

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

SHAWN C. CARNES

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 2009 CA 56

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 08 CR 157

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 15, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH W. OSWALT
Licking County Prosecutor

By: TRACY F. VAN WINKLE
Assistant Prosecuting Attorney
20 S. Second Street, Fourth Floor
Newark, Ohio 43055

JOHN SHERROD
ROGER SOROKA
673 S. Mohawk St., Suite 100
Columbus, OH 43206

Hoffman, J.

{¶1} Defendant-appellant Shawn C. Carnes appeals his conviction entered by the Licking County Court of Common Pleas, on one count of illegal cultivation of marijuana, in violation of R.C. 2925.04(A)(C)(5)(e), after the trial court found Appellant guilty following his plea of no contest. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On March 21, 2008, the Licking County Grand Jury indicted Appellant on the aforementioned charge together with a firearm specification. Appellant appeared before the trial court with counsel for arraignment on April 8, 2008, and entered a plea of not guilty to the Indictment. Appellant filed a Request for Notice of the State's Evidence and Demand for Discovery. The State filed its Discovery Record, Notice of Intent, Bill of Particulars, and Request for Discovery on May 8, 2008. Via Court Order filed May 15, 2008, the trial court scheduled the matter for jury trial on October 7, 2008.

{¶3} On October 1, 2008, Appellant filed a Motion to Continue the Jury Trial, citing defense counsel's need of additional time for investigation, trial preparation, and negotiations. Via Entry filed the same day, the trial court continued the trial to February 5, 2009. Appellant subsequently retained new counsel, Attorneys John Sherrod and Roger Soroka, who entered a Notice of Appearance on February 3, 2009. On the same day Attorneys Sherrod and Soroka filed a Demand for Discovery as well as a Request for Bill of Particulars. The following day, the State filed supplemental discovery, indicating the discovery filed on May 8, 2008, had been hand delivered to Appellant's new counsel.

{¶4} The matter came before the trial court on February 5, 2009. At that time, Appellant withdrew his former plea of not guilty and entered a plea of not contest. The State dismissed the gun specification. The trial court scheduled the matter for sentencing on March 31, 2009.

{¶5} At the sentencing hearing, the trial court stated the case had originally been assigned for trial in October, 2008, but was continued until February 5, 2009, at original defense counsel's request. The trial court noted Appellant had changed counsel at the last minute and requested a continuance. The trial court explained it denied the request as its docket was "extremely crowded" and it did not "have the luxury of continuing cases." Transcript of March 31, 2009 Sentencing Hearing at 6. The trial court added, rather than proceeding to trial after the denial of the continuance, Appellant entered a plea of no contest, which the trial court accepted and found Appellant guilty. The trial court ordered Appellant to serve a three year period of community control.

{¶6} It is from his conviction Appellant appeals, raising as his sole assignment of error:

{¶7} "I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN DENYING APPELLANT'S REQUEST FOR CONTINUANCE OF THE JURY TRIAL."

{¶8} The decision whether to grant or deny a continuance is within the sound discretion of the trial court and should not be reversed on appeal absent an abuse of that discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. "Whether the court has abused its discretion

depends upon the circumstances, ‘particularly * * * the reasons presented to the trial judge at the time the request is denied.’ ’ *State v. Powell* (1990), 49 Ohio St.3d 255, 259, 552 N.E.2d 191, quoting *Unger v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921.

{¶9} While no “mechanical formula” exists for determining whether a trial court has abused its discretion in denying a motion for a continuance, the Ohio Supreme Court has utilized a “balancing test which takes cognizance of all the competing considerations” present in a particular case. *Unger* at 67, 423 N.E.2d 1078. When evaluating a request for a continuance, a court should note the length of the delay requested; whether other continuances have been requested and received; the convenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; and other relevant factors depending on the unique facts of each case. *Id.* at 67-68, 423 N.E.2d 1078. A reviewing court must weigh the potential prejudice to the 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. Powell* (1990), 49 Ohio St.3d 255, 259, 552 N.E.2d 191.

{¶10} Appellant maintains the requested delay was for a legitimate reason as he had retained new counsel three days prior to trial and the State provided counsel with discovery less than 24 hours prior to the scheduled trial date.

{¶11} We have reviewed the record and found it does not contain a written motion for a continuance. Appellant provided this Court with a copy of the sentencing transcript, which contains a reference to the trial court’s denial of his request for a

continuance. Assuming, *arguendo*, a valid motion to continue was before the trial court, we find the *Ungar* factors weigh in favor of the trial court's decision.

{¶12} Appellant asserts the continuance was necessary in order for new defense counsel to prepare for trial. However, the February 5, 2009 trial date had been scheduled four months earlier, and there is nothing in the record in way of explanation as to why Appellant waited two days before trial to retain new counsel. This was Appellant's second request for continuance, the first having been made by original defense counsel. At the time newly retained counsel entered their appearances, the matter had been pending over ten months. The State had subpoenaed ten law enforcement witnesses as well as three lay witnesses, some of whom were coming from other counties. Another continuance would have been costly to both the State and witnesses, from monetary and time standpoints. Although Appellant states new defense counsel did not receive discovery until less than 24 hours prior to the scheduled trial date, the record establishes the State had filed discovery in May, 2008, and such was the same information provided to new defense counsel. The trial court indicated the scheduling of a new trial date would be troublesome due to its overwhelmed docket.

{¶13} Based upon the foregoing, we find the trial court did not abuse its discretion in denying Appellant's request for a continuance.

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

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

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin

HON. W. SCOTT GWIN

s/ Patricia A. Delaney

HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SHAWN C. CARNES

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 2009 CA 56

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

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin

HON. W. SCOTT GWIN

s/ Patricia A. Delaney

HON. PATRICIA A. DELANEY