

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00180 COA**

TANGULA GREGORY A/K/A "TANG"

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

DATE OF JUDGMENT:	12/13/95
TRIAL JUDGE:	HON. C. E. MORGAN III
COURT FROM WHICH APPEALED:	ATTALA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	MARK E. MCLEOD JOHN M. COLETTE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: WAYNE SNUGGS
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I, CT II & CT III SALE OF COCAINE: SENTENCED TO SERVE 20 YRS ON EACH CT; CT II CONCURRENT CT I; CT III CONCURRENT CT I & CT II; CONSECUTIVE TO ANY PREVIOUS SENTENCES
DISPOSITION:	AFFIRMED-12/16/97
MOTION FOR REHEARING FILED:	12/30/97
CERTIORARI FILED:	3/9/98
MANDATE ISSUED:	5/14/98

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

KING, J., FOR THE COURT:

Tangula Gregory was convicted of three counts of selling cocaine in violation of

§41-29-139(a)(1)(b)(1) of the Miss. Code Ann. (Rev.1994) and sentenced to serve a term of twenty years on each count, with each sentence to run concurrently, in the custody of the Mississippi Department of Corrections. Gregory assigns the following errors on appeal: (1) the lower court erred

in forcing counsel for the defendant to proceed to trial and (2) the lower court erred in not granting a continuance. Finding no error, we affirm.

FACTS

On September 11, 1995, Gregory was indicted on three counts of selling cocaine in Kosciusko, Mississippi. On September 13, 1995, Eddie Fenwick, an Attala county public defender, was assigned to Gregory's case and thereafter represented her at the preliminary hearing and arraignment. Attorney Fenwick received all discovery by the end of September and conducted continued plea negotiations with the district attorney's office prior to the day of trial, December 11, 1995.

On the day of trial, Attorney Fenwick announced that he was not prepared to proceed with this case. In response to questioning from the trial judge, Attorney Fenwick explained that he had only met with Gregory a few days before trial. At this meeting, he discussed discovery material and plea negotiations with her and scheduled another meeting to discuss her decision to plead guilty or go to trial. Gregory did not show up for the second meeting. Attorney Fenwick stated that upon calling Gregory's home, he was informed by her mother that Gregory was trying to employ another attorney, Mark McCleod.⁽¹⁾ Gregory was in court on the day of trial as scheduled, but had not made further contact with Attorney Fenwick until that morning.

After determining that Attorney Fenwick was familiar with the State's witnesses and the discovery material, the trial judge ordered him to proceed to trial. A jury convicted Gregory on three counts of the sale of cocaine. She now appeals her conviction and sentence.

ISSUES

I. WHETHER THE LOWER COURT ERRED IN FORCING COUNSEL FOR THE DEFENDANT TO PROCEED TO TRIAL

Gregory's first assignment of error is that her Sixth Amendment right to effective assistance of counsel was violated because the trial judge ordered Attorney Fenwick to proceed to trial, despite the fact that he had met with her on only one occasion before trial and announced on the day of trial that he was not prepared to go forward.

When judging attorney performance, the proper standard is that of reasonably effective assistance. In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court set forth the following two-prong test for determining effective assistance of counsel:

(1) Was counsel's performance deficient?

(2) Did the deficient performance prejudice the defense so as to deprive the defendant of a fair trial?

See also Wilcher v. State, 479 So.2d 710, 712 (Miss.1985); *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984).

In applying the first prong of the test, we consider whether Attorney Fenwick's performance was deficient. It is presumed that Attorney Fenwick's conduct falls within the wide range of effective

assistance. ***Strickland*, 466 So.2d. at 689.** To overcome this presumption, Gregory must identify specific deficiencies in the record which indicate a failure of counsel to render effective assistance. ***Id.***

In her attempts to overcome this presumption, Gregory contends that Attorney Fenwick (1) met with her only one time before trial, (2) failed to put on a defense, and (3) failed to submit jury instructions. After review of the record, we find that Attorney Fenwick's performance, viewed in its entirety, countervails these alleged errors.

Attorney Fenwick had only one formal meeting with Gregory, at which time he discussed plea negotiations and discovery materials with her. Despite further attempts to meet with Gregory, she failed to appear. In evaluating Attorney Fenwick's performance, we also consider Gregory's efforts to assist in her own defense. "A defendant cannot base a claim of inadequate representation upon [her] refusal to cooperate with appointed counsel." ***Johnson v. State*, 631 So.2d 185, 190 (Miss.1994)** (citing *Shaw v. U.S.*, 403 F.2d 528, 529 (8th Cir.1968)). A significant part of the assistance required of Gregory was being prepared to meet and confer with her attorney. In this respect, we find Gregory's performance to have been deficient.

Attorney Fenwick presented no witnesses during the defense's case, but vigorously engaged in the cross-examination of three undercover narcotics officers and a confidential informant. He displayed significant familiarity with the State's witnesses and their testimony. Though Gregory contends that Attorney Fenwick put on no defense, after review of the brief on appeal, we find that Gregory fails to suggest witnesses who should have been called in her defense.

Attorney Fenwick did not submit jury instructions. Nor, did he state on the record a lack of time or ability to prepare Gregory's instructions. During trial he actively engaged in the discussion of instructions submitted by the circuit court and the State. While troubled by his failure to submit jury instructions, when Attorney Fenwick's performance is taken as a whole, we cannot say it was deficient.

Having determined that Attorney Fenwick's representation was not deficient, it is not necessary to apply the second prong of the test. However, in the interest of Gregory's rights to a fair trial and effective assistance of counsel, we will consider whether prejudice resulted to Gregory as a result of Attorney Fenwick's representation. The proper standard requires the defendant to "[s]how that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland*, 466 U.S. at 694.**

The record reveals that an undercover narcotics agent, equipped with a wire recording device, and a confidential informant purchased cocaine from Gregory. The purchases took place at her home on three separate occasions. A second agent, who conducted surveillance near Gregory's home, witnessed the first agent and informant go to Gregory's house to make the purchases. A third agent maintained custody of the cocaine. Viewing the evidence in its totality, it does not appear that different conduct by Attorney Fenwick would have produced a not-guilty verdict.

Considering the State's remarks regarding Attorney Fenwick's continued efforts to conduct plea negotiations⁽²⁾ and giving deference to the trial judge's decision that Attorney Fenwick was prepared to go to trial, we find that Attorney Fenwick rendered effective assistance in the instant case. This

first assignment of error is without merit.

II. WHETHER THE LOWER COURT ERRED IN NOT GRANTING A CONTINUANCE

Gregory contends that she should have been given a continuance because Attorney Fenwick announced that he was not prepared to go to trial and she had also retained other counsel to represent her. "[I]t is a well-settled rule in this State that the granting of a continuance is within the sound discretion of the trial court, and a judgment will not be reversed because the continuance was refused unless there has been an abuse of discretion resulting in injustice." *Ladnier v. State*, 273 So.2d 169, 171-172 (Miss.1973). In *Byrd v. State*, 522 So.2d 756, 759 (Miss.1988), our supreme court held that when an accused appears on the morning of trial with a new lawyer and asks for a continuance, the trial court does not abuse its discretion in denying the continuance. Though Gregory did not actually appear in court with new counsel, Attorney Fenwick announced on the day of trial that Gregory was trying to retain other counsel. Gregory had approximately four months to retain another attorney. On the day of trial, she had not done so. The judge determined that Attorney Fenwick was sufficiently familiar with the case to proceed. We find that the trial judge did not abuse his discretion in denying the motion for continuance. Finding no error, we affirm the circuit court's judgment.

THE JUDGMENT OF THE ATTALA COUNTY CIRCUIT COURT OF CONVICTION ON COUNTS I, II, AND III OF SALE OF COCAINE AND SENTENCES OF TWENTY YEARS ON EACH COUNT, WITH SENTENCES TO RUN CONCURRENTLY, WITH EACH OTHER AND CONSECUTIVELY TO ANY PREVIOUSLY IMPOSED SENTENCE, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

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

1. The trial judge stated in the record that Attorney McCleod did not file an appearance with the Court.
2. Prior to trial, the district attorney stated that "[M]r. Fenwick has contacted me and has been very interested in Ms. Gregory's case, primarily because she's facing more sale counts than anybody else that's been indicted. And he's called me and we've had detailed discussions and plea negotiations and he has actively participated in plea negotiations and in the State's opinion, has adequately represented her to this point, and I'm sure he will throughout the trial."