

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 1143

STATE OF LOUISIANA

VERSUS

PRINCETON OLIVER

Judgment Rendered: February 8, 2008

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**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Case No. 09-04-0523**

The Honorable Bonnie Jackson, Judge Presiding

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**Doug Moreau
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Dylan C. Alge
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State of Louisiana**

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**Counsel for Defendant/Appellant
Princeton Oliver**

* * * * *

BEFORE: GAIDRY, MCDONALD, AND MCCLENDON, JJ.

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GADRY, J.

The defendant, Princeton Oliver, was charged by bill of information with manslaughter, a violation of La. R.S. 14:31. The defendant entered a plea of not guilty. The defendant waived trial by jury and, after a bench trial, was found guilty as charged. The trial court denied the defendant's motion for new trial. The defendant was sentenced to fifteen years imprisonment at hard labor. The defendant now appeals, raising as error the trial court's denial of the motion to continue the hearing on the motion for new trial and the trial court's denial of the motion for new trial. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about July 26, 2004, Baton Rouge City Police Officers Brannon Ogden and Thomas Morse, Jr., were on patrol duty when they heard gunshots. As they approached a traffic light on 46th Street in Baton Rouge, Wilma Byrd flagged down the officers and informed them that someone had been shot. The officers proceeded in the direction indicated by Byrd and located Morris Kinchen (the victim) lying in the bushes next to a residence. The victim died after suffering three gunshot wounds. Byrd later identified the defendant as the perpetrator.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues that the trial court abused its discretion in denying the defendant's motion to continue the hearing on the motion for new trial in order to locate Byrd, the only trial witness linking the defendant to the crime. The defendant notes that Byrd recanted her trial testimony in an affidavit executed after the trial. The defendant contends that necessary steps were taken to ensure Byrd's appearance at the hearing. The defendant notes that Byrd was present on a

previous hearing date and the trial court continued the hearing based on the results of Byrd's court-ordered drug testing. The defendant further notes that the trial court was aware of Byrd's drug addiction and propensity to fail to appear. The defendant argues that the trial court could have held Byrd as a material witness until her drug level diminished, or it could have issued a bench warrant when she failed to appear.

La. Code Crim. P. art. 709 sets forth the requirements for a motion for a continuance based upon the absence of a witness. The motion must state:

- (1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;
- (2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial [or in this case hearing on the motion for a new trial] is deferred; and
- (3) Facts showing due diligence used in an effort to procure attendance of the witness.

The decision to grant a continuance is placed in the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Washington*, 407 So.2d 1138, 1148 (La. 1981); *State v. Simon*, 607 So.2d 793, 798 (La. App. 1st Cir. 1992), writ denied, 612 So.2d 77 (La. 1993). While La. Code Crim. P. art. 707 provides for a motion for continuance to be in writing, where the occurrences that allegedly made the continuance necessary arose unexpectedly and the defendant had no opportunity to prepare a written motion, a jurisprudential exception has been created so that a motion for continuance may be orally made. *State v. Parsley*, 369 So.2d 1292, 1294 n.1 (La. 1979). Accordingly, the trial court's denial of the defendant's motion for a continuance is properly before this court for review.

The hearing on the motion for new trial was set for January 12, 2007. On that date Byrd appeared. The State lodged an objection that was, in part,

based on Byrd's appearance of being under the influence of narcotics. The trial court had Byrd tested and recessed the proceeding. After the recess, the trial court questioned Byrd regarding the basis for the motion for new trial and her drug intake. Byrd claimed that her trial testimony was incorrect. Byrd stated that her last drug use was the night before the proceeding. Over the State's objection, the trial court allowed Byrd's affidavit to be admitted. After receiving Byrd's drug-testing results, the trial court noted that her drug level was very high (over five thousand) and recessed the proceeding until January 16, 2007. The trial court admonished Byrd regarding the importance of the proceeding and that she return in a sober state.

Byrd did not appear on January 16, 2007. On joint motion of the State and defense counsel, the trial court ordered the matter continued until January 26, 2007. On January 26, 2007, the hearing resumed. On this date, Byrd again was not present. After the trial court reviewed the basis for the motion for new trial, the defense attorney stated that Byrd was not present and that he did not believe that she would appear for the proceeding. The defense attorney further conveyed his belief that Byrd had been served. The trial court thoroughly noted its assessment of the affidavit and the testimony presented at the trial and denied the motion for new trial. The defense attorney objected to the trial court's ruling and moved for a continuance based on Byrd's absence, noting that the State was previously granted a continuance (over defense objection) on the same basis.

At the outset, we note that it is questionable as to whether the occurrence that made a continuance necessary, Byrd's absence, arose unexpectedly. Moreover, a continuance shall not be granted after a hearing has commenced. La. Code Crim. P. art. 708. Herein, the defendant did not request a continuance until after the trial court denied the motion for new

trial. Thus, the motion is more properly a motion for a recess, a temporary adjournment of a hearing after it has commenced. La. Code Crim. P. art. 708. A motion for recess is evaluated by the same standards as a motion for a continuance. *State v. Warren*, 437 So.2d 836, 838 (La. 1983). In the instant case, the record shows that the defendant did not satisfy the requirements of La. Code Crim. P. art. 709. The defendant failed to state facts and circumstances showing a probability that Byrd would be available at the time of a deferral as required by La. Code Crim. P. art. 709(2). Moreover, the trial court reviewed the substance of Byrd's affidavit before denying the motion for new trial and briefly questioned Byrd regarding the affidavit during a previous proceeding. Thus, we do not affirmatively find that Byrd's presence was necessary. See La. Code Crim. P. art. 709(1). Whether refusal of a motion for continuance or recess is justified depends on the circumstances of the case. Under the instant circumstances, we find no abuse of discretion. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant argues that the trial court erred in denying his motion for new trial. The defendant's motion for new trial is based on newly discovered evidence consisting of Byrd's affidavit. The defendant notes that Byrd was the only witness linking the defendant to the crime. The defendant further notes that Byrd was under the influence of drugs during the trial, admitted to having mental problems, and recanted her trial testimony as stated in her affidavit. The defendant also notes that the State did not have Byrd's testimony at the time of the preliminary examination, and the trial court found that there was no probable cause to hold the defendant.

Louisiana Code of Criminal Procedure article 851 provides, in pertinent part:

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

* * *

(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty[.]

In evaluating whether or not the newly-discovered evidence warrants a new trial, the test to be employed is not simply whether another trier of fact might render a different verdict, but whether the new evidence is so material that it should produce a verdict different from that rendered at trial. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. *State v. Henderson*, 99-1945, pp. 15-16 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 758, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235. Recantations are highly suspicious and, except in rare circumstances, a motion for new trial should not be granted on the basis of a recantation. The rationale is that the recantation amounts to a confession of perjury by the witness. *State v. Prudholm*, 446 So.2d 729, 736 (La. 1984); *State v. Clayton*, 427 So.2d 827, 832-33 (La. 1983) (on rehearing).

In her affidavit, Byrd stated that she did not see the defendant on the scene and that she was pressured by the district attorney. In denying the motion for new trial, the trial court noted that Byrd's statement to the police was given close in time to the offense. The trial court further noted that

Byrd's trial testimony was consistent with the information she provided to the police.

On the first day of the trial, the trial court suspected that Byrd was under the influence of drugs and had her tested. As noted by the trial court, Byrd's drug level was very high. The trial court had Byrd re-tested on the second day of the trial and her drug level had significantly decreased. The trial court allowed Byrd to testify on that day. We note that the defendant did not object to the trial court's decision to allow Byrd to testify during the trial. The defendant has not assigned error to this allowance and to the extent that he raises issues in this regard, those issues are not preserved for appeal. La. Code Evid. art. 103(A)(1); La. Code Crim. P. art. 841.

According to the testimony presented at the trial by the police officers and Byrd, moments after the shooting, Byrd flagged police officers down and informed them of the shooting and the location. She continued to walk away from the scene and the police officers proceeded to the victim's aid. Byrd was located within a couple of days of the incident and positively identified the defendant as the perpetrator in a photographic lineup. During her trial testimony, Byrd conveyed her belief that the defendant killed the victim. According to her testimony, Byrd heard a total of three shots. Byrd was inside the residence at the scene when the first two shots were fired and did not actually see the defendant pull the trigger. When she exited the residence, she observed the victim and the defendant. According to Byrd, the defendant had a firearm in clear view and the victim did not have a firearm. Byrd also testified that she had known the defendant since birth and saw him on a regular basis during his entire life. Byrd pleaded with the defendant to not shoot the victim again. Byrd observed the defendant attempt to shoot the victim again, but the gun jammed. As Byrd walked

away from the scene in fear, she heard the third shot. Consistent with Byrd's testimony, the victim suffered three gunshot wounds. Since there are no special circumstances which would suggest that Byrd's latest statement (her affidavit) is truthful, the trial judge reasonably could have concluded that Byrd's recantation would not have created a reasonable doubt of the defendant's guilt. Based on our review of the record, we find no abuse of discretion in the trial court's denial of the motion for new trial. This assignment of error lacks merit.

DECREE

The defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.