[Cite as *State v. Jaco*, 2010-Ohio-1789.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 23341

v. :

T.C. NO. 08 CRB 15169

CLIFFORD A. JACO : (Criminal appeal from Municipal Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 23rd day of April, 2010.

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EBONY N. WREH, Atty. Reg. No. 0080629, Assistant City Prosecutor, 335 W. Third Street, Room 372, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

BRADLEY D. ANDERSON, Atty. Reg. No. 0061325, 25 S. Plum Street, Troy, Ohio 45373
Attorney for Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Clifford Jaco, filed

March 5, 2009. Jaco appeals from the Dayton Municipal Court's decision convicting him of one count of assault, in violation of R.C. 2903.13(A), a misdemeanor of the first degree. Jaco was charged by way of complaint on September 19, 2008, and he entered a plea of not guilty. Trial was scheduled for October 30, 2008, and on that date a continuance was granted at the request of both parties, because the complainant was recovering from knee surgery and Jaco failed to appear. Trial was rescheduled for December 4, 2008, and the record contains a praecipe signed by defense counsel, requesting the issuance of a subpoena to David Kennedy, at 5507 Hoover Avenue, for December 4th. The subpoena was returned unexecuted and provides, "no such street #." On December 3rd, a second continuance was granted on the State's motion because the complainant was hospitalized. Trial was rescheduled for January 12, 2009. The record does not contain a second praecipe or subpoena for David Kennedy.

{¶ 2} On the day of trial, Jaco orally requested another continuance as follows:

{¶ 3} "THE DEFENSE: Your Honor at this time we would * * * ask for a continuance of trial. We had issued subpoenas to some * * * witnesses who are not here and I was also under the impression that the police officers who did the report would be here but its my understanding the prosecution did not subpoena them in. * * *

{¶ 4} "* * *

{¶ 5} "THE DEFENSE: * * * I think it's vital (inaudible) the case that the officers be here * * * .

{¶ 6} "* * *

{¶ 7} THE DEFENSE: * * * I don't have the proper witnesses present here today. We

{¶ 8} would be calling the police officers as defense witnesses.

{¶ 9} "* * *

{¶ 10} "THE DEFENSE: And the witnesses I did issue a subpoena to did not appear today." The trial court denied the motion.

{¶ 11} At the close of the State's case, the court asked Jaco if he had any witnesses to call to the stand. Defense counsel responded, "Your Honor as we stated on the record we had issued a subpoena for David Kennedy. He has not appeared. Based on that we would have to rest at this time unless the court would be willing to grant us a continuance and separate the trial after the State has rested and allow us an opportunity to bring in our witnesses." The trial court confirmed with defense counsel that the absent witness was Kennedy.

{¶ 12} The trial court denied the continuance. Jaco was found guilty and sentenced to 90 days in jail, suspended, assessed a $500.00 fine and costs, with $350.00 of the fine suspended on the condition that he complete two years of non-reporting community control sanctions, obey all laws and avoid contact with the complainant, and perform 25 hours of community service.

{¶ 13} Jaco asserts one assignment of error as follows:

{¶ 14} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE BECAUSE A CONTINUANCE WAS NECESSARY TO PROCURE THE ATTENDANCE OF A SUBPOENAED DEFENSE WITNESS WHO HAD FAILED TO APPEAR AS ORDERED."

{¶ 15} "'The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." (Internal citations omitted). *State v. Brewer*, Montgomery App. No. 22935, 2009-Ohio-6129, ¶ 24. "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. (Internal citation omitted). It is to be expected that most instances of abuse of discretion will result in decisions that are simply

unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 16} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 17} "'A court may not refuse to grant a reasonable recess for the purpose of obtaining defense witnesses when it has been shown that the desired testimony would be relevant and material to the defense.' *State v. Brooks* (1989), 44 Ohio St.3d 185, 195 * * * ." *State v. Earnest*, Montgomery App. No. 20124, 2004-Ohio-4049, ¶ 41.

{¶ 18} In analyzing a motion for a continuance, "'[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'

{¶ 19} "* * *

{¶ 20} "'In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested; 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 circumstances which give[] 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 * * * ." *Brewer,* at ¶ 24, 26. Finally, "we must weigh the potential prejudice to a defendant against the trial court's 'right to control its own docket and the public's interest in the prompt and efficient dispatch of justice.'" *State v. Richardson,* Greene App. No. 2007 CA 74, 2009-Ohio-1418, ¶ 7.

{¶ 21} Weighing the potential prejudice to Jaco against the trial court's right to control its own docket and the public interest in the prompt and efficient dispatch of justice, we now apply the *Unger* test to the facts before us. We note that Jaco did not request a continuance of specific duration. Jaco had jointly, with the State, requested one continuance prior to the request at issue. In terms of inconvenience to litigants, witnesses, opposing counsel and the court, the victim, Nancy Fugate, her daughter, Brittany Philpot, and Joy Craig, were all present in court as State witnesses. (Craig was subsequently dismissed without testifying because her name had not been provided to the defense.)

{¶ 22} Most significantly, however, Jaco was dilatory and contributed to the circumstances giving rise to his request to continue trial. Jaco stated that he had issued subpoenas to "some" other witnesses who failed to appear, but he did not identify anyone other than Kennedy, and the court's records do not substantiate this claim. Jaco specifically averred that Kennedy had been subpoenaed, and he further avers in his brief that "there is no proper evidence of any reason why the subpoena could not have been enforced, requiring Mr. Kennedy to attend trial and give his testimony." However, the subpoena for Kennedy was for an earlier trial date and not January 12, 2009.

{¶ 23} In his reply brief, Jaco asserts that Crim.R. 17(D) "permits subpoenas to be served by certain persons, including attorneys at law. It is possible that Appellant's defense counsel filled in a blank subpoena form and personally served it on Mr. Kennedy without filing it with the trial court or filing a praecipe to request service by the clerk's office," and that the "uncontradicted evidence presented to the trial court was that defense counsel had subpoenaed David Kennedy to appear at trial." This argument is not persuasive. While Crim.R.17(D) provides that an attorney at law may serve a subpoena, the rule further requires that the "person serving the subpoena *shall* file a return thereof with the clerk." (Emphasis added). See also, *City*

of Toledo v. Leister, Lucas App. No. L-89-305 ("The provisions of Crim.R. 17(D) require a showing from the person seeking the testimony of a witness that the subpoena has actually been served.") There is no return of service in the record demonstrating proper service upon Kennedy. Additionally, while Jaco asserts that it "was obvious under the circumstances that Appellant wished to obtain Mr. Kennedy's testimony to support a claim of self-defense, even if no formal proffer was made," the record before us does not establish that Kennedy's testimony would have been relevant and material. Finally, Jaco's lack of diligence is further evidenced by the fact that he initially told the trial court that he was "under the impression" that the responding officers, whose testimony he deemed "vital," would be present at trial pursuant to State subpoenas, but he did nothing to procure their attendance.

{¶ 24} Having considered all of the *Unger* factors, we see no abuse of discretion. Jaco's sole assignment of error is overruled, and the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

Ebony N. Wreh
Bradley D. Anderson
Hon. John S. Pickrel