

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 30, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 99-0215-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOEL A. DEWALL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Ozaukee County:  
JOSEPH D. MC CORMACK, Judge. *Affirmed.*

BROWN, J. Joel A. DeWall pled no contest to disorderly conduct, battery and two counts of bail jumping. Sentence was withheld and DeWall was placed on probation. That probation was later revoked and at a sentencing hearing, DeWall requested that the trial court allow the telephonic testimony of his current probation agent from Monroe county—some great

distance from Ozaukee.<sup>1</sup> The trial court refused. It is this refusal which is the focal point of all the issues DeWall raises on appeal. We observe that whether to allow telephonic testimony lies within the discretion of the trial court. Here, the trial court stated that it had a “real problem” taking this information over the telephone because, as the trial court put it, “[T]here are probation agents who see a crime around every corner, and there are some with stars in their eyes regarding their clients.... And without having somebody here as a live witness—I would like to be able to make my own evaluation regarding that.” We hold that the trial court’s rationale was appropriate under the law and uphold it. We also affirm the denial of a continuance and the sentence.

The pertinent facts are as follows: The case against DeWall stems from a pattern of domestic abuse. Prior to June 7, 1996, DeWall was out on bail for two misdemeanors associated with an assault upon Margaret M. As a condition of bail, he was informed that he must not have contact with Margaret or consume intoxicants. On June 7, he was arrested for disorderly conduct, battery to Margaret, and two counts of bail jumping for violating the conditions of his bail. He pled guilty to all four counts. Sentence was withheld and DeWall was placed on probation for three years on December 23, 1996, concurrent with a term of probation that he was serving in Monroe county. As conditions of probation, DeWall was informed that he was to have no contact with Margaret and was not to consume alcohol. On February 18, 1997, in Tomah, DeWall entered a tavern and consumed alcohol. On the same date, he pushed and kicked Margaret and threw a

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<sup>1</sup> The sentencing hearing we refer to was actually a resentencing hearing. How that came about is irrelevant to the issue in this case and we will refer to the hearing as the “sentencing hearing.”

glass mug at her, striking her in the chest. His probation was revoked and he was returned to the Ozaukee County Circuit Court for sentencing.

At sentencing, the assistant district attorney's plea to the court for jail time was based on his belief that DeWall continued in his pattern of abuse despite being on probation. To counteract the State's entreaty, DeWall's counsel drew the court's attention to a letter in the court file from DeWall's probation agent in Monroe county. The letter stated in pertinent part that DeWall had been placed on probation by the Monroe County Circuit Court, that he has maintained full employment and has received a promotion at work, that no reported probation violations have ensued, and that it was the agent's opinion that DeWall "has sincerely been making changes to avoid the type of behavior that resulted in his criminal trouble."

After DeWall's counsel drew the trial court's attention to the letter, the trial court responded that the letter "frankly raises more questions than it answers." The trial court read the letter into the record and then commented that the letter "certainly doesn't answer what kind of assessment he had for treatment of domestic abuse, how much treatment he had, if any." In response, DeWall's counsel asked the court to allow the agent to testify via telephone and indicated to the court that the agent had agreed to be available for this purpose. Counsel explained that while the agent did not feel she had any authority to make a sentencing recommendation in her letter due to department rules and regulations, she could answer any questions the court might have. The court replied: "I think if you wanted her here, you should have gotten her here, okay? I'll take that [letter] along with all the other things that have been presented here." DeWall's counsel continued to emphasize the importance of the agent's testimony as it affected the trial court's determination about DeWall's character. DeWall's

counsel argued that DeWall's recent history showed that he had turned his life around. She indicated that she was still "not clear why the Court won't call [the agent]."

It is at this point that the trial court made the following response:

Well, I'll tell you why. Because I have a real problem taking this information over the phone. I have another problem with the State not having the opportunity to verify this. I have a real problem with the State—I assume the State is going to want me to talk to the other person [another probation agent] if I talk to her. I have a real problem not having her here in person to evaluate what she has to say in terms of seeing a live witness here.

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... I have a lot of problems with calling her. One of the problems you have—you know, I don't want to in any way denigrate her abilities as a probation agent. I'm just not in a position to evaluate her. And one of the things that we all know whether or not they are—and I don't know where this agent falls within the spectrum. There are probation agents, and there are probation agents; and there are probation agents who see a crime around every corner, and there are some with stars in their eyes regarding their clients. And I guess most of them fall someplace in the middle. And without having somebody here as a live witness—I would like to be able to make my own evaluation regarding that.

DeWall's counsel responded by saying, "Well, in that case, your Honor, I respectfully request a continuance of the hearing. I will subpoena [the agent] for the hearing."

We will get to the trial court's denial of the request for continuance in a moment. First, we answer DeWall's argument that the trial court erroneously exercised its discretion by declining the request that the agent appear by telephone. Section 807.13(2), STATS., governs testimony by telephone. Section 807.13(2) was adopted by the supreme court after long study by the Judicial Council. The section allows telephonic testimony to be submitted in lieu of live testimony when

a statute or rule permits, the parties stipulate or one of the parties convinces the court that good cause exists. The section sets forth eight appropriate considerations, the last of which is a catch-all.

It is unnecessary for this court to list all the considerations mentioned by the section. The section does not require that the court consider all eight markers nor does it require the court to conduct a balancing test. The purpose of the eight considerations appears simply to alert the bench and bar to the various kinds of circumstances which might be relevant to a given situation. It also appears to give the court great discretion in determining whether just cause exists for the use of telephonic testimony.

Here, while the trial court did not explicitly speak about the section's considerations, it did clearly explain why it wanted live testimony. The court's reasons are found in at least two of the listed considerations found in the section. Section 807.13(2)(c)5, STATS., informs the reader that an appropriate consideration includes:

The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully.

And § 807.13(2)(c)6 informs that another consideration is “[w]hether the quality of the communication is sufficient to understand the offered testimony.”

As we can see from the previously quoted portion of the trial court's remarks, the court was concerned about the quality of the agent's communication in that it raised more questions than it answered. Telephonic testimony would not alleviate this concern, because the trial court was troubled by the incapacity to observe whether the agent was sufficiently neutral in her assessment of DeWall.

These considerations are “appropriate” according to § 807.13, STATS., and do not constitute an erroneous exercise of discretion.

We now turn to the request for a continuance. DeWall’s counsel commented that, in light of the court’s remarks, a continuance was important so that the court could then observe the agent’s demeanor. DeWall’s counsel informed the court that the reason why the agent was not produced was because, with the distance involved, counsel had approached the district attorney and gained the understanding that telephonic testimony was routinely allowed in the Ozaukee county circuit courts. Because that was not the case in the instant proceeding, counsel thought a continuance was appropriate.

The trial court asked the assistant district attorney for comment and the assistant district attorney said, in pertinent part, “from what I understand, the Court is taking at face value what counsel has said, that the probation officer will say those things. So I don’t know what difference it will make having her here.” The trial court agreed. It commented: “And I don’t think it would be productive to adjourn this case to bring her in. I don’t think it would add enough one way or the other that I would consider to be significant in this sentencing.”

A motion for continuance is subject to the discretion of the trial court. See *Bowie v. State*, 85 Wis.2d 549, 556, 271 N.W.2d 110, 113 (1978). DeWall cites *State v. Anastas*, 107 Wis.2d 270, 273-74, 320 N.W.2d 15, 17 (Ct. App. 1982), for the proposition that the trial court should consider and balance the following factors: (1) the likelihood that the defendant will be able to produce the witness’s testimony at an adjourned hearing, (2) the likelihood that the witness will give evidence which is significant and favorable to the defendant’s case, (3) whether the defendant diligently attempted to secure the evidence in time for the

hearing, (4) the length of delay requested, and (5) the burdens on both the trial court and the State if the continuance were granted. DeWall asserts that all five factors favor continuance. The agent would be produced, she would testify favorably for DeWall, counsel did explore the use of telephonic testimony before the hearing, the delay would only be such as would favor the court's calendar, and the burden is minimal on both the court and the State.

A close look at *Anastas* reveals that the specific factors listed by DeWall are actually factors that a court should consider when a defendant requests that his or her trial be delayed until the codefendant's trial is over in order to secure the testimony of the codefendant. See *id.* at 273, 320 N.W.2d at 17. Obviously, we do not have that circumstance here. As for continuances in general, the *Anastas* court wrote: "There is no set test for determining whether the trial court abused its discretion. Rather, that determination must be made upon the particular facts and circumstances of each individual case." *Id.* at 273, 320 N.W.2d at 16. While there is no set test for *appellate* review, our courts have written that when deciding whether to grant a continuance to obtain the attendance of a witness, a *trial court* should consider certain factors, including: (1) whether the testimony of the absent witness is material, (2) whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and (3) whether there is a reasonable expectation that the witness can be located. See *Bowie*, 85 Wis.2d at 556-57, 271 N.W.2d at 113.

Here, the trial court obviously keyed on the first factor. DeWall's counsel claimed that, in light of the trial court's comments, the attendance of the agent was material to the sentencing. The trial court, as we shall soon see, implicitly ruled that while the agent's testimony was material, her live testimony was not critical.

The trial court agreed with the assistant district attorney's statement that the court was accepting the agent's letter at "face value." Thus, the trial court accepted the agent's letter statement that, since September 1997—when DeWall was initially sentenced by the trial court—DeWall had been gainfully and fully employed and had received a promotion, he had been reviewed to begin counseling for his alcohol problems, he had no new reported violations in a year and he had complied with all the rules of probation. As we shall see when we reach the sentencing issue, the trial court also accepted the agent's opinion that DeWall "ha[d] sincerely been making changes to avoid the type of behavior that resulted in his criminal trouble." Because the trial court ended up treating the agent's statements and impressions as fact, DeWall was not prejudiced by the failure to grant a continuance.

We now reach the sentencing issue. DeWall wanted electronic monitoring. He wanted this so that he could go back to Sparta and continue his employment. The court stated:

Let me just say this. I'm willing to accept the premise that Mr. DeWall is a different person than the individual that was here back in September, and I think on a resentencing that has to be considered....

I can appreciate that there is probably some difficulty in getting him into treatment.... [G]etting people into these [treatment programs] takes time and there are waiting lists.

Later, the court indicated that, based on the agent's letter, "clearly he has made some progress."<sup>2</sup>

But then the court also commented that "[o]n the other hand, there [are] a couple of things that leap out here." It was the other "things" that the court

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<sup>2</sup> So, as we stated before, the trial court *did* give the agent's letter all its due.



placed great emphasis on, even after taking at face value the agent's impressions. The court first mentioned that it had problems with DeWall's explanation for his behavior. DeWall said the alcohol made him do it. The court's response was as follows:

Well, that isn't what caused him to beat [Margaret]. The brandy or the bourbon or whatever, beer, he was drinking didn't do it. He did it. One of the clearest signs of denial is somebody who always blames something external, and in this case it was alcohol. Well, it wasn't the alcohol, it was him. That is who beat her up, not what was in the bottle.

The trial court then observed that while it has to concern itself with rehabilitation, it could not let the message "go out from the courts in this county that not only can you beat some woman up, but after you get put on probation you can beat her up again and somehow wind up on electronic monitoring. I am not going to stand for that."

Based on these considerations, the court sentenced DeWall to a total of twelve months' jail time without electronic monitoring. DeWall asserts that the court gave too much weight to the gravity of the offense and the need to protect the public and not enough weight to the turnaround in DeWall's life. DeWall suggests that "skepticism" about the agent's letter caused the court to give undue weight. We disagree. As we already stated, the court agreed to give the agent's letter full weight. This meant that DeWall's claims about how much progress he had made toward rehabilitation were accepted by the court as true and were considered as true. Still, the court decided that the progress in DeWall's life did not overcome the fact that DeWall answered the court's grant of probation by ignoring the good graces of the court. The trial court said in no uncertain terms that this kind of behavior would not be condoned. Also, progress or not, DeWall still believed that the problem was alcohol, not him. The trial court was upset

about DeWall's refusal to accept personal accountability for his actions. Both of the grounds voiced by the trial court are valid. The trial court's balancing of DeWall's progress toward rehabilitation against the need to punish and the need to show the community that ignoring the conditions of probation will not go unpunished is affirmed as being an appropriate exercise of judicial discretion.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

