

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01306 COA**

CHELSIE O. BROWN A/K/A

APPELLANT

CHELSIE ORLANDO BROWN

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	11/15/95
TRIAL JUDGE:	HON. THOMAS J. GARDNER III
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	MELVIN C. ELLIS III SHELLY NICHOLS ELLIS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	JOHN R. YOUNG
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	ARMED ROBBERY: SENTENCED TO SERVE A TERM OF 40 YRS IN THE MDOC; DEFENDANT IS SENTENCED TO SERVE NOT LESS THAN 10 YRS BECAUSE A FIREARM WAS USED IN COMMISSION OF THE OFFENSE
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

Chelsie O. Brown appeals his conviction of armed robbery raising the following issue as error:

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR A CONTINUANCE BASED UPON THE ABSENCE OF CRUCIAL ALIBI WITNESSES WHICH MADE UP THE ENTIRETY OF THE ACCUSED'S DEFENSE.

Finding no error, we affirm.

FACTS

On the evening of August 2, 1994, Reverend Chester Pegues was staying at the Ramada Inn in Tupelo, Mississippi. After attending an annual conference, he was driving his car to the back side of the parking lot, close to his room. When Pegues got out of his car, a man came from behind a nearby van and pointed a chrome-plated gun at Pegues and told him to turn over all his belongings. Pegues noticed that there was another fellow with the man, but that this person did not have a gun and did not do anything except stand there. Pegues described the perpetrator, holding the gun, as a light-skinned black male, between five foot seven and five foot eight inches tall, and bald. Pegues thought the person with the gun was joking and told the individual to "go on." At that point the man cocked the gun and told Pegues that he was not playing. Pegues then took out his money clip and threw it on the ground. The man with the gun noticed Pegues had a watch and told him to give him that also. Pegues testified that he had \$475 in cash and the watch was worth \$295.

On cross-examination, Pegues testified that he had been shown a photo lineup at the police station and was unable to identify the person who held the gun on him, and had not in fact ever made an identification of anyone connected with the crime, including the suspects, so he was unable to identify Chelsie Brown as the perpetrator.

Second to testify for the State was Robert Miller. He stated that on August 2, 1994, he and Brown were at Dewayne Toliver's apartment. Miller stated that while at the apartment, Brown asked if anyone had a gun. Miller testified that a guy named Eric placed a chrome-plated gun on a pillow, and Brown picked it up. Miller and Brown then went to the Ramada Inn and hid in the bushes. Miller stated that soon after the preacher arrived, he saw Brown instruct the preacher to drop his belongings or he would shoot. After Miller saw Brown pick up the wallet and the watch, they ran away. Brown gave Miller \$132 and kept the watch and the rest of the money.

Next to testify for the State was Ezell Miller, brother of Robert Miller. He stated that a few nights before the robbery he was talking with Brown, when Brown indicated that he was going to make a sting or a robbery. Ezell testified that Brown indicated that he was going to do the robbery because he needed money to go out of town. The night of the robbery, Ezell stated that Brown had money at Dewayne Toliver's apartment and that Brown told him about the robbery that evening.

Andrew Dewayne Toliver testified that on August 2, 1994, Brown and several others were at his apartment. Toliver testified that Brown said he was going to rob someone and that he needed a gun. Toliver stated that his cousin gave Brown a chrome-plated gun. Thereafter, Brown took the gun and left with Robert Miller. About thirty minutes later, Brown came back to the apartment and told everyone that he had just robbed someone at the Ramada Inn. Toliver testified that Miller and Brown gave his cousin some money for the use of the gun and that Brown showed him the gold wristwatch he had taken.

The first person to testify for the defense was Katherine Brown, Chelsie Brown's mother. She testified that her son could not have committed the robbery because he was out of town in Chicago, Illinois. She stated that her son left for Chicago around the third week of July and returned in November.

Chelsie Brown testified on his own behalf. He testified that he did not commit the robbery because he was in Chicago, Illinois visiting his father and other relatives.

The jury found Brown guilty of armed robbery, but were unable to fix the penalty. The circuit court fixed the penalty at forty years in the custody of the Department of Corrections.

ANALYSIS

I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR A CONTINUANCE BASED UPON THE ABSENCE OF CRUCIAL ALIBI WITNESSES WHICH MADE UP THE ENTIRETY OF THE ACCUSED'S DEFENSE.

Three days prior to the trial date of November 6, 1995, Chelsie Brown asked the court for a continuance on the grounds that his trial counsel was still conducting discovery in this matter, including obtaining statements from out of state witnesses, and due to the fact that the attorney had not received the trial docket until four days before trial. On the day of trial, after voir dire was completed, Melvin Ellis, Brown's attorney, argued this motion. The circuit court noted that the docket was scheduled January 25th, 1995, and that Brown had been arraigned on August 22, 1995. Brown's first attorney was allowed to withdraw due to a conflict of interest and Mr. Ellis was substituted as counsel. The record reflects that the time from when Brown was appointed an attorney and the trial date was approximately ten weeks. The judge commented that it had also come to his attention that Mr. Ellis had fervently tried to contact Brown without success until the Thursday or Friday before trial. The circuit judge did not feel that he should allow Brown to delay the trial where he clearly had not been cooperating with his counsel until immediately before the trial; he therefore denied the motion.

After the State rested its case, the trial court inquired as to the out of state witnesses, who were family members, that Brown had mentioned as possibly testifying on his behalf. Mr. Ellis advised the court that the two witnesses would not be there until 4:30 that afternoon. Mr. Ellis explained that he had tried unsuccessfully to contact the witnesses on Friday and on the weekend prior to trial on Tuesday.

The court placed in the record that Brown had not contacted Mr. Ellis until Thursday prior to the day of the trial, even though Mr. Ellis had tried to contact him. The circuit court therefore chose not to delay the trial because the jury was waiting.

Brown argues that an injustice occurred when he was not allowed a continuance. This Court, and the Mississippi Supreme Court have held, on numerous occasions, that the granting or denial of a continuance rests within the sound discretion of the trial judge and this Court will not reverse on the refusal to grant a continuance in the absence of an abuse of discretion. *Johnson v. State*, 631 So. 2d

185, 189 (Miss. 1994); *Wallace v. State*, 607 So. 2d 1184, 1190 (Miss. 1992); *Morris v. State*, 595 So. 2d 840, 844 (Miss. 1991); *Jackson v. State*, 538 So. 2d 1186, 1189 (Miss. 1989); *Arteigapiloto v. State*, 496 So. 2d 681, 685 (Miss. 1986); *Gates v. State*, 484 So. 2d 1002, 1006 (Miss. 1986); *Smith v. State*, 463 So. 2d 1102, 1103 (Miss. 1985). "Unless manifest injustice appears to have resulted from the denial of the continuance, this Court should not reverse." *Johnson*, 631 So. 2d at 189 (citing *Hatcher v. Fleeman*, 617 So. 2d 634, 639 (Miss. 1993)).

"[A] trial court has the inherent right to control its trial docket and is afforded reasonable latitude regarding the setting and continuance of cases." *Dew v. Langford*, 666 So. 2d 739, 746 (Miss. 1995) (citing *Watts v. Pennington*, 598 So. 2d 1308, 1312 (Miss. 1992)). The inquiry for this Court when a continuance has been denied is whether denial of this motion "resulted in substantial prejudice to [the party's] right to a fair opportunity to prepare and present his defense." *Jackson v. State*, 538 So. 2d 1186, 1189 (Miss. 1989).

Brown tried to explain on cross-examination why he had not contacted his attorney sooner than a few days before the trial. He testified that he and the co-defendant had originally been appointed the same attorney. This attorney had the cases severed and informed Brown that there would be a conflict of interest in representing both defendants. The original attorney informed Brown that another attorney would be appointed to him, and Brown testified that this attorney never contacted him and told him who would represent him as new counsel. Brown testified that he did not know who to contact or that he even had a lawyer until the Thursday before his trial. However, the record reveals that Mr. Ellis, Brown's attorney, was appointed eight weeks before trial. We fail to see how eight weeks could be considered an insufficient amount of time for either Brown to contact Mr. Ellis, or Mr. Ellis contact Brown.

We also note that the affidavits, which were filed on behalf of the missing witnesses, do not claim that these witnesses were alibi witnesses. The affidavits merely indicate that these witnesses did not arrive in Tupelo until 5:45 p.m., after the trial concluded. Even assuming that these witnesses were indeed alibi witnesses, we note that their testimony would have been cumulative. Brown and his mother testified that he was in Chicago, Illinois at the time of the robbery.

Contrary to Brown's claim, there is a lack of evidence for holding that an injustice occurred. Brown had new counsel appointed to represent him approximately eight weeks before trial, who, as the record indicates, tried his best to contact Brown. The affidavits from the out of town witnesses were insufficient in that they did not indicate what testimony the witnesses would have given. Assuming the witnesses would have testified to support Brown's alibi, their testimony would have been merely cumulative to the testimony already given by Brown and his mother. Accordingly, we find that the circuit judge, did not abuse his discretion, in his denial of the continuance.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF FORTY YEARS WITH APPELLANT NOT TO SERVE LESS THAN TEN YEARS BECAUSE A FIREARM WAS USED IN THE COMMISSION OF THE OFFENSE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LEE COUNTY.

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING,
PAYNE, AND SOUTHWICK, JJ., CONCUR.**