COURT OF APPEALS
DECISION
DATED AND FILED

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2105-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANDREW B. LAMONT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Andrew Lamont appeals a judgment convicting him of possessing drug paraphernalia, contrary to § 161.573(1), STATS., possessing THC as a second offense, contrary to §§ 161.14(4)(3r) and 161.48, STATS., and possessing cocaine as a second offense, contrary to §§ 161.41(3m) and 161.48, STATS. Lamont contends that the trial court erred by failing to grant him a

continuance to obtain the appearance of a witness who failed to honor a subpoena. We agree and therefore reverse.

The relevant facts are undisputed. In February 1996, a deputy sheriff found Lamont's unoccupied car leaning against a tree in a snow bank. The deputy observed a marijuana pipe through the window. He subsequently had the car towed and inventoried. During the inventory search, the police found small amounts of cocaine and marijuana. Police found a mirror with cocaine powder residue under the driver's seat. The police also found .175 grams of marijuana between the seat and console. Other items seized included a brass pipe, a chrome pipe, a napkin and a straw. The police inventoried a total of eighty-five items, most of which were on the floor.

When initially interviewed, Lamont denied any knowledge of the contraband. While being booked, however, he admitted the items found in the car were his. Lamont also acknowledged using cocaine in his car in Beloit over Christmas of 1995. He indicated that the marijuana also "came from a friend in the Beloit area."

At trial, Lamont denied all knowledge that there was marijuana, cocaine residue or any other contraband in his car. He testified that during December 1995, a friend took him home from a Beloit bar when he was too drunk to drive, and that other people in his car at that time may have used drugs. He believed, however, that they left nothing behind. He further testified that, despite his statement to police, he was in fact inebriated to the point where he was in and out of consciousness and was unsure both as to whether he ingested any drugs, and what other people were doing in his car.

Lamont subpoenaed a transactional witness, Carl Dickenson, to testify on his behalf. At the start of trial, defense counsel informed the court that Dickenson had called him the day before and informed him that he would not appear at the trial. Counsel told the court that, although he had not spoken to Dickenson about the substance of his testimony, counsel believed he would testify that the drug paraphernalia found in the car either belonged to the witness himself or to someone other than Lamont. The subpoena did not require the witness's appearance until 10 a.m. The trial court decided to defer considering the matter until it was confirmed that Dickenson would not honor the subpoena.

Dickenson did not appear in conformance with the subpoena, and the trial proceeded. Defense counsel again raised the issue after the State rested its case. The defense filed an affidavit showing the subpoena was served at 4:31 p.m. on December 18, 1996, two days before trial. Counsel requested enforcement of the subpoena and a continuance until the witness could be made to appear. He told the court that he believed the witness "will indicate that the items which are exhibits here are exhibits owned by someone other than my client." Counsel again admitted he had not spoken with the witness about the substance of the witness's testimony. Counsel characterized the testimony, however, as a strong part of the case in which he believed the witness's testimony would verify Lamont's version of what happened.

The State objected to the motion. The court applied the factors established in ***Elam v. State***, 50 Wis.2d 383, 184 N.W.2d 176 (1971), to determine whether to grant the continuance to compel the witness to appear. These factors are whether: (1) the testimony of the absent witness is material; (2) the moving party has been guilty of neglect in procuring attendance of the witness; and

(3) there is a reasonable expectation that the witness can be located. ***Id.*** at 390, 184 N.W.2d at 180.

In denying the motion for continuance, the court found that he could not rule the witness's testimony material because it was not clear what he would say if called and the witness might assert his Fifth Amendment privilege. The court further found that defense counsel was not dilatory in serving process, but that it would have been prudent to have contacted the witness earlier. Finally, the court found that the witness could be located and brought to court, although it was unclear to what he would testify or whether he would claim Fifth Amendment protections. Lamont was subsequently convicted of possessing drug paraphernalia, cocaine and marijuana.

A criminal defendant's right to compulsory process to obtain witnesses in his or her behalf is guaranteed by both the Sixth and Fourteenth Amendments to the United States Constitution,[1] and art. I., § 7, of the Wisconsin Constitution. In general, a motion for continuance to obtain the attendance of a witness is within the trial court's discretion. ***Id.*** at 389-90, 184 N.W.2d at 180. Recent cases recognize, however, that whether the trial court's exercise of discretion violated a defendant's compulsory process rights is a question of constitutional proportion, and as such involves "constitutional facts" that are reviewed de novo. ***State v. Pulizzano***, 155 Wis.2d 633, 648, 456 N.W.2d 325, 331 (1990). Where a defendant's right to due process is implicated, we must balance that right against the public interest in the prompt and efficient administration of

[1] ***Washington v. Texas***, 388 U.S. 14, 17-19 (1967).

justice. *See* ***State v. Fink***, 195 Wis.2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995).

We conclude that, even under the more conventional erroneous exercise of discretion standard, the trial court erred by denying the request for continuance in that Lamont satisfied each of the three ***Elam*** factors. A trial court erroneously exercises its discretion when it does not apply the facts to the appropriate law, or when it does not apply the law correctly. ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993).

The real issue involves the trial court's interpretation of ***Elam's*** requirement that the absent witness's testimony be "material."[2] The trial court believed that it could not find materiality because it did not know either if Dickenson "would have the same version of events as the defendant" or if forced to testify, whether Dickenson might assert his Fifth Amendment privilege against incrimination. This interpretation of what constitutes material evidence is incorrect. The trial court also placed too great a burden on the defendant in providing that degree of assurance required for a sufficient offer of proof when what is at stake is the defendant's right to compel attendance to present evidence.

Evidence is material if it relates to a fact that is of consequence to the merits of the litigation. *See* ***Johnson v. Kokemoor***, 199 Wis.2d 615, 635, 545

[2] As to the other two factors under ***Elam v. State***, 50 Wis.2d 383, 184 N.W.2d 176 (1971), the trial court specifically found that trial counsel was not dilatory in serving process and Dickenson could be located. Findings of fact will not be upset on appeal unless they are clearly erroneous. Section 805.17(2), STATS. Dickenson had been duly served with a subpoena before trial. The court considered both that Dickenson's address was known and the timing of the subpoena's service relative to the trial date in finding, apparently without objection, that Dickenson could be readily located. Thus the trial court's findings in this instance are supported by the record.

N.W.2d 495, 503 (1996).[3] All three charges required proof of knowing possession of contraband. Lamont's credibility was also a substantial issue, particularly in light of the statements law enforcement attributed to him. Lamont's offers of proof alleged that Dickenson was present at the time Lamont claimed both that others were in his car and that he was too inebriated to know what was happening. As an eyewitness, Dickenson was in a position to confirm or refute that someone other than Lamont possessed drugs or paraphernalia in the car and that Lamont exhibited such extreme signs of intoxication that a jury might reasonably believe he was effectively insensate. The offer of proof put Dickenson in a location where he could observe matters that relate to the merits of the case and was therefore sufficient to show the anticipated evidence's materiality.

The dissent concurs that under ***Elam*** the trial court should have granted the adjournment. However, it contends that Lamont is not entitled to a new trial unless he can show that he was prejudiced by the trial court's failure to grant an adjournment. We have no assurance that Dickenson will testify as Lamont anticipates. Thus, the dissent maintains, we cannot determine whether Lamont was prejudiced by his inability to present the witness's testimony. Absent such prejudice, Lamont is not entitled to a new trial.

We acknowledge that generally a party must demonstrate prejudice to successfully challenge a denial of a motion for continuance. *See* ***Allen v. Allen***, 78 Wis.2d 263, 274-75, 254 N.W.2d 244, 250 (1977) (superseded by statute on

[3] "The testimony sought to be elicited from the absent witness was material. Testimony which tends to prove that the accused was at another place at the time the crime was committed, and therefore could not have been involved, is clearly relevant and material to the issues before the trier of fact." ***Elam***, 50 Wis.2d at 390, 184 N.W.2d at 180.

other grounds); *see also* ***Angus v. State***, 76 Wis.2d 191, 196, 251 N.W.2d 28, 31 (1977) (showing of prejudice necessary when basis of motion for continuance is surprise). The general rule does not, however, appear to apply in the situation where a criminal defendant's Sixth Amendment compulsory process right is at stake. Neither ***Elam*** nor any case applying ***Elam*** requires the defendant to demonstrate prejudice. Perhaps it is implicit in ***Elam*** that failure to allow a subpoenaed witness to testify is manifestly prejudicial. In any event, we decline to go beyond the explicit bounds fixed by the supreme court in ***Elam*** and impose such a showing of prejudice in these types of cases.

In ***Elam***, the defendant and two accomplices were tried and convicted of burglary of a vehicle. ***Id***. at 385, 184 N.W.2d at 178. The original trial date had been adjourned on the day the trial was to commence. ***Id***. at 386, 184 N.W.2d at 178. Elam's trial counsel had subpoenaed two alibi witnesses for the trial date. ***Id***. Neither appeared in response to the subpoena. ***Id***. The decision does not disclose whether trial counsel interviewed either alibi witness. On the adjourned trial date, Elam's attorney informed the court that on the previous day he had issued subpoenas for the alibi witnesses but they had not yet been served. He asked for an adjournment in order to locate the witnesses and have them served. ***Id***. The trial court found that Elam's trial counsel had not been diligent in procuring the absent witnesses' attendance and denied the request. ***Id***. at 390, 184 N.W.2d at 181.

Several postconviction motions predicated upon the denial of Elam's right to present his defense failed. After the first unsuccessful motion hearing, his postconviction counsel, James Mattison, was told that an inmate named Talmadge Edwards was actually the third man involved in the burglary. ***Id***. at 387, 184 N.W.2d at 179. Mattison interviewed Edwards who eventually admitted that he in

fact had committed the burglary for which Elam was convicted and that Elam was not involved. ***Id***. Mattison also spoke with one of Elam's accomplices, Robert Words, who corroborated Edward's statement that Elam had not been present at the burglary. ***Id***. at 395, 184 N.W.2d at 183. Neither would unconditionally agree to testify to these alleged facts.[4] When subpoenaed to testify at a second postconviction motion hearing, they each exercised their Fifth Amendment privilege against self-incrimination. ***Id***. at 387, 184 N.W.2d at 179. After a third postconviction motion based on the same grounds was denied, Elam filed a writ of error, seeking a new trial. ***Id***.

The first issue the supreme court addressed under the writ was whether the trial court abused its discretion[5] by denying the motion for continuance made on the day of trial. ***Id***. at 388-89, 184 N.W.2d at 180. The supreme court observed that a motion for a continuance to obtain the attendance of witnesses is addressed to the discretion of the trial court. ***Id***. at 389, 184 N.W.2d at 180. It held that in exercising discretion, the trial court should consider the three factors that the court in the instant case applied: materiality, diligence and availability. ***Id***. at 390, 184 N.W.2d at 180. The supreme court then observed that when these elements are satisfied, "the moving party is ordinarily entitled to a continuance, particularly in a case such as the instant one where the facts sought to

[4] Edwards told the attorney that he would so testify "if it would not affect his present situation." ***Elam***, 50 Wis.2d at 387, 184 N.W.2d at 179. On a later date Elam's attorney asked Edwards and Words if they would give a signed statement under oath. Both refused, indicating that they would only testify if subpoenaed and granted immunity from further prosecution.

[5] Our supreme court has replaced the term "abuse of discretion" with "erroneous exercise of discretion" because the former suggests an unjustified negative connotation. ***Hefty v. Hefty,*** 172 Wis.2d 124, 128 n.1, 493 N.W.2d 33, 34 n.1 (1992).

be established cannot be proved by other witnesses, and the defendant has a constitutional right to compel their attendance." ***Id.***

The supreme court reviewed these three factors and found that the trial court properly exercised its discretion in denying Elam's request for an adjournment based upon his failure to diligently attempt to procure the absent witnesses' attendance. ***Id***. at 390-91, 184 N.W.2d at 181. This conclusion was buttressed by Elam's failure to meet the third factor by showing that the alibi witnesses could be located and brought to court. ***Id***. at 391-92, 184 N.W.2d at 181. Despite its conclusion, the supreme court nonetheless determined that the real controversy had not been tried and granted a new trial in the interest of justice. ***Id***. at 394, 184 N.W.2d at 183. The court noted that Elam had consistently maintained his innocence. ***Id***. at 395, 184 N.W.2d at 183. It further considered that the only witness who identified the defendant at trial was seated in a car at the time of the burglary, and that Elam had not presented any evidence. ***Id***. at 394, 184 N.W.2d at182. Finally, the court observed that postconviction affidavits averred both that one of the alibi witnesses had been found and would provide exculpatory testimony and that Edwards and Words had exonerated Elam. ***Id***. 50 Wis.2d at 395, 184 N.W.2d at 183. Although acknowledging the latter could assert their Fifth Amendment right, the court nonetheless concluded that "Elam should have the right to call them in his defense … and should have an opportunity to present his only defense and one which, if accepted by a jury, would establish his innocence." ***Id***. at 395, 184 N.W.2d at 183. It is only in connection with the issue of *discretionary reversal* that the court refers to the probable *exculpatory* testimony of the alibi witness; it appears to be of no significance with regard to the compulsory process issue. ***Id***.

This court is bound by decisions of the supreme court. ***State v. Irish***, 210 Wis.2d 107, 109 n.2, 565 N.W.2d 161, 162 n.2 (Ct. App. 1997). We conclude

that the ***Elam*** mandate clear. Where a defendant satisfies all three factors, he or she ordinarily is entitled to a continuance. ***Elam***, 50 Wis.2d at 390, 184 N.W.2d at 180. The trial court, aside from erring in its interpretation of the materiality factor under ***Elam***, was concerned that a continuance would require releasing the jury for a weekend and that a delay could conceivably inconvenience the jury. We agree with Lamont that, under the facts of this case, these considerations are insufficient to render this an extraordinary situation, outweighing Lamont's right to present witnesses in his own behalf through the compulsory process clause.

In conclusion, we hold that Lamont satisfied the three ***Elam*** factors and the court erred by failing to grant him a continuance.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

No. 97-2105-CR(D)

CANE, P.J. *(Dissenting).* While I agree that it was error to deny Lamont his requested continuance to obtain a subpoenaed witness's appearance to testify, I would conclude it was harmless error. As the majority recognizes, generally a defendant is not entitled to a new trial unless he can show that he was prejudiced by the trial court's refusal to grant a continuance.

I would continue to apply that rule, especially under the facts of this case where we still do not know if the witness's testimony would have aided Lamont in his defense. Trial counsel had no idea what the witness would have said. He merely speculated without any basis that he might testify favorably to the defense. However, even appellate counsel after all these months has not demonstrated in any way that the witness's testimony will be favorable or helpful to Lamont. We can only speculate at best what the witness will say. That is not enough to require a new trial.

Also, I reject the majority's broad application of the term "material." This term must be viewed in light of Lamont's claim that he was denied the right to compel a witness to attend and testify. Underlying this theory of a defendant's right to compel a witness to attend and testify is a defendant's constitutional right to present a defense. Therefore, the witness's testimony is only material under this scenario if it is favorable to the defendant. Otherwise, how has he been harmed or prejudiced by failure to grant a continuance in order to have a defense witness testify?

We should not take lightly the requirement that a defendant show he was prejudiced by the trial court's refusal to grant a continuance. What if the witness appears at the new trial and testifies favorably to the State or even is neutral and knows nothing about the relevant facts? Has justice been served by ordering a new trial? I doubt it. This is not an error that on its face demands a new trial, such as the admission of a coerced confession or some improper evidence obviously affecting the outcome of a trial. The defendant must show how he was prejudiced in order to require the expense of a new trial. He has not shown anything other than that it was error to deny the continuance. That is not enough.