

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-120

MAR 5 2009

MARCH TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Lennie Bushey	}	DOCKET NO. 5214-12-06 CnCr
		Trial Judges: Christina C. Reiss;
		Linda Levitt

In the above-entitled cause, the Clerk will enter:

Defendant appeals from his conditional no-contest pleas to careless and negligent operation and leaving the scene of an accident with serious injury resulting. He argues that the court erred in denying his motion for a continuance. Alternatively, he asserts that the court erred in denying his motion to withdraw his pleas prior to sentencing. We affirm.

The record indicates the following. In December 2006, defendant was charged with driving under the influence of alcohol; negligent operation; and leaving the scene of an accident (LSA) involving property damage. According to the affidavit of probable cause, defendant rear-ended a motor vehicle in front of him, causing it to rear-end a third vehicle. One of the passengers in the second vehicle was injured, as was defendant. Defendant was later located at his girlfriend's house in an intoxicated state.

At a January 2007 calendar call, the State made a "comprehensive offer" to defendant, but defendant's attorney indicated that he needed additional time to investigate the charges. In March 2007, the State amended the first count to driving under the influence, second offense. A jury draw was set for May 29 but at the State's request, it was rescheduled for August 20. At defendant's request, the jury draw was moved to September 24. On September 21, defendant again moved to continue the jury draw, indicating that he needed additional time to prepare for trial. The court initially denied defendant's motion, but later granted the continuance when the State amended the third count—leaving the scene of an accident—to a felony. Jury draw was then set for October 8. On October 3, defendant moved to continue jury draw, asserting that certain depositions would not be transcribed in time for the jury draw. The court initially denied this request, but later granted it, continuing the jury draw until October 22.

On October 18, the parties filed a "stipulation for a trial date certain" with the court. They asked the court to schedule the jury draw on November 5, and reserve November 7-9 for trial. The court granted the parties' request. On the day of the jury draw, however, defendant's attorney requested another continuance, indicating that he was not ready for trial because there

were “too many loose ends that need to be put together.” He stated that defendant had been badly injured in the underlying September 2006 accident and that defendant had been unable to contribute the time necessary to prepare his defense. Counsel also indicated that defendant had an appointment with his doctor on November 7 to schedule surgery.

After hearing argument from the parties, the court denied the motion. It explained that it had already granted far more continuances than were generally allowed and it had set a date certain for trial. The court recognized that defendant might need to consult with his doctor, but it found no indication why it had to be on the first day of trial as opposed to any other date. The court also questioned why it was necessary, as posited by defense counsel, to have more time to find witnesses, given that the case was over a year old. It found no prejudice from defendant’s late deposition of his own witnesses. For these and other reasons, the court denied the request, stating that a jury would be drawn unless the parties came up with a resolution.

During a recess, defendant signed a plea agreement, reserving the right to appeal the court’s denial of the motion to continue. Pursuant to the agreement, defendant was to plead no contest to the charges of felony LSA and misdemeanor negligent operation, and the State would recommend a sentence of one to five years, all suspended except ninety days and probation. The State also agreed not to file a violation of probation based on the conviction, and to dismiss the DUI-second-offense charge and three violations of conditions of release. When the agreement was presented to the court, defendant repeated that he had not had a chance to review all of the depositions and he asserted that many of the continuances in the case had been at the State’s request. The court made clear to defendant that it would not reconsider its denial of his request for a continuance and that it would not accept the plea agreement unless defendant entered into it voluntarily. When defendant indicated that he had accepted the agreement because he did not want to miss his doctor’s appointment, the court rejected the plea agreement and stated that a jury would be drawn.

Following another recess, defense counsel stated to the court that he had discussed the situation with defendant and that defendant was prepared to voluntarily enter the plea agreement. Defendant represented to the court that this was accurate. The court informed defendant that it had no intention of forcing him to accept a plea agreement, and that if he had any issues he needed to raise them. Defendant replied that he wanted to go forward with the plea agreement. The court then advised defendant of his rights, and defendant indicated that he understood them, and that he wished to enter a no contest plea. He stated that no one had made any threats or promises, outside the agreement, that caused him to plead no contest, and that he was not under the influence of any medication that would interfere with his understanding of the nature of the proceedings. The State described the factual basis for the charges and defendant agreed that the State could prove its facts beyond a reasonable doubt. The court then accepted defendant’s pleas and set the matter for sentencing.

Sentencing was continued twice at defendant’s request. On the day before the rescheduled hearing, defendant’s attorney moved to withdraw and to continue the sentencing again. At a hearing, the court granted the motion to withdraw and appointed new counsel. Defendant then filed a motion to withdraw his pleas, arguing that he had been coerced into signing the plea agreement. Defendant complained about the denial of his motion to continue, repeating that he had a doctor’s appointment scheduled for the first day of trial. The court

denied the motion, finding that defendant's allegations of coercion did not amount to the type of impermissible pressure that would render his pleas involuntary. The court observed that defendant was simply trying to obtain a continuance through improper means, and it found no fair or just reason why defendant should be allowed to withdraw his pleas. After denying defendant's request to delay sentencing further, the court imposed the sentence set forth in the plea agreement. This appeal followed.

Defendant asserts that the court erred in denying his request for a continuance. According to defendant, the court failed to view his request in light of the circumstances surrounding his case, and it denied the motion merely because there had already been too many continuances granted. Defendant notes that the State did not oppose his request, and he asserts that the State would not have suffered any prejudice had the continuance been granted. He reiterates that, given the state of his health, the delay was necessary to allow him to finish preparing his defense.

We find these arguments without merit. The trial court has discretion in considering a motion to continue, and it acted well within its discretion in denying defendant's request here. See State v. Schreiner, 2007 VT 138, ¶ 14 (citations omitted) ("Because a motion to continue must be decided in the light of the circumstances surrounding each individual case, [the Supreme Court] will not interfere with the trial court's decision if there is a reasonable basis to support it."). As recounted above, defendant was granted numerous continuances throughout this case. At the parties' urging, the court set a date certain for trial. Although the court had informed the parties that no further continuances would be granted, it nonetheless considered the merits of defendant's request for another continuance, made on the day of jury draw. As set forth above, the court was unpersuaded by defendant's medical excuse and it found no prejudice resulting from defendant's late deposition of his own witnesses. Given the history of the proceedings, and the fact that the case had been pending for almost a year, the court also rejected defendant's assertion that he needed yet more time to prepare for trial. The court identified numerous reasonable grounds for its decision, and it did not abuse its discretion in denying defendant's request. See id. (to demonstrate abuse of discretion, a defendant must do more than show that another court might have reached a different conclusion).

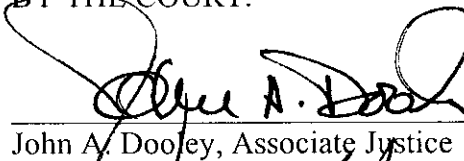
Defendant next argues that the court erred in denying his request to withdraw his pleas. Defendant reiterates his claim that he had insufficient time to read depositions and that going to trial would have required him to miss a doctor's appointment. He suggests that these factors rendered his pleas involuntary. He also asserts that the State would have suffered no prejudice had his request to withdraw his pleas been granted.

We find no error. The trial court may permit withdrawal of a plea "if the defendant shows any fair and just reason and that reason substantially outweighs any prejudice which would result to the state from the withdrawal of the plea." V.R.Cr.P. 32(d). The trial court has discretion in considering such a request, and "if defendant's justification for withdrawal is unreasonable under the circumstances, the motion should be denied." State v. Fisk, 165 Vt. 260, 262 (1996). In this case, the trial court found defendant's request unreasonable. As the court explained, and the record shows, defendant was cognizant of his choices prior to entering the plea agreement, and he voluntarily decided to go forward. The fact that defendant had scheduled a doctor's appointment for the first day of trial does not demonstrate that he was impermissibly

coerced into accepting a plea agreement. We agree with the trial court that, through his motion, defendant was simply trying to accomplish indirectly what he could not do directly, that is, to continue his trial to a later date. Defendant failed to identify a “fair and just reason” for allowing the withdrawal of his pleas, and the court acted within its discretion in denying his request.

Affirmed.

BY THE COURT:



John A. Dooley, Associate Justice



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice