

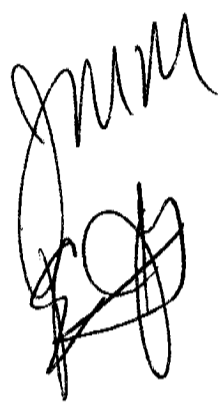
**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

**2011 KA 0810**



STATE OF LOUISIANA

VERSUS

WARREN TODD GORDON

**Judgment Rendered: December 21, 2011**

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF ST. TAMMANY  
STATE OF LOUISIANA  
DOCKET NUMBER 494535-1

THE HONORABLE PETER J. GARCIA, JUDGE

\* \* \* \* \*

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**BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.**

*Hughes, J. concurs.*

**McDONALD, J.**

The defendant, Warren Todd Gordon, was charged by bill of information with possession with intent to distribute methamphetamine, a Schedule II controlled dangerous substance,<sup>1</sup> a violation of La. R.S. 40:967(A)(1). He pled not guilty and following a jury trial, was found guilty as charged. He was sentenced to twenty years imprisonment at hard labor. The State filed a multiple offender bill of information. Following a hearing on the matter, the defendant was adjudicated a third-felony habitual offender. The trial court vacated the previously imposed twenty-year sentence and resentenced him to forty years imprisonment at hard labor. The defendant now appeals, designating one assignment of error. We affirm the conviction, habitual offender adjudication, and sentence.

**FACTS**

On July 18, 2010, Detective Ricky Steinert, with the St. Tammany Parish Sheriff's Office, spoke with a confidential informant with whom the detective had worked in the past. The confidential informant had arranged to purchase methamphetamine from the defendant the following day at Friendly Fred's in Pearl River, Louisiana. According to the confidential informant, the defendant would have about \$400 worth of methamphetamine in his truck. Detectives from the St. Tammany Parish Sheriff's Office planned to conduct a "rip," wherein the defendant would be stopped and arrested before the drug transaction took place. On July 19, 2010, police surveillance began at the St. Tammany Parish Justice Center in Covington, where the defendant was observed getting into his Ford pickup truck with his brother. Detectives followed the defendant as he drove from Covington to Friendly Fred's, where other detectives were waiting for his arrival. When the defendant pulled into the parking lot, detectives conducted a felony stop

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<sup>1</sup> See La. R.S. 40:964, Schedule II(C)(2).

of the defendant's truck prior to any drug transaction taking place.

Sergeant Steven Gaudet, with the St. Tammany Parish Sheriff's Office, asked the defendant if he had anything illegal inside his truck. The defendant responded that he did not and told Sergeant Gaudet to "go ahead and search it." Sergeant Gaudet looked inside the truck and found an amber-colored prescription bottle with a white cap on the front driver's side floorboard. Inside the bottle were three small plastic bags, each containing methamphetamine in the form of a white powder. The net weight of the methamphetamine was 1.48 grams.

### **ASSIGNMENT OF ERROR**

In his sole assignment of error, the defendant advances several arguments. Specifically, he asserts the trial court violated his right to due process of law and his Sixth Amendment right to effective counsel; the trial court abused its discretion in denying his motion to continue the trial without performing the minimal balancing test required to support the denial of a motion of continue; and the trial court abused its discretion in denying his motion to recess.

The defendant's trial counsel in the instant matter was Robert Stamps, an assistant public defender. The prosecutor was Scott Gardner. Trial began December 6, 2010. See La. Code Crim. P. art. 761. The minutes of the record indicate that Mr. Stamps was representing the defendant when he was arraigned on September 22, 2010. On October 25, 2010, private attorney Ernest J. Bauer, Jr., enrolled as counsel of record; Bauer then filed a motion to withdraw as attorney of record on November 22, 2010. Mr. Bauer explained in his motion to withdraw that he was retained to assist the defendant, along with the Public Defender's Office, for plea bargain purposes only; that he had always informed Mr. Stamps that if the case went to trial, Mr. Stamps would represent the defendant; that he hand-delivered discovery to Mr. Stamps; and that he hand-delivered a copy of his motion

to withdraw to the defendant in jail.

On the first day of trial, just prior to the start of voir dire, Mr. Stamps moved for a continuance of trial, informing the trial court of the following:

[T]he motion to continue is predicated upon the fact that Ernie Bauer had been the attorney representing the particular defendant. He withdrew and got out. I came into the case, and when I came into the case, I started filing all the motions that I considered to be important.

But at this time, the defendant would request a continuance of the matter to allow him to hire private counsel, because he believes that his case should be handled by private counsel, and there are certain other things now he's telling me. There are witnesses he wants to have subpoenaed and everything else at this time.

Mr. Stamps then added that he only became involved with the defendant in the last week or so when Mr. Bauer withdrew from the case, and that he met with and spoke to the defendant in jail but did not have a chance to go over "all of the big particulars." The trial court denied the motion to continue.

Despite the motion having been denied, the parties resumed the discussion of the continuance issue. The relevant part of that colloquy is as follows:

[Court]: I understand. Mr. Stamps, you spent some time with [the defendant]?

[Mr. Stamps]: What happened was when I understood that Mr. Bauer was out, I went to the jail and I met with him and I discussed everything preliminarily with him, and I started filing the motions. As Your Honor would know, I was involved in a CLE situation, and then I was in court a couple of days last week, and it's a matter of, you know, this is not the only case I work.

[Court]: I understand.

[Mr. Stamps]: I filed all the appropriate motions that I thought were necessary.

[Court]: How much time would you like with Mr. Stamps?

[Defendant]: Between an hour and two hours tops.

[Court]: No, we don't have that much time. We've got a jury waiting upstairs.

[Defendant]: I need some time to go over the case with him. I mean, we haven't even discussed the case, sir. We spent 10 to 12 minutes in

the jail out there, and that's all we even talked about.

Ernie Bauer didn't tell me why he withdr[e]w. He came to the jail and said, Todd, I withdrew, and 15 minutes later, he came to the jail.

[Mr. Gardner]: Judge, if I may, was Mr. Bauer the arraignment attorney?

[Clerk]: I don't think so. No. Mr. Stamps stood with both of them.

[Mr. Gardner]: My understanding is this case perhaps came for pretrial in the past. The Court had made an offer of 20 years, no bill. At that time, I was not in this section, so I can't vouch for all of this personally. This is my understanding of the chronology.

I think at that point the defendant became interested in hiring counsel, quote, to see if the deal would get better, unquote. I did have conversations when I entered the case with Mr. Bauer, and he indicated that the deal was not getting better, and as a matter of fact, that we intended to multiple bill the defendant.

At that point, I believe that may have prompted some disagreements which resulted in Mr. Bauer withdrawing, and I know that at the pretrial, Mr. Stamps and I discussed this would be a priority case, and we've been in contact with each other during the period of time leading up to today's motion hearing for the purpose of making sure that this primary case, the priority case that we had would be ready for trial.

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[Mr. Stamps]: In conversations that I did have with the defendant, he informed me that up until that time he was desirous of pleading to the 20 years, but since he never got into court, he never had the opportunity to do it, and then other things started happening. And I think it's only in about the last week or something or week and a half that we found out that Ernie Bauer was out and I was involved.

[Court]: All right. One of the reasons that I signed the motion is because it's stated as follows.

Undersigned counsel was retained to assist the defendant, along with the Public Defender's Office, for plea bargain purposes only. Two, undersigned counsel has always informed the public defender, Mr. Bob Stamps, that should this case go to trial, that he would be the person representing the defendant at trial. Three, the state has informed undersigned counsel that defendant's case is a priority setting for trial on December 6th, 2010.

I mean, that was the basis for me granting the withdrawal. Otherwise, Mr. Bauer would still be here. He represented that you have been in it all along, Mr. Stamps.

[Mr. Stamps]: No, Your Honor, I have not been it all along. My understanding is Mr. Bauer was the attorney. In fact, initially, when I was involved in it, I saw there was a conflict. I shipped the other brother out to Mr. Burke through the office, and then I was out of the case, and all during that time when they had the CLE's when I was up there --

[Court]: Why would you be out if we shipped out a codefendant?

[Mr. Stamps]: Because Ernie Bauer came in to represent this particular man.

[Court]: I'm going to go on what is represented in the motion to withdraw ... [.]

The trial court maintained his denial of the motion to continue and gave Mr. Stamps thirty minutes to meet with the defendant before commencing with voir dire.

In his brief, the defendant asserts that defense counsel was not adequately prepared for trial. Our review of the record, however, suggests otherwise. Mr. Stamps was attorney of record for the defendant for about two and one-half months -- from the time of his arraignment to the conclusion of his trial. We have found no motion to withdraw as counsel by Mr. Stamps in the record. As Mr. Stamps informed the trial court, he filed all the motions he thought were necessary. The record indicates Mr. Stamps filed, among other filings, a motion for discovery, a motion to suppress identification, a motion to suppress the confession, a motion to suppress evidence, a motion for **Prieur** hearing, a motion for **Daubert** hearing, and a motion for change of venue. At trial, Mr. Stamps lodged appropriate and timely objections and thoroughly cross-examined the State's witnesses. We have found nothing in the record to suggest Mr. Stamps was inadequately prepared for trial.

While the defendant has alleged the very broad claim of defense counsel's unpreparedness for trial, he has not alleged any specific instances of ineffective assistance of counsel. A claim of ineffective assistance of counsel is more properly

raised by an application for post-conviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. See State v. Carter, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438. It is well settled that decisions relating to investigation, preparation, and strategy require an evidentiary hearing and cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond that contained in the instant record, could these allegations be sufficiently investigated.<sup>2</sup> State v. Smith, 06-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 12, writ denied, 07-0211 (La. 9/28/07), 964 So.2d 352. Thus, to the extent the defendant has made an ineffective assistance of counsel claim, there is nothing before us to review. See State v. Albert, 96-1991 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1364.

Based on the foregoing, the court did not err in denying the motion for continuance. The decision whether to grant or refuse a motion for a continuance rests within the sound discretion of the trial judge and a reviewing court will not disturb such a determination absent a clear abuse of discretion. State v. Strickland, 94-0025 (La. 11/1/96), 683 So.2d 218, 229. See La. Code Crim. P. art. 712. Whether refusal of a motion for continuance is justified depends on the circumstances of the case. Generally, the denial of a motion for continuance is not reversible absent a showing of specific prejudice. State v. Addison, 93-1872 (La. App. 1st Cir. 10/7/94), 644 So.2d 767, 768 aff'd and remanded, 94-2745 (La. 6/23/95), 657 So.2d 974.

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<sup>2</sup> The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924 *et seq.* in order to receive such a hearing.

The right to counsel cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice. **State v. Seiss**, 428 So.2d 444, 447 (La. 1983). While the right to counsel of choice in a criminal trial is guaranteed by the United States and the Louisiana Constitutions, there is no constitutional right to make a new choice on the date a trial is scheduled to begin, with the attendant necessity of a continuance and its disrupting implications to the orderly trial of cases. **State v. Leggett**, 363 So.2d 434, 436 (La. 1978). The right to counsel of choice must be exercised at a reasonable time, in a reasonable manner, and at an appropriate stage within the procedural framework of the criminal justice system of which it is a part. **State v. Lee**, 364 So.2d 1024, 1028 (La. 1978). Once the day of trial has arrived, the question of withdrawal of counsel rests largely within the discretion of the trial court. The Louisiana Supreme Court has frequently upheld the trial court's denial of motions for a continuance made on the day of trial when the defendant is dissatisfied with his present attorney but had ample opportunity to retain private counsel. **Leggett**, 363 So.2d at 436. See State v. Dilosa, 01-0024 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 666-68, writ denied, 03-1601 (La. 12/12/03), 860 So.2d 1153; **State v. Spradley**, 97-2801 (La. App. 1st Cir. 11/6/98), 722 So.2d 63, 67-69, writ denied, 99-0125 (La. 6/25/99), 745 So.2d 625.

The motion for continuance was based on the defendant's request on the first day of trial to hire private counsel. At all times, he was represented by Mr. Stamps. At the early stages of the defendant's case, Mr. Bauer enrolled as private counsel to assist in obtaining a plea bargain. After Mr. Bauer withdrew, the defendant asked the trial court for a continuance to obtain yet another attorney. Thus, in less than three months, the defendant was seeking representation from a third attorney. There is no evidence in the record he sought to inform the court of his desire to



retain private counsel prior to trial. The first indication the court had that he desired new private counsel was the first day of his trial. Moreover, as the prosecutor noted to the court, and as indicated in Mr. Bauer's November 22 motion to withdraw, Mr. Stamps was aware well before the first day of trial that the defendant's case had priority status and was set for trial on December 6th. Considering the foregoing we cannot say the defendant exercised his request to retain counsel in a reasonable time, manner, or stage of the proceedings. Accordingly, the trial court did not err in denying a continuance. See Dilosa, 849 So.2d at 666-68.

The defendant further claims the court erred in denying his motion for a recess because of a witness's refusal to respond to a subpoena. During the defendant's case-in-chief, Joe Provost was called to testify. When he could not be found, Mr. Stamps informed the court that he spoke to Mr. Provost two or three hours earlier and told him an instanter subpoena had been issued for him. Mr. Provost said he was going home to get dressed for court. However, Mr. Provost (according to Mr. Stamps) also told Mr. Stamps that the officer told him he did not have to be in court. Mr. Stamps then added:

The critical part of this situation is Mr. Provost supposedly is the confidential informant. He's technically involved in the entire situation, and it's a necessary witness, and according to the code, we'd be entitled to a recess to acquire his presence if the Court can recess until tomorrow until we can get him here.

The court called Kent Wadenphul to the stand and questioned him. Wadenphul worked in the civil division of the St. Tammany Parish Sheriff's Office and was involved with the court's issuance of the instanter subpoena for Mr. Provost. Mr. Wadenphul explained that he contacted Deputy Charles Geer, who went to Mr. Provost's residence to contact him but was unable to find him. Upon learning this information the court advised Deputy Geer to make another attempt to

contact Mr. Provost. Deputy Geer returned to Provost's residence and placed four phone calls to Mr. Provost. Deputy Geer checked the perimeter of the residence, as well as the woods near the residence, but was unable to locate Mr. Provost.

Following the examination of Mr. Wadenphul, Mr. Stamps asked the court for a recess, stating, "I'm fairly certain this man will return to his home tonight, we can confect service on him, and we can continue this matter tomorrow." The trial court stated it was taking a short recess "while we continue to find him." Following the recess, the following colloquy took place between the court and Mr. Stamps:

[Court]: Be seated, please. All right. Mr. Stamps, let's talk about Mr. Provost first. He's obviously not here, and he's not going to be available to testify.

[Mr. Stamps]: Your Honor, at this time, I ask that the matter be recessed until tomorrow morning, and I assume Mr. Provost will return to his home and service can be conected, and he then will be a witness in this proceeding. The code allows for a recess, and predicated upon that fact, and in the interest of justice predicated upon the fact that this is a defense witness, and more specifically, since it's a possibility that Mr. Provost is the confidential informant who formed the basis for the original charge for this particular defendant.

Predicated upon those facts, I think he's a witness that is the most important witness to the entire matter, and in the interest of justice, it's no burden upon the Court to recess the matter until tomorrow because the Court's in session. We have other matters that are going to be taken up and --

[Court]: I don't agree with your assessment that it may be that he would return to his home tonight. I think that given the fact that I was asked to issue an instanter subpoena as recently as this morning, that extraordinary efforts have been made by the sheriff's office to try to accomplish service on this witness.

You had telephone communication with him you told him you wanted him to be here, and he responded to you in a way that indicates to me that he's trying to avoid service, not the other way around, and I think that he's going to continue to try to avoid service for whatever reason I don't understand.

He had an opportunity to be here and you had an opportunity to get him here and impress on him the importance of his presence, and he made the decision not to appear. He told you on the phone that he

could be here within a short period of time and that he was on his way. He is not here.

I'm not going to recess this case at the whim of this person who just decides not to appear even though we had deputies appear at his house on a couple of occasions, stay at this house and communicate with his wife and he had direct communication with you, so I'm going to deny the request for a recess.

[Mr. Stamps]: Your Honor, can I also add that most probably this person is a confidential informant, and I'm fairly certain that that's the situation. That, therefore, he then is a witness of the prosecution, and so what we have here is the prosecution not presenting a witness, not the defense not presenting a witness, and it goes become [sic] to the same issue that I raised with **Brady** and **Kyles**.

[Court]: He's your witness, not the State's witness. The state has rested. They apparently feel that they've met their burden of proof without the necessity of that witness's appearance. It's your witness. You tried to get him here, and you had him on the phone. He's failed to appear after a telephone conversation with you.

I don't know what else we can do, what other efforts we can make. I don't think that a continuance or a recess today, tomorrow, or the next day is going to do anything to improve his possibility of showing up in court.

[Mr. Stamps]: Well, Your Honor, that's the only request that I can make in the interest of justice on behalf of the defendant.

[Court]: I understand. You've done everything you could to get him here, Mr. Stamps. What else do you have before we bring the jury back in?

[Mr. Stamps]: I'd like to, since the Court is denying me a recess, at this time, I would move for a mistrial predicated upon the fact that he's the most important witness for the defense, and also his further involvement that he could possibly be the confidential informant and would technically be a witness for the prosecution and has something to do with the guilt or innocence of the particular defendant, and predicated upon that fact, I think that the Court --

[Court]: I don't understand that reference about the guilt or innocence.

[Mr. Stamps]: Well, the guilt or innocence because he supposedly is the person who made the telephone call on the 18th that the stuff would be there on the 19th, and with the understanding that he was going to be the recipient of the stuff that Fred's friendly place [sic].

[Court]: If you're referring to the line of cases regarding a witness who has actually witnessed something and may, therefore, be critical

to the determination of guilt or innocence, I don't think that this fits that category.

[Mr. Stamps]: Your Honor, if the situation --

[Court]: He was not present at the time of the arrest.

[Mr. Stamps]: He was not present at the time of the arrest, but he was a co-principal to the entire episode, and in being a co-principal, he then --

[Court]: I don't understand that term.

[Mr. Stamps]: Well, he precipitated the entire episode to move forward, and then he was going to be the person that was going to be the eventual person to receive the stuff, and now to cover him, the state made what they call a rip before that happened to cover the CI, and in covering the CI, they're covering Joe Provost.

[Court]: All right. The motion for a mistrial is denied.

Following the reading of the verdict, the defendant was remanded to the sheriff and the jury was retired. The following colloquy then took place:

[Court]: Mr. Stamps, I want to go on the record one more time with what you gentlemen reported to me while the jury was deliberating, please. Mr. Gardner.

[Mr. Stamps]: Yes, Your Honor.

[Mr. Gardner]: Judge, at approximately 5:20, I was contacted by Detective Ricky Steinert. He indicated that he had received a telephone call from Mr. Provost, who was the subject [of] the instanter subpoena this morning.

Mr. Provost indicated that there was quite a bit of law enforcement present near his house, and he was scared. He indicated that he was scared to come to court, and he indicated that he was scared of what would happen to him if he came to court, referring to them boys might kill me.

So he indicated that he was -- he had not been served at that time. I asked Detective Steinert whether or not he had contact with the witness at any time during the daytime today or at any time during the daytime yesterday, and Detective Steinert indicated that he had had no contact with this person and had had no instructions with him obviously on whether he should come to court or not.

I promptly relayed that information to the Court at approximately 5:25, and Detective Steinert remained present in the event he was needed any further.

[Court]: Mr. Stamps.

[Mr. Stamps]: Well, Your Honor, I moved for a motion for mistrial during the process of the trial. I could re-urge that at this time.

[Court]: Well, this information only confirms to me the unavailability and the fact that the witness was purposely absenting himself from the courtroom and from his availability as a witness.

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). Louisiana Code of Criminal Procedure article 709(A) sets forth the requirements for a motion for a continuance to locate witnesses:

A motion for a continuance based upon the absence of a witness shall state all of the following.

- (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 is deferred.
- (3) Facts showing due diligence used in an effort to procure attendance of the witness.

We agree with the trial court's determination that Mr. Provost was an unavailable witness. Substantial effort was made to serve a subpoena on Mr. Provost, who actively engaged in avoiding law enforcement to prevent being served. Moreover, despite his description of Mr. Provost as a necessary or "the most important" witness, defense counsel never stated the facts to which Mr. Provost was expected to testify. As such, defense counsel made no showing of the materiality of Mr. Provost's testimony, or of the necessity of his presence at trial. See La. Code Crim. P. art. 709(A)(1). Assuming Mr. Provost was the confidential informant, who is ordinarily a witness for the State, the prosecutor felt he could prove his case without this witness. Accordingly, the trial court did not abuse its discretion in denying the motion for a recess. See **State v. Bertrand**, 381 So.2d

489, 491-92 (La. 1980).

This assignment of error is without merit.

The defendant's conviction, habitual offender adjudication, and sentence are affirmed.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.**