COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP645-CR **Cir. Ct. No. 2012CF44**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES M. DUNCAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. James Duncan appeals from a judgment convicting him of hit and run and operating a motor vehicle with a prohibited blood alcohol concentration (5th or 6th offense). He argues that the circuit court erred when it denied his request for a continuance, made shortly before trial, so that he could

retain an expert to address blood alcohol testing results. Under the circumstances of this case, the circuit court did not err when it denied a continuance. We are also not persuaded by Duncan's challenges to three evidentiary rulings. We affirm.

¶2 In February 2012, Duncan was charged with operating while intoxicated (5th or 6th offense) and hit and run. Trial was scheduled for December 3, 2012. In June, the State made a discovery demand for statements and experts' reports. On November 28, a few days before trial, new counsel appeared for Duncan, filed Duncan's first discovery request in the case and requested a continuance of the December 3 trial. New counsel, who was retained the week of the November hearing, noted her firm's expertise in the science of blood testing. She stated that Duncan's original counsel had not requested from the Wisconsin State Crime Laboratory (the lab) the documents she needed to analyze in order to counter the blood testing evidence. Counsel argued that she could not review the necessary documents, consult with potential experts and be ready for the trial on December 3. Therefore, she sought a continuance.

¶3 The circuit court observed that the case had been pending for nine months and that the State had its experts available for the December 3 trial. The court found that Duncan's interest in consulting with additional counsel was first expressed six months earlier when Duncan sought additional time to act in the case. The court declined to adjourn the case and encouraged the parties to cooperate on discovery in light of the looming trial date.

¶4 In response to the court's ruling, new counsel reiterated that her firm was recently retained and that the documents requested from the lab were essential

to Duncan's defense. Counsel stated that she would not be able to present a defense without the documents associated with the blood test results.[1]

¶5 The circuit court found that new counsel's involvement came too late in light of all of the circumstances, including the long-scheduled trial. New counsel tried the case in conjunction with original counsel. The jury convicted Duncan.

¶6 On appeal, Duncan argues that the circuit court's refusal to grant a continuance to obtain lab documents and consult with and retain an expert denied him due process and the right to present a defense.

¶7 A motion for a continuance is addressed to the circuit court's sound discretion, and we will not reverse unless there is a clear showing of an erroneous exercise of that discretion. ***State v. Wright***, 2003 WI App 252, ¶49, 268 Wis. 2d 694, 673 N.W.2d 386. We will uphold the court's discretionary decision if the record shows that the court exercised its discretion and had a reasonable basis for its decision. ***Schwab v. Baribeau Implement Co.***, 163 Wis. 2d 208, 215, 471 N.W.2d 244 (Ct. App. 1991).

¶8 Based upon the record, we conclude that the circuit court properly exercised its discretion when it denied Duncan's several requests for a continuance. The court found that the parties had nine-months' notice of the trial

[1] Counsel did not elaborate in the circuit court on the theories of defense that might arise from a review of the blood testing documents or what a yet-to-be-retained expert might offer to support a defense. Counsel only suggested that Duncan's low blood alcohol concentration prompted questions about how the testing was completed, but counsel did not elaborate before the circuit court as she now does on appeal. When we review a circuit court's decision, we consider what was before the court at the time it ruled.

date. Almost six months before trial, Duncan sought an extension of time to consult with additional counsel. However, Duncan did not secure a meeting with new counsel until the week before trial. We observe that Duncan offered no explanation for the delay in retaining new counsel.[2] While new counsel claimed that she needed additional time to analyze blood testing evidence, counsel never elaborated, pretrial, on the type of expert opinion and analysis she hoped to procure. The court balanced the facts before it against the availability of the State's witnesses and the amount of time the case had been scheduled for trial. We see no misuse of discretion under these circumstances or any denial of Duncan's due process or Sixth Amendment rights. *See* ***State v. Wollman***, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979).

¶9 On the first day of trial, new counsel again sought a continuance. She confirmed that she had received all of the documents possessed by the State relating to blood testing. Nevertheless, she was not prepared to address blood testing evidence because the documents had only been received the previous Friday. Due to the late-received documents, counsel had not been able to locate an expert to address the evidence.

¶10 While the court acknowledged Duncan's right to present a defense, the court reiterated that the case had been pending for nine months and that for the last six months, a change in counsel or consultation with other counsel had been contemplated. To support this view, the court referred to the May 23, 2012 circuit

[2] In his reply brief, Duncan argues that while trial may have been scheduled for nine months, Duncan only learned of potential defenses relating to blood testing evidence when he and his original counsel met with new counsel the week before trial. This argument ignores the circuit court's findings that it was up to Duncan and his original counsel to act upon his intention, first expressed in May 2012, to consult with new counsel.

court docket entry stating that original counsel was "requesting additional time to consult with another attorney." The court found that Duncan "had plenty of opportunity to [consult with another attorney]" rather than requesting a continuance at the "eleventh hour." The court noted that the State's witnesses, experts who are difficult to secure for trial, were available for trial. That new counsel did not have the material she needed was attributable to the failures of Duncan and original counsel. The court expressed its confidence that even under the current circumstances, Duncan would receive an adequate defense. We see no misuse of discretion in denying Duncan's day-of-trial continuance request.

¶11 We turn to Duncan's claims that three evidentiary rulings at trial excluded evidence necessary to his defense and denied him due process. A circuit court's evidentiary rulings are reviewed for a misuse of discretion. ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850.

¶12 Duncan argues that the circuit court's denial of a continuance effectively excluded evidence. We have addressed this issue, and we will address it no further in its guise as a challenge to an evidentiary ruling.

¶13 We decide the second and third challenges together. The circuit court barred Duncan's counsel from cross-examining the lab's forensic toxicologist about the lab policy that she claimed precluded her from bringing with her to trial certain documents Duncan requested in a subpoena duces tecum. At trial, the toxicologist testified about the testing of Duncan's blood and stated that Duncan's blood ethanol concentration was 0.055 grams per 100 milliliters.[3] The

[3] Having had several prior operating while intoxicated convictions, Duncan was subject to the requirement that he have no more than .02 grams of blood ethanol per 100 milliliters.

toxicologist testified that she did not bring with her certain requested records because the lab has a policy not to disclose certain records. The court ruled that the lab policy was not a proper subject for cross-examination because questions about the policy presented a legal question outside the scope of the jury's consideration. However, the court did not foreclose counsel from cross-examining the toxicologist about individual documents and whether the toxicologist had produced the documents or was otherwise familiar with the documents. Duncan's counsel cross-examined the toxicologist about the documents she did not produce at trial.

¶14 The circuit court also barred Duncan's counsel from cross-examining the toxicologist about how the lab's nondisclosure policy allegedly differed from the open disclosure policy of the Wisconsin State Laboratory of Hygiene. The court ruled that the distinctions between the policies, if any, presented a question of law outside the scope of the jury's consideration and were not relevant to the manner in which blood samples are tested by the crime lab.

¶15 In addition to declaring these two lines of inquiry outside of the jury's scope, the court found that counsel's complaints about lab policy were part and parcel of Duncan's failure to timely retain or consult with new counsel and timely procure an expert to address blood testing evidence. The court reiterated the interest of the court and the State in proceeding with the scheduled trial.

¶16 A circuit court may limit cross-examination to evidence that is relevant. ***Id.***, ¶¶37-38. Under the circumstances of this case, the circuit court considered the proper facts when it barred Duncan's cross-examination of the toxicologist on questions of law. A defendant's right to present a defense is not abridged by an evidentiary ruling that excludes irrelevant evidence. ***State v.***

Muckerheide, 2007 WI 5, ¶40, 298 Wis. 2d 553, 725 N.W.2d 930. On this record, we see no misuse of discretion or abridgement of Duncan's right to present a defense.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).