

NO. 46077-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LAMONT M. BROUSSARD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy, Judge (Trial)
The Honorable Frank Cuthbertson, Judge (Pretrial)

No. 13-1-02973-3

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in denying defendant's motion to continue his trial to obtain a written version of his mental health evaluation and call the psychiatrist as a witness at trial where the evaluation did not support a legal defense of not guilty by reason of insanity?

B. STATEMENT OF THE CASE.

1. Procedure

On July 18, 2013, the Pierce County Prosecutor's Office charged Lamont Mateo Broussard ("defendant") by information with failure to register as a sex offender between June 18 and July 18, 2013. CP 1.

After questions about defendant's competency were raised, an evaluation at Western State Hospital found defendant competent to stand trial and assist in his own defense. 12/2/13 RP 4-5;¹ CP 12-13. The parties set the trial for December 30, 2013. 12/2/13 RP 4. On December 12, defendant requested a continuance for his trial to finalize preparation of a mental health defense. CP 61. The continuance was granted, and trial was set for February 4, 2014. *Id.* On January 23, 2014, another

¹ The State will report to the Verbatim Report of Proceedings as follows: The transcript labeled "Volume 1" will be referred to as "RP." The two transcripts containing the pretrial proceedings will be referred to by date.

continuance was granted at the request of both parties because of scheduling conflicts. CP 62. The case was set for trial on February 11, 2013. *Id.*

The parties appeared before the Honorable Frank Cuthbertson, the Criminal Division Presiding Judge, on February 11, 2014. 2/11/14 RP 1. Prior to that date, the Department of Assigned Counsel ("DAC") hired Dr. Mark Duris, a psychiatrist, to perform an independent mental health evaluation of defendant. 2/11/14 RP 2-3. Defense counsel requested a continuance in order to obtain the final written report of the evaluation, as he had only received an oral report from Dr. Duris at that time. *Id.* Counsel informed the Court that DAC had also hired a psychiatrist to perform the same mental health evaluation in 2012. *Id.* In that case, defendant's mental health issues did not rise to the legal standard necessary to present a defense of diminished capacity, but were considered as mitigating factors by the State during defendant's plea negotiations. 2/11/14 RP 3. Counsel said both the current mental health evaluation and the 2012 evaluation "came back with essentially the same analysis." 2/11/14 RP 2-3. Counsel stated he would be prepared to go to trial once he had the written report and would probably present a mental health defense. 2/11/13 RP 3-4. The Court denied the motion, noting that defendant had already been evaluated by two experts and had 181 days in custody to prepare his defense, and assigned the case to Judge Edmund Murphy for trial. 2/11/14 RP 5-6.

Later that day, defense counsel renewed the motion for a continuance of the trial before the Honorable Edmund Murphy. RP 4-5. Counsel told the Court he planned on presenting Dr. Duris as a witness at trial, but was unable to do so because he did not have a finished report of the mental health evaluation. RP 7. Counsel noted the evaluation would be more relevant to mitigation than acquittal of the charges, and would argue that during trial. RP 7. After discussing the issue with Judge Cuthbertson, Judge Murphy denied the motion to continue and acknowledged the psychiatrist could be used as a witness at sentencing for mitigation purposes if the case reached that stage. RP 6, 8.

Defendant waived his right to a jury trial and the case proceeded as a bench trial before Judge Murphy on February 11, 2014. RP 1, 10-11. On February 21, 2014, the trial court found defendant guilty as charged and imposed a standard range sentence of 43 months confinement, and 36 months community custody based on his offender score of 15. CP 34-48; RP 96. Defendant timely filed his notice of appeal on March 21, 2014. CP 30.

2. Facts

In 1994, defendant was adjudicated guilty of third degree rape, triggering the duty to register as a sex offender. RP 23-24; Ex. 4. In 2012, defendant pleaded guilty to two counts of failure to register as a sex offender during 2011. RP 25-27; Ex. 5-6.

Defendant served six months confinement for the 2012 convictions and was released on June 4, 2013. RP 28. The next day, he registered as a sex offender with the Pierce County Sheriff's Department. He filled out a full registration packet, listed 4410 East K. Street as his fixed residence, and received a copy of the registration laws. RP 29-31. On June 11, defendant re-registered as a transient and was informed that transient offenders were required to return to the Sheriff's Office every seven days. RP 33, 20. Although he received a card indicating he was to report back on June 18, he failed to do so. RP 35-36. Defendant was arrested on a Department of Corrections warrant on July 25th, 2013. RP 45.

Defendant alleged at trial that he did not register between June 18 and July 18, 2013 because he was hearing voices telling him to kill himself and suffering delusions that he was a CIA or DEA detective. RP 66-67. Over the course of his life, he has suffered from various mental disorders, including schizophrenia, bipolar disorder, and psychotic disorder, and sporadically taken medication to mitigate his symptoms. RP 58. He was not able to obtain medication during his incarceration prior to June 4, 2013 or upon release. RP 60-64.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO CONTINUE THE TRIAL TO OBTAIN A WRITTEN COPY OF THE MENTAL HEALTH EVALUATION AND CALL THE EVALUATING PSYCHIATRIST AS A WITNESS AT TRIAL.

Defendant is not entitled to a continuance as a matter of right.

Pursuant to CrR 3.3(f)(2), "the court may continue the trial date . . . when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2).² An appellate court reviews a trial court's decision to grant a continuance for abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). It will not disturb a trial court's decision unless the appellant makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Granting or denying a motion for a continuance rests within the sound discretion of the trial court.

² CrR 3.3 (f): Continuances or other delays may be granted as follows:

. . . (2) *Motion by the Court or a Party.* On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

Downing, 151 Wn.2d at 272. In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. **State v. Eller**, 84 Wn.2d 90, 95 524 P.2d 242 (1974).

The failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case. **State v. Cadena**, 74 Wn.2d 185, 443 P.2d 826 (1968). Whether the denial of a continuance rises to the level of a constitutional violation requires a case by case inquiry. **Eller**, 84 Wn.2d at 96 (*citing Cadena*, 74 Wn.2d 185); **Ungar v. Sarafite**, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). The appellant must show he or she has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied. **Eller**, 84 Wn.2d at 95.

On appeal, defendant argues the trial court's denial of the motion for a continuance was an abuse of discretion which denied him of his constitutional right to prepare and present a defense. However, the trial court did not abuse its discretion by denying defendant's motion for a continuance when the decision is viewed in light of the totality of the circumstances and the particular facts of the case. Defendant fails to show he was prejudiced by the denial of the continuance given the evaluation did not support the legal defense he claims he could have asserted.

Defendant also fails to show the result of the trial would have been different had he been able to present the written evaluation and the testimony of the evaluating psychiatrist.

- a. Defendant fails to show he was prejudiced by the denial of the continuance.

Defense counsel diligently investigated and prepared defendant's case over the course of approximately six months. 2/11/14 RP 5. After the case was set to go to trial in December, defense counsel obtained a continuance in order to finalize preparation of a mental health defense. CP 61. Counsel took full advantage of the additional preparation time and hired a psychiatrist to perform a mental health evaluation of defendant, to supplement the evaluation completed by Western State Hospital. 2/11/14 RP 3. Although the evaluation did not support a formal finding of diminished capacity, counsel continued to advocate for defendant.

Defense counsel first made the motion before Judge Cuthbertson after receiving an oral report of the psychiatrist's evaluation of defendant. Based on the representations of defense counsel that the result of the evaluation was essentially the same as the evaluation in the 2012 case, which found defendant's capacity was not sufficiently diminished to constitute a legal defense, Judge Cuthbertson properly denied the motion.

Similarly, Judge Murphy did not abuse his discretion in denying defense counsel's renewal of the motion. Judge Murphy was provided with the same information previously presented to Judge Cuthbertson and

spoke with Judge Cuthbertson to ensure he received all the pertinent information. Judge Murphy acted within his discretion in relying on defense counsel's representations of the findings of the mental health evaluation, determining it would not be sufficient to rise to the level of a legal defense, and agreeing with defense counsel in determining that Dr. Duris' testimony would be more relevant to mitigation of a potential sentence.

At trial, defense counsel argued that defendant was not capable of registering as a sex offender due to his mental illness, and therefore did not knowingly fail to register. RP 14.³ Counsel did not assert the legal defense that defendant should be found not guilty by reason of insanity.

On the second day of trial, the Court further addressed the mental health evaluation:

My understanding is the evaluation that was done by Dr. Duris has been completed, it just hasn't been put into written form, and the understanding of counsel was that it was not supportive of the not guilty by reason of insanity plea. It may be towards mitigation. For that reason, the Court went forward with trial.

RP 56.

After finding defendant guilty of failing to register, the Court addressed the element of whether defendant knowingly failed to register:

³ To convict a defendant of failure to register as a sex offender, the State must prove he or she knowingly failed to comply with the requirements of the registration statute. RCW 9A.44.132(1).

The defendant asked the Court to believe that his mental illness reached a point after June 11th, 2013, that he did not knowingly fail to comply with the registration requirements, when it had not gotten to that point just before that date. He clearly was able to understand it just a few days before. The Court has no evidence before it that would indicate that he did not knowingly fail to comply with his registration requirements after he left the Sheriff's Department on June 11th, 2013.

RP 95.

Before sentencing, defense counsel provided the Court with several documents, including the latest mental health evaluation, to support the defense's request for an exceptional downward sentence. RP 100-04. The Court reviewed the documents before the sentencing hearing on March 21, 2014, and did not find defendant's mental health to be a convincing mitigating factor. The record does not indicate the evaluation contained evidence that defendant had diminished capacity during the period in which he failed to register. RP 100-12. Although the Court recognized defendant's mental health issues, he did not grant an exceptional sentence downward based on defendant's past noncompliance after the last two cases. RP 102. The Court addressed defendant and explained:

You weren't on your mental health medication while you were in prison, while you were in jail, after you were released, and you were able to get from jail to the Sheriff's Department to register, then to be in compliance for a short

period of time. You at least came back in at least one time before, then you disappear. It is not the mental health medications that were the issue. It is when you get involved with the drugs and try to self-medicate that becomes the problem.

RP 110.

The Court imposed a standard range sentence, which reflects that the mental health evaluation did not support leniency in sentencing. Likewise, the evaluation would not have been sufficient to meet the standard of a legal defense. Defendant argued the continuance motion to two separate judges who both denied it. Both were informed of the general conclusion of the evaluation, and correctly concluded there was no finding of diminished capacity. As the mental health evaluation did not support a legal defense, defendant was not prejudiced by the fact it was not presented as evidence at trial. Defense counsel, the State, and the trial court all agreed evidence of defendant's mental health issues would be relevant at sentencing and not at trial. Thus, the trial court did not abuse its discretion in denying the motion to continue.

- b. Defendant fails to show the result of the trial would likely have been different had the continuance been granted.

Even if the court had granted the continuance, defendant fails to show that the result of the trial would likely have been different. He claims "[a] short continuance would have allowed [defendant]'s counsel to obtain the critical psychological report and to fully prepare a defense."

Br.App. 6. The record, and specifically the arguments of defense counsel, does not indicate the findings of the evaluation would be sufficient for acquittal, because the results were essentially the same as the 2012 evaluation which found defendant did not have a diminished capacity. There is no reason to believe the final, written report would contradict the oral report Dr. Duris provided to defense counsel. If the continuance had been granted, and Dr. Duris had testified about the results of the evaluation at trial, it would have served only to support the undisputed fact that defendant suffers from mental illness. This information was adduced at trial through defendant's testimony and by the forensic mental health report conducted by Western State Hospital. Furthermore, the Court reviewed the evaluation before sentencing and did not find defendant's mental illness a significant mitigating factor. It can be reasonably inferred that the evaluation lacks the "critical" evidence to support the contention that defendant did not knowingly fail to report. Thus, the absence of the evaluation and testimony of the psychiatrist was without significant effect on the ultimate result of the case.

On appeal, defendant fails to make a clear showing that the trial court manifestly abused its discretion in denying the continuance. Defendant argues that the testimony of Dr. Duris was not merely cumulative because it would address whether defendant knowingly failed to report, which was the "heart of the defense case." Br.App. 6. Yet, the record does not indicate the evaluation would show that defendant

suffered from diminished capacity during the period he failed to register. In other words, the evaluation did not contain any finding that would support the legal defense defendant claims he could have asserted. On the contrary, defense counsel repeatedly acknowledged the results of the evaluation were the same as the evaluation from the 2012 case. The basis for defendant's diminished capacity defense does not exist.

Furthermore, defendant testified at trial and asserted the defense that he did not knowingly fail to register. 1 RP 58-79. He had the opportunity to explain in detail to the Court his history of mental illness, and that he was not medicated during his prior incarceration or after he was released in 2013. He explained that during the period in which he failed to register, he was hearing voices and suffering delusions. He asserted that even though he registered with the Sheriff's Office upon release from confinement, he did not continue to register because he was not in his right mind. Thus, defendant was able to present the exact mental health defense that he claims to have been denied. As he was provided the opportunity to present evidence and argue he did not knowingly fail to register, he was not prejudiced by the denial of the continuance. The Court heard and considered defendant's testimony, and ultimately concluded that he did, in fact, knowingly fail to register.

The trial court did not abuse its discretion in denying defendant's continuance because the mental health evaluation and accompanying testimony of the psychiatrist did not support a defense of not guilty by


reason of insanity. As defendant has failed to show he was prejudiced by the denial of the continuance, or that the result of the trial would likely have been different had the continuance been granted, this Court should affirm defendant's conviction.

D. CONCLUSION.

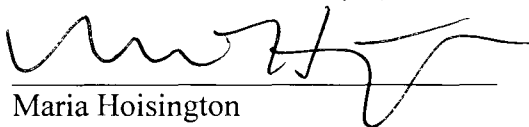
For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction.

DATED: October 8, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



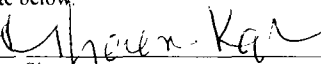
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The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/8/14 
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