuffed Defendant and placed him in the rear of his patrol vehicle while Deputy Corriher finished the investigation.

¶ 4

Shortly thereafter, Deputy Corriher heard a disturbance from inside of the patrol vehicle. Sergeant Rowland opened the rear door of the patrol vehicle and

Defendant, still handcuffed, attempted to flee. Defendant and the law enforcement officers engaged in a protracted struggle, which was recorded by the officers' body cameras. Additional law enforcement arrived, and together, the officers secured Defendant.

¶ 5 On 18 March 2019, a Rowan County grand jury returned true bills of indictment formally charging Defendant with malicious conduct by a prisoner, assault on a law enforcement officer inflicting physical injury, assault on a government official, and attaining the status of habitual felon. On 13 June 2019, Defendant rejected a plea offer, and his case was set for trial on 9 July 2019.

¶ 6 When the case came on for trial on 9 July, Defendant's counsel first presented the trial court with a motion to continue, and the trial court heard the arguments of counsel. In his written motion, Defendant's counsel explained that he needed time to give the State the requisite notice of Defendant's intent to present an affirmative defense and to prepare the defense:

Counsel was informed last week (July 1-5) that the case was likely to be tried. After preparing for trial with the Defendant and receiving notice of the imminence of trial, it has come to counsel's attention that an affirmative defense may be applicable and necessary in the defense of the Defendant. All that being said, counsel has not had adequate time to give notice of the affirmative defense upon receiving notice that the case was to be tried and would respectfully ask for more time to meet with the Defendant to prepare this extra element of our defense.

¶ 7 Before the trial court, defense counsel explained that Defendant intended to raise a self-defense claim, and added:

[DEFENDANT'S COUNSEL]: . . . I think [Defendant] and I could benefit from just a little bit -- just a little bit more time. To be fair, I'll be completely candid, if Your Honor tells me that the motion's denied, I'm ready to go. I don't -- I'm all about trying cases. I just tried in April a Class C assault --

THE COURT: I'm with you.

[DEFENDANT'S COUNSEL]: -- and a murder in May, so I'm ready to go. But I think it would stand to reason, I don't want to open myself up for an IEC [sic] claim or something like that to make sure I . . . advocate as much as I can for my client. That's the basis for the motion to continue.

¶ 8 Defendant's counsel also acknowledged, as in the written motion, that he had not provided the State with the statutorily required notice of Defendant's intent to offer the affirmative defense of self-defense. The State informed the court that it would waive the notice requirement, had "thought about" Defendant's self-defense argument, and was "ready to proceed." The trial court denied Defendant's motion to continue.

¶ 9 On 10 July 2019, the jury returned its verdicts finding Defendant guilty of malicious conduct by a prisoner, assault on a law enforcement officer inflicting physical injury, and misdemeanor assault on a government official. Defendant then pleaded guilty to attaining the status of habitual felon. The trial court sentenced

Defendant to a term of 105 to 128 months in the custody of the North Carolina Division of Adult Correction for the felony offenses, and a consecutive term of 150 days' imprisonment for the misdemeanor offense. Defendant gave notice of appeal in open court.

Discussion

¶ 10 Defendant raises only one issue on appeal: that the trial court “deprived [him] of his constitutional right to effective counsel and [his] due process right to present a defense when it denied his motion for a continuance.” After careful review, we disagree.

I. Standard of Review

¶ 11 “Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court’s ruling is not subject to review.” *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002). However, “[w]hen a motion to continue raises a constitutional issue, the trial court’s ruling is fully reviewable upon appeal.” *Id.*

¶ 12 The State asserts that Defendant’s motion to continue did not raise a constitutional issue and that therefore abuse of discretion is the proper standard for our review. Specifically, the State maintains that the basis for Defendant’s motion was “(1) the statutory requirement that the State receive 20 days’ notice of an affirmative defense, which the State waived, and (2) the fact that [Defendant] could

benefit from his counsel having more time to prepare. Neither argument raises a constitutional right.”

¶ 13 However, the State overlooks Defendant’s counsel’s statement that he did not “want to open [him]self up to an IEC [sic] claim or something like that” in the event that he failed to “advocate as much as [he could] for [his] client.” Defendant’s counsel clearly raised the issue of effective assistance of counsel, a constitutional question. *See State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000) (“It is implicit in the constitutional guarantee[] of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense.”).

¶ 14 It is well settled that when a motion to continue is “based on a constitutional right the ruling of the trial judge is reviewable on appeal as a question of law. Defendant’s motion for a continuance in this case was based on his constitutional right to effective assistance of counsel and, thus, is fully reviewable as a question of law.” *State v. Maher*, 305 N.C. 544, 547, 290 S.E.2d 694, 696 (1982) (citation and internal quotation marks omitted). Questions of law are reviewed de novo. *See State v. Burton*, 224 N.C. App. 120, 126, 735 S.E.2d 400, 405 (2012), *cert. denied*, 367 N.C. 285, 753 S.E.2d 795 (2014). Accordingly, we review Defendant’s argument de novo.

¶ 15 However, whether our review is for abuse of discretion or de novo, “a denial of a motion to continue is grounds for a new trial only when defendant shows both that

the denial was erroneous and that he suffered prejudice as a result of the error.”
Taylor, 354 N.C. at 33–34, 550 S.E.2d at 146.

II. Analysis

¶ 16 “An inquiry into alleged constitutional error by a trial court in denying a motion to continue requires scrutiny of the record and consideration of the circumstances of the individual case.” *State v. Barlowe*, 157 N.C. App. 249, 253, 578 S.E.2d 660, 663 (citation omitted), *disc. review denied*, 357 N.C. 462, 586 S.E.2d 100 (2003). First, a defendant must show that he was prejudiced by the denial of his motion to continue:

To establish that the trial court’s failure to give additional time to prepare constituted a constitutional violation, [the] defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion. A motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance. A postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts.

State v. McCullers, 341 N.C. 19, 31–32, 460 S.E.2d 163, 170 (1995) (citations and internal quotation marks omitted).

¶ 17 On appeal of the denial of a defendant’s motion to continue, this Court considers several aspects of the case, including:

(1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with

which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm [the] defendant might suffer as a result of a denial of the continuance.

Barlowe, 157 N.C. App. at 254, 578 S.E.2d at 663.

¶ 18 The second and third factors refer to “the expected evidence” of which the defendant was deprived at trial because the trial court denied the defendant's motion for continuance, and it is here that Defendant's argument comes up short. Defendant has not alleged—either on appeal or, crucially, before the trial court—that there would have been any additional “expected evidence” presented at trial but for the trial court's denial of his motion to continue. Rather, he asserts that “the ‘expected evidence’ would [have been] a more thorough and detailed view of the footage” that was presented to the jury; defense counsel could have “present[ed the officers' body camera video] footage to the jury in a manner that would divulge key details” in support of Defendant's claim of self-defense. Essentially, Defendant argues that the trial court's denial of his motion to continue resulted in the State's “one-sided presentation of the evidence” with stills of crucial moments in the video of Defendant's scuffle with the officers, which defense counsel was not prepared to match. Nevertheless, the jury viewed the body camera footage, and thus there is no additional “expected evidence.”

¶ 19 Moreover, Defendant's counsel included no affidavit in support of his motion

to continue. “A motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance.” *McCullers*, 341 N.C. at 31–32, 460 S.E.2d at 170 (citation and internal quotation marks omitted). Both the written motion and oral argument before the trial court provided scant support for defense counsel’s assertion that “more time to meet with the Defendant to prepare” was necessary. While it may have been true, Defendant did not “show [the trial court] *how* his case would have been better prepared had the continuance been granted[.]” *Id.* at 31, 460 S.E.2d at 170 (emphasis added) (citation and internal quotation marks omitted). Neither did he demonstrate to the trial court a belief, “reasonably grounded on known facts[.]” that “*material* evidence [would] come to light” if he were granted a continuance. *Id.* at 32, 460 S.E.2d at 170 (citation omitted).

¶ 20 This Court has found no error in a trial court’s denial of a motion to continue where the defendant “failed to show how the additional time would have helped him to better prepare had the continuance been granted.” *State v. Smith*, 178 N.C. App. 134, 143, 631 S.E.2d 34, 40 (2006). In *Smith*, defense counsel moved for a continuance after the State informed him of the defendant’s confession on the Friday afternoon before the trial was set to begin. *Id.* In lieu of a written motion supported by an affidavit, defense counsel merely informed the trial court: “I’ll ask for a motion to continue, your Honor, simply to be able to completely process the new information and to be better able to advise my client.” *Id.*

¶ 21 Relying on our Supreme Court’s opinion in *McCullers*, this Court concluded that, “[w]hile [the d]efendant attempts to suggest reasons supporting the motion in his brief on appeal, as in *McCullers*, this attempt is insufficient to overcome his failure to provide these reasons to the trial court in an affidavit or otherwise.” *Id.*

¶ 22 In the instant case, Defendant similarly states the reasons that the requested continuance was necessary, but as in *McCullers* and *Smith*, these arguments were not presented to the trial court. Instead, before the trial court, Defendant’s counsel candidly admitted that, if the trial court denied the motion, he was “ready to go.”

¶ 23 Given that Defendant’s motion to continue before the trial court was not sufficiently supported, by affidavit or otherwise, we cannot say that the trial court erred by denying the motion.

Conclusion

¶ 24 For the reasons stated herein, we conclude that Defendant received a fair trial, free from error.

STATE V. DIPiETRO

2021-NCCOA-25

Opinion of the Court

NO ERROR.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).