

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 5, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 97-1127-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

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STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SANTOS SANCHEZ,

DEFENDANT-APPELLANT.

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APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Santos Sanchez appeals from a judgment entered after a jury found him guilty of one count of first-degree intentional homicide, contrary to § 940.01(1), STATS. He claims (1) the trial court erroneously exercised its discretion when it denied his motion for a continuance to locate material witnesses, and (2) that he was denied access to witnesses in violation of due

process. Because the trial court did not erroneously exercise its discretion and because Sanchez's due process rights were not violated, we affirm.

## I. BACKGROUND

On April 18, 1996, Sanchez and the victim, Carlos Santiago, were at the apartment of Sanchez's ex-wife, Christina Depena. The two men were arguing about a drug deal that failed when the potential purchaser pulled out a gun and robbed them. Santiago was shot and killed in the apartment. Who committed the shooting was hotly contested.

Depena originally told police that two masked men had entered the apartment and killed Santiago. Depena also had her three daughters, who were sleeping in the apartment at the time of the shooting, tell the police the same story. Sanchez was the father of two of the three daughters. Later, Depena changed her story and told police that Sanchez had shot Santiago.

Sanchez was charged with the crime. The State placed Depena and her three daughters in the witness protection program. The State agreed to produce these witnesses for defense interviews and/or trial. Trial was scheduled for July 15, 1996. Sometime after June 21, 1996, Depena fled the state with the three girls. As a result, the State requested an adjournment of the July trial, which was granted. The State located Depena in New York. The trial court ordered the State to return Depena and the girls for trial, which was set for October 14, 1996. The State was only able to return Depena, because Depena claimed to have sent the girls to the Dominican Republic.

Sanchez requested an adjournment of the October trial to give him an opportunity to locate the daughters. The trial court denied the motion. Trial

proceeded and the jury found Sanchez guilty. Judgment was entered and Sanchez now appeals.

## II. DISCUSSION

### A. *Motion for Continuance.*

Sanchez claims the trial court erroneously exercised its discretion in denying his motion to adjourn the trial to give him an opportunity to locate the missing witnesses. We do not agree.

A trial court's decision on a motion for a continuance is directed to the sound discretion of the trial court and will not be reversed on appeal unless the trial court erroneously exercised its discretion. *See State v. Anastas*, 107 Wis.2d 270, 272, 320 N.W.2d 15, 16 (Ct. App. 1982). We will not find an erroneous exercise of discretion if the trial court considered the pertinent facts, applied the proper law and reached a reasonable conclusion. *See Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

In ruling on a continuance motion due to the absence of a witness, the trial court should consider three factors: (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 v. State*, 85 Wis.2d 549, 556-57, 271 N.W.2d 110, 113 (1978).

We glean from the record that the trial court considered the testimony of the daughters to be material. It had ordered that the State return the girls when it was believed they were with their mother in New York. It also appears that Sanchez was not guilty of neglect in procuring the witnesses,

although no effort was made to interview them when they were in the State's protective custody. The trial court, however, concluded that there was no reasonable expectation that the witnesses could be located or returned because they were in the Dominican Republic, which was beyond the reach of the Wisconsin courts. Accordingly, we conclude that in ruling on the motion, the trial court considered the pertinent facts, applied the correct law and reached a reasonable conclusion. Thus, there was no erroneous exercise of discretion.

Sanchez argues that the trial court should not have taken Depena's word as to the location of the children because Depena is a liar. Such credibility determinations are more appropriately left in the trial court. *See Leciejewski v. Sedlak*, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984).

*B. Due Process.*

Sanchez also claims that his right to due process was violated because the State denied him access to material witnesses. We reject this claim.

Whether a defendant's constitutional rights have been violated is a question of law that we review independently. *See State v. Kllessig*, 211 Wis.2d 194, 204, 564 N.W.2d 716, 721 (1997).

The State is prohibited from denying access to its witnesses. *See State v. Watkins*, 40 Wis.2d 398, 402-03, 162 N.W.2d 48, 50-51 (1968). In order to succeed on his claim, Sanchez must show both that the State denied him access to the witnesses and that prejudice resulted. *See id.; United States v. Clemones*, 577 F.2d 1247, 1252 (5th Cir. 1978).

Here, Sanchez has failed to show that he was denied access. There is no evidence that Sanchez requested that the witnesses be produced for

interviews while they were in the witness protection program. If these witnesses were of such importance to the defense, Sanchez should have interviewed them as soon as possible. If the State refused such a request or instructed the witnesses not to speak with Sanchez, that would constitute “denial of access.” See *Watkins*, 40 Wis.2d at 402-03, 162 N.W.2d at 50-51. Where no request or effort is made to gain access to a witness, there cannot be a “denial of access.”

After the witnesses fled on their own accord, the State cannot be said to have denied the defendant access. See *United States v. Brown*, 555 F.2d 407, 425 (5th Cir. 1977) (when a witness independently refuses to talk to the defense, there is no violation of due process). Here, Depena fled with her daughters without the assistance or inducement of the State. Her flight was of her own choice, as was her decision to send the children to another country. The State made reasonable efforts to return all of the witnesses.

Depena’s actions are akin to a witness’s right to refuse to be interviewed. See *Watkins*, 40 Wis.2d at 402-03, 162 N.W.2d at 50-51. It was her actions, rather than the State’s, that caused “denial of access” to the daughters. Under these circumstances, the State cannot be found to have violated Sanchez’s right to due process.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

