[Cite as *State v. Wheat*, 2004-Ohio-2088.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellee	:	Hon: John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2003-CA-00057
RICKY L. WHEAT, JR.	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Criminal Appeal from the Licking County Court of Common Pleas, Case No. 03-CR-92
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 23, 2004
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
BRIAN WALTZ Licking County Prosecutor's Office 20 South Second St., 4th Fl. Newark, OH 43055	ANDREW T. SANDERSON Law Offices of Kristin Burkett 21 West Church Street, Ste 201 Newark, OH 43055

Gwin, P.J.

{¶1} Appellant Ricky L. Wheat, Jr. appeals from his conviction and sentence in the Licking County Court of Common Pleas on one count of possession of crack cocaine in an amount equal to or exceeding one gram, but less than five grams, a

felony of the fourth degree, in violation of R.C. 2925.11 (A)(C)(4)(b). Appellee is the State of Ohio.

{¶2} Appellant was originally indicted in the Licking County Court of Common Pleas, Case No. 2002-CR-421. That case was set for trial December 13, 2002, however, the State dismissed the case on that date. Appellant was re-indicted on February 27, 2003 in the case at bar.

{¶3} On September 1, 2002 at approximately 12:47 a.m. Officer Hartless of the Newark Police Department made a routine traffic stop. The vehicle was driven by the appellant.

{¶4} In the front passenger's seat was Michael Haile. The appellant's brother, Christopher Wheat, was seated in the back passenger seat. In the rear driver's side seat was James "JJ" McCall. Appellant was the only adult in the car.

{¶5} Officer Hartless requested appellant step out of the car. The officer testified as appellant started to step out of the car, the appellant "leans back in and pulls something from his pocket and hands it to the front passenger." (T. at 65).

{¶6} The officer asked appellant to wait by the patrol car. Officer Hartless then approached the passenger, Michael Haile, and asked him what appellant had handed to him. At first, Mr. Haile produced a picture identification card. When again asked what appellant had handed him, Mr. Haile remained silent. Officer Hartless then radioed for the K-9 Unit to conduct a search of the vehicle. While waiting for K-9 Unit to arrive, the officer asked Mr. Haile if appellant had given him any drugs or anything, entreating Mr. Haile to come clean by informing him that K-9 Unit will find them. (T. at 66). Mr. Haile responds by producing a clear plastic bag with several small off-white rocks.

{¶7} A search of the vehicle revealed a second plastic bag with off-white colored rocks between the driver's seat and front console. Both of the bags were analyzed and found to be crack-cocaine in an amount exceeding one gram.

{¶8} After transporting the appellant to the police station, Officer Hartless began to question him. At first the appellant requested an attorney. According to Officer Hartless the appellant then initiated a conversation about what he could do to get himself out of trouble. The appellant informs Officer Hartless he was approached by a gentleman at a local gas station. The gentleman asked if he was going to Hookaville. The appellant acknowledged that he was, and the unidentified male subject then asked whether the appellant would transport some rocks to Hookaville for him. Officer Hartless testified that the appellant told him he gave fifty dollars to the gentleman and that he would get the fifty dollars back when he delivered the rocks of crack-cocaine to Hookaville. Officer Hartless further testified that appellant told him that he thought he could sell the stuff on his own and make more than fifty dollars.

{¶9} Michael Haile testified that he picked up the crack-cocaine thrown down by appellant and stuffed it into his sweat pants so the officer would not see it lying on the seat.

{¶10} Appellant testified that the officer found both bags of crack-cocaine inside the car, and that neither belonged to him. Appellant testified he lied to the officer at the station to keep his friends from getting into trouble.

{¶11} A one-day jury trial commenced on June 3, 2003 and concluded with the jury finding appellant guilty of possession of crack-cocaine. The jury also found the

amount of crack-cocaine to be in excess of one gram but less than five grams. The court deferred sentencing and ordered a pre-sentence investigation report.

{¶12} On August 20, 2003, the trial court conducted a sentencing hearing and sentenced appellant to a term of incarceration of ten months.

{¶13} Appellant timely filed a notice of appeal setting forth a sole assignment of error:

{¶14} "THE TRIAL COURT COMMITTED HARMFUL ERROR AND ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S REQUEST FOR A CONTINUANCE OF THE JURY TRIAL HEREIN."

{¶15} In his sole assignment of error, appellant argues that the trial court erred when it failed to continue the trial so that appellant could secure the attendance of witnesses subpoenaed by appellant. We disagree.

{¶16} 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. If, however, the denial of a continuance is directly linked to the deprivation of a specific constitutional right, some courts analyze the denial in terms of whether there has been a denial of due process. *Bennett v. Scroggy* (6th Cir. 1986), 793 F. 2d 772. A defendant has an absolute right to prepare an adequate defense under the Sixth Amendment of the United States Constitution and a right to due process under the Fifth and Fourteenth Amendments. *United States v. Crossley* (6th Cir. 2000), 224 F. 3d 847, 854. The United States Supreme Court has recognized that the right to offer the testimony of witnesses and compel their attendance is constitutionally protected. *Washington v. Texas* (1967), 388 U.S. 14, 19, 87 S. Ct. 1920, 1923. The

Ohio Supreme Court recognized that the right to present a witness to establish a defense is a fundamental element of due process of law. *Lakewood v. Papadelis* (1987), 32 Ohio St. 3d 1, 4-5. A trial court's failure to grant a continuance to enable a defendant to exercise his constitutionally protected right to offer the testimony of witnesses and compel their attendance may, in some circumstances, constitute a denial of due process. *Mackey v. Dutton* (6th Cir. 2000), 217 F. 3d 399, 408; *Bennett v. Scroggy,* supra, 793 F. 2d at 774.

{¶17} Among the factors to be considered by the court in determining whether the continuance was properly denied are: (1) the length of the requested delay, (2) whether other continuances had been requested and granted, (3) the convenience or inconvenience to the parties, witnesses, counsel and court, (4) whether the delay was for legitimate reasons or whether it was "dilatory, purposeful or contrived", (5) whether the defendant contributed to the circumstances giving rise to the request, (6) whether denying the continuance will result in an identifiable prejudice to the defendant's case, and (7) the complexity of the case. *Powell v. Collins* (6th Cir. 2003), 332 F. 3d 376, 396; *State v. Unger* (1981), 67 Ohio St. 2d 65, 67-68, 423 N.E. 2d 1078, 1080.

{¶18} On a petition for habeas corpus relief, the federal courts have enumerated a slightly different set of factors that a reviewing court should consider in determining whether an accused was deprived of his rights to compulsory process and due process of law by denial of a motion for continuance: "[1] the diligence of the defense in interviewing witnesses and procuring their testimony within a reasonable time, [2] the specificity with which the defense is able to describe their expected knowledge or testimony, [3] the degree to which such testimony is expected to be favorable to the

accused and [4] the unique or cumulative nature of the testimony." *Hicks v. Wainwright* (5th Cir. 1981), 633 F. 2d 1146, 1149 (quoting *United States v. Uptain* [5th Cir. 1976], 531 F. 2d 1281, 1287); see, also, *Bennett v. Scroggy*, supra, 793 F. 2d at 774.

{¶19} Applying the factors in *Powell,* supra, and *Hicks,* supra, to the case at bar, we find that appellant was not deprived of his rights to compulsory process and due process by the trial court's denial of his motion for a continuance.

{¶20} Defense counsel did issue subpoenas to Mr. Wheat and to Mr. McCall. (T. at 9). The subpoenas were filed on May 29, 2003, five days prior to trial. In making his request, appellant's trial counsel stated: "We did learn today that the address we had for Christopher Wheat was incorrect. I really don't know where Mr. McCall is at this time." (Id. at 6). In overruling the motion the trial court noted that the case had been pending for seven weeks. (T. at 8). The trial court further reasoned that the appellant should know the whereabouts of his own brother. (Id.).

{¶21} Absent from counsel's request for a continuance are two critical factors: (1.) the amount of time necessary to secure the attendance of the witnesses, and (2.) the nature of the witness' testimony.

{¶22} In *State v. Brooks,* (1989), 44 Ohio St. 3d 185, 542 N.E. 2d 636 the court noted: "defense counsel failed to proffer to the trial court what the desired testimony of [the absent witness] was and how it would have been relevant and material to the defense. Evid. R. 103 (A)(2) requires an offer of proof in order to preserve any error in excluding evidence, unless the excluded evidence is apparent in the record." Id. at 195, 542 N.E. 2d at 645.

{¶23} In the case at bar, as in *Brooks,* supra, trial counsel failed to provide the court with any indication of the expected nature or relevancy of the witness' testimony or the amount of time that may be necessary to locate the witnesses. *State v. Mills*, 5th Dist. No. 01-COA-01444, 2002-Ohio-5556; *State v. Komadina* 9th Dist. No. 02-CA-008104, 2003-Ohio-1800.

{¶24} Therefore, based upon the record before this court, we find that appellant has failed to show prejudice and we cannot say that the trial court abused its discretion when it denied appellant's motion for a continuance.

{¶25} Appellant's sole assignment of error is overruled.

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

Judgment affirmed.

Hoffman and Wise, JJ., concur.

[Cite as *State v. Wheat*, 2004-Ohio-2088.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RICKY WHEAT	:	
Defendant-Appellant	:	CASE NO. 2003-CA-00057

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs to appellee.

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JUDGES