

IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01223 COA

DENVILLE LEE HUMPHREY

APPELLANT

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

TRIAL JUDGE: HON. MELVIN KEITH STARRETT

COURT FROM WHICH APPEALED: LINCOLN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOSEPH A. FERNALD, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: JERRY L. RUSHING

NATURE OF THE CASE: CRIMINAL: UNLAWFUL SALE OF COCAINE WITH ENHANCED
PUNISHMENT

TRIAL COURT DISPOSITION: GUILTY - SENTENCED TO TWENTY YEARS IN MDOC TO
RUN CONSECUTIVELY WITH CAUSE NO. 10948, PAY \$2,500 FINE, COURT COSTS AND
ATTORNEY FEES

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

DIAZ, J., FOR THE COURT:

Denville Lee Humphrey (Humphrey) was convicted by a jury in the Lincoln County Circuit Court for the sale of cocaine with an enhanced sentence. For this conviction, Humphrey received a twenty-year sentence, fined \$2,500 and required to pay all court costs and attorney fees. Aggrieved, Humphrey appeals to this Court asserting that the trial court abused its discretion when it denied Humphrey's motion for continuance. Finding no reversible error, we affirm the judgment below.

FACTS

On April 16, 1992, confidential informant Dwayne Phillip Wells bought a rock of crack cocaine from Humphrey while under police surveillance. Humphrey was later indicted under the Mississippi Code section 41-29-139, for the sale of cocaine, and section 41- 29-147 that allows for enhanced sentencing due to prior offenses.

Humphrey's first appointed counsel filed a motion for continuance in order to prepare for his defense after Humphrey's co-conspirator filed a motion for severance. Both motions were granted. Subsequent to the continuance, Humphrey's counsel was suspended from the practice of law for one year; therefore, the circuit judge appointed Mr. Fernald to represent Humphrey. At this point, Humphrey had been convicted on an unrelated charge and was incarcerated at the Pike County Community Work Center. The court subsequently granted another continuance; this time pursuant to a motion filed by the State. The case was set for trial Saturday, September 11, 1993.

On September 10, 1993, the day before trial, at 5:30 p.m., Humphrey told his attorney for the first time that he needed to secure some witnesses for his trial. Humphrey met with his attorney several times before this date, even earlier that day, but could not remember any witnesses to call for his defense. One witness he remembered at this time was his co-conspirator, who was serving a sentence at Parchman. Another witness he remembered was his brother, who was living in Lincoln County. Humphrey also told counsel that his first attorney had crucial information to his case, as well

as his co-conspirator's attorney. Humphrey's attorney immediately filed a motion for continuance, an affidavit, and subpoena the next day. The trial judge heard the arguments of counsel, and denied the motion. The trial proceeded on its merits. Humphrey did not testify, nor did he offer any witnesses in his defense.

DISCUSSION

Trial judges are vested with broad discretion in their decision to grant or deny continuances. *Morris v. State*, 595 So. 2d 840, 844 (Miss. 1991). Furthermore, we will not reverse a case based solely on a denial of a continuance unless the defendant shows not only an abuse of discretion, but also that injustice resulted from it. *Morris*, 595 So. 2d at 844; see Miss. Code Ann. § 99-15-29 (Rev. 1994). The trial court is vested with reasonable latitude in setting and continuance of cases. *Thomas v.*

Hilburn, 654 So. 2d 898, 903 (Miss. 1995). Based on our findings, there was no abuse of discretion in denying the motion for continuance.

Section 99-15-29 sets forth certain requirements a motion for continuance must include. Stated in relevant part, the section provides:

[T]he party shall set forth in his affidavit the facts which he expects to prove by his absent witness . . . that the court may judge of the materiality of such facts, the name and residence of the absent witness, that he has used due diligence to procure . . . the presence of the absent witness . . . stating in what such diligence consists, and that the continuance is not sought for delay only, but that justice may be done . . . A denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom.

Miss. Code Ann. § 99-15-29 (Rev. 1994). Our State Supreme Court has consistently held that a trial court will not be found in error in denying a continuance if the defendant fails to follow the procedure outlined by statute and case law. *Johnson v. State*, 631 So. 2d 185, 190 (Miss. 1994) (citations omitted).

In the instant case, we find that Humphrey failed to use due diligence in procuring the absent witnesses. Humphrey's second trial attorney was appointed on May 8, 1993. Between May 8, 1993, and September 8, 1993, Humphrey met with his attorney twice to discuss his case and potential witnesses. On the September 8 meeting with his attorney, Humphrey could not recall any witnesses to testify on his behalf. In fact, Humphrey could not recollect any witnesses as late as 1:00 p.m., September 10, 1993, the day before trial. It was not until 5:30 p.m., the evening before trial that Humphrey informed his attorney that he remembered some witnesses that could testify in his defense. The statute clearly places the responsibility on the party seeking the continuance to use due diligence in procuring the absent witnesses. Humphrey argues that the witnesses he remembered were crucial to his defense. If that be the case, it can hardly be called due diligence suddenly to recollect such witnesses the night before trial, when Humphrey was indicted a year before trial, and had several meetings with his attorney on the subject previously. Despite the fact that Humphrey's attorney may have acted with due diligence under the circumstances, it is not the attorney's diligence that the statute contemplates.

We hold that the statute was not complied with since the party, in this case Humphrey, did not act with due diligence, and the continuance was seemingly sought for delay only. Therefore, we affirm the judgment of the circuit court.

THE JUDGMENT OF THE LINCOLN COUNTY CIRCUIT COURT OF CONVICTION OF SALE OF COCAINE WITH ENHANCED SENTENCE AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY WITH CAUSE NO. 10948, AND TO PAY \$2,500 FINE IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO LINCOLN COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING,

McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.