

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DKT. NO. AND-25-7

STATE OF MAINE

Plaintiff-Appellee

v.

HEATHER MARICHAL

Defendant-Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET
ANDROSCOGGIN COUNTY
DOCKET NO. CR-2021-2260

BRIEF OF APPELLANT

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Procedural History

On or about October 14, 2021, the State filed a criminal complaint charging Ms. Heather Marichal with one count of Criminal OUI in violation of 29-A M.R.S. §2411(1-A)(A), a Class D offense, alleged to have occurred on or about October 1, 2021. (Appendix hereinafter A. 12).

Defendant subpoenaed Mr. Justin Johnson on January 30, 2024. (A. 22). Mr. Johnson ignored this subpoena, so Defendant filed a Motion for Capias Respondendum on February 27, 2024. (A. 31-38). The court granted the Motion for Capias Respondendum on March 14, 2024. (A. 17). Defense counsel filed a Motion to Continue on April 30, 2024 due to an unforeseen medical issue, which was granted May 1, 2024. (A. 16, 44).

The case was reset for docket call on July 8, 2024. (A. 17). The docket record notes that as of July 11, 2024, the civil habeas for defense witness was still pending. (A. 17). The State subpoenaed Mr. Johnson on July 15, 2024. (A. 24). The case was not reached at jury selection on August 8, 2024. (A. 17). The case was reset for docket call on October 30, 2024. (A. 17). The docket record notes that as of November 4, 2024, the civil habeas for defense witness was still pending. On November 8, 2024, Defendant filed a Motion in Limine to Allow Police Video Into Evidence See Rule 804: Exception to Hearsay Rule When Declarant

Unavailable. (A. 17, 39-43). A brief hearing was held on November 25, 2024 where the trial court issued another arrest warrant for Mr. Johnson. The State subpoenaed Mr. Johnson on December 6, 2024. (A. 21). Defense counsel emailed the trial judge and Assistant District Attorney on December 11, 2024 to inform the trial court that he still had no evidence that the capias had been executing, stating that “[t]he witness is my defense.” (A. 29).

On December 16, 2024, the case was set for trial. (A. 18). Defendant’s Motion in Limine was denied. (A. 18). Upon arrival, Defendant the capias had not been executed by Oxford County Sheriff’s Office. (A. 18). The docket record states “via zoom witness Justin Johnson has not been served with the warrant. Clerk to tell Oxford County Sheriff’s Office to try to locate witness and PR him to 12/16/2024.” (A. 18). Defendant orally moved to continue due to Mr. Johnson’s absence, which was denied. (A. 18).

Defendant entered a conditional guilty plea on December 16, 2024 with the intent to appeal the denial of her motion to continue. (Tr. 26-28). Defendant was sentenced to three days to the Androscoggin County Jail, a \$600 fine, and a 150 day loss of license. (A. 9-11).

Statement of Facts

On October 1, 2021, the State alleges Defendant was operating her motor vehicle on Court Street. (Tr. 29). The vehicle was heading towards the intersection

of Upper Court and Minot in Auburn. (Tr. 29). At one point, the vehicle was on the wrong side of the road and crashed into another vehicle, causing Defendant's vehicle to ricochet off the other vehicle and stop on the lawn of the residence at 844 Court Street. (Tr. 29). Defendant's vehicle struck a snowplow in the driveway, which is what caused the vehicle to come to a stop. (Tr. 29).

Defendant told the officer she had been at the Lost Valley brew fest and had consumed alcohol. (Tr. 29-30). Defendant indicated she was the only one in the vehicle and the driver of the vehicle. (Tr. 30). Officers on scene administered field sobriety tests and an intoxilyzer test, which came back with a result of .21. (Tr. 30). According to officers on scene, the driver's seat was very close to the steering wheel and there were things in the passenger seat that in their opinion would prevent someone from being able to sit there. (Tr. 22).

Defendant had only two drink tickets at the brew fest event. (Tr. 23). There was opportunity for her drinks to be spiked and for another person to drive her car. (Tr. 23). Defendant's car is a manual, so it's possible the person driving was unfamiliar with how to drive a manual, leading to the crash. (Tr. 23).

If this case had gone to trial, Defendant would have called Justin Johnson, who was questioned at the scene of the accident. (Tr. 30-31). After the accident, Mr. Johnson spoke to law enforcement twice. (A. 39). During the first interaction, the following dialogue was exchanged:

Mr. Johnson: "A guy got out and left."

Police: "Was he driving?"

Mr. Johnson: "I'm pretty sure he was...(unintelligible). He had a hat on, a baseball cap, tall, camo hat...there was a vehicle behind that he got into." (A. 39).

After Defendant indicated that she was driving, officers went back to question Mr. Johnson a second time. (Tr. 31). Mr. Johnson's second interaction with officers was captured on the officer's body camera. (Tr. 32). On body cam, Mr. Johnson shows the officer a picture of the man leaving the vehicle and heading to another vehicle, and the following exchange occurs:

Mr. Johnson: "I was taking picture after it happened...I'm pretty sure I caught him right here. He had the camo hat on."

Police: "Yeah, yeah, the black sweatshirt guy." (A. 39).

(Tr. 32). Mr. Johnson also wrote a witness statement, indicating there was a female passenger and male driver. (A. 26). Defendant could not adequately testify without the benefit of the body cam video capturing Mr. Johnson explaining that a man left the vehicle. (Tr. 17). Mr. Johnson's absence essentially left the Defendant without a defense. (Tr. 17).

Due to Mr. Johnson's failure to appear for trial, Defendant decided not to proceed to trial. (Tr. 18). According to defense counsel, "I don't want to waste the jury's time, quite frankly, with a case where there is no defense." (Tr. 18).

Defendant conditionally pled guilty to the charge of operating under the influence,

a Class D crime, pursuant to Rule 11(a)(2) of Unified Criminal Procedure. (Tr. 26-27).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether denying defendant's motion to continue violated defendant's right to compulsory process under the United States and Maine Constitutions, thus violating defendant's right to due process.

2. Whether it was an abuse of discretion for the trial court to deny defendant's motion to continue trial due to an unavailable witness, when the witness had been subpoenaed multiple times and a *capias ad respondendum* was ordered but not executed by law enforcement.

SUMMARY OF ARGUMENT

Defendant conditionally pled guilty to operating under the influence after her only listed witness was found to be unavailable the day of trial, despite diligent efforts by Defendant to secure his presence, including multiple subpoenas by both Defendant and the State, as well as a *capias ad respondendum* ordered by the trial court.

In this case, a warrant for Mr. Justin Johnson was active for almost nine months pursuant to the ordered *capias ad respondendum*, but it was never executed by the Oxford County Sheriff's Office. While it is unclear why the warrant was never executed, it is clear that Defendant did everything in her power to secure Mr. Johnson's attendance at her trial. Mr. Johnson's testimony was necessary for Defendant's alternate driver defense, as he was the only one who could testify that he saw another potential driver exit the vehicle after the crash.

Defendant orally moved to continue the day of her trial, once she learned the warrant for Mr. Johnson had not been executed by law enforcement and he was not present to testify. Despite Mr. Johnson's absence, which was caused by his continuously avoiding subpoenas and law enforcement not executing the warrant for his arrest, the trial court denied Defendant's motion to continue. One of Defendant's important trial rights is the right to subpoena witnesses, known as the right to compulsory process. When the trial court denied Defendant's motion to continue, it

violated Defendant's due process rights by effectively rendering her right to call witnesses useless.

The trial court also should have granted Defendant's oral motion to continue based on the finding of witness unavailability. Defendant demonstrated due diligence in attempting to get Mr. Johnson to court for her trial, his testimony was material to her defense, the Defendant was unfairly prejudiced by his unavailability, and a continuance would not have substantially impacted the State's case.

ARGUMENT

I. THE DENIAL OF DEFENDANT’S MOTION TO CONTINUE DUE TO AN UNAVAILABLE WITNESS AFTER SAID WITNESS HAD BEEN SUBPOENAED MULTIPLE TIMES AND A CAPIAS HAD BEEN ORDERED BY THE COURT BUT NEVER EXECUTED VIOLATED DEFENDANT’S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

The Sixth Amendment of the United States Constitution guarantees persons accused of crimes certain trial rights, including the right “to have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI. Article 1, Section 6 of the Maine Constitution guarantees that the accused shall have the right to “have compulsory process for obtaining witness in favor of the accused.” ME. Const. art. 1, § 6.

“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quotation marks omitted).

“The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.” Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967). The Supreme Court explains this further:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id.

A party can subpoena witnesses for trial. *See generally* Me. R. Crim. P. 17.

A subpoena “shall command each person to whom it is directed to attend and give testimony at the place and during the time period specified therein.” Me. R. Crim.

P. 17(a). “If a person fails to obey a subpoena served upon that person, the court may issue a warrant or order of arrest.” Me. R. Crim. P. 17(h). Pursuant to Title 16:

When a person, summoned and obliged to attend before any judicial tribunal, fails to do so without reasonable excuse, he is liable to the party aggrieved for all damages sustained thereby. The judge or justice of such tribunal may issue a *capias* to apprehend and bring such delinquent before him, and he shall be punished by a fine of not more than \$100 and costs of attachment, and committed until the same costs are paid.

16 M.R.S. §102 (emphasis added).

The Supreme Court has held that the Sixth Amendment does not grant the right to call all witnesses; it only secures the right to obtain witnesses in the defendant’s favor. *See States v. Valenzuela-Bernal*, 458 U.S. 858, 873, 102 S. Ct. 3440, 3449, 73 L. Ed. 2d 1193 (1982). “A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the

defense.” *Id.*; see also Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

In State v. Willoughby, the Court looked at whether the trial court deprived the Defendant of his constitutional right to compulsory process by quashing the subpoena for a prosecutor who tried the codefendant. See State v. Willoughby, 507 A.2d 1060 (Me. 1986). The Defendant made no showing “that the testimony sought from the prosecutor would have satisfied the *Valenzuela-Bernal* test” and the testimony sought from the prosecutor was “solely his opinion regarding [the defendant’s] credibility,” which is inadmissible pursuant to M.R.Evid. 405. *Id.* at 1068. Therefore, the Court held quashing the subpoena of what was inadmissible testimony likely did not impact the judgment, so it was harmless error and Defendant’s right to compulsory process was not violated. *Id.*

This case is distinguishable from Willoughby in several ways, but the key difference is that the case before the Court now does satisfy the standard set forth in *Valenzuela-Bernal*. It is clear that Mr. Johnson’s testimony would be favorable to the Defendant, as it would suggest there was an alternate driver who crashed her vehicle. This testimony is not only favorable, but material to her defense. In fact, Mr. Johnson’s testimony was so material to her defense that due to his unavailability, caused both by his continuous ducking of the system and the failure

of law enforcement to execute the warrant for his arrest, Defendant chose to conditionally plead guilty rather than proceed to trial.

II. THE DENIAL OF THE CONTINUANCE WAS ALSO AN ABUSE OF DISCRETION AS THE DEFENDANT PROVIDED THE NECESSARY INFORMATION AS TO THE WITNESS'S RELEVANCY AND THE DUE DILIGENCE TO SECURE SAID WITNESS, AS WELL AS SHOWING THAT A CONTINUANCE WOULD IN FACT SECURE THE WITNESS FOR TRIAL.

The Maine Rules for Criminal Procedure outline the following procedure for filing a motion to continue:

A motion for a continuance order shall be made immediately after the cause or ground become known. The motion must specify (1) the cause or ground for the request, (2) when the cause or ground for the request became known, and (3) whether the motion is opposed.... Telephonic or other oral notice of the motion shall be given immediately to all other parties.... Continuances should only be granted for substantial reasons.

M. R. Crim. P. 25A(c).

According to State v. Curtis, it is essential that “a party seeking a continuance for the purpose of securing the attendance of witnesses” show “[w]ho they are, what their testimony will be, that it will be relevant... and competent, that the witness can probably be obtained if the continuance is granted, and that due diligence has been used to obtain their attendance for the trial as set....” State v. Curtis, 295 A.2d 252, 255 (Me. 1972) (citation omitted).

Defendant has met this burden in this case. The various subpoenas and the Motion for Capias ad Respondendum demonstrate Defendant's due diligence to

obtain Mr. Johnson for trial. (A. 22-23, 24, 25, 31-38). Defense counsel's recitation during the conditional plea of Mr. Johnson's expected testimony demonstrate that his testimony was relevant. (Tr. 30-32). Furthermore, it is probable that a continuance would secure Mr. Johnson's presence for trial because it would have allowed more time for law enforcement to act on the capias ordered by the trial court.

In State v. Damboise, the Court upheld the trial court's denial of a continuance sought by Defendant on the first day of trial due to an unavailable witness. *See State v. Damboise*, 1997 ME 126, ¶ 3, 695 A.2d 1203, 1205. The Court reiterated that the following is the standard for the party seeking a continuance:

The party seeking the continuance has the burden of establishing that the evidence sought will be relevant and competent, that a continuance will make its procurement likely, that due diligence was used to obtain the evidence before the commencement of trial, and that the length of the continuance sought is reasonable.

Id. (quoting State v. Chambers, 624 A.2d 473, 474 (Me. 1993). When the Defendant sought a continuance, "he offered no evidence as to the relevancy or competency of the witness's testimony, the unavailability of the witness, or any attempt to procure the witness's attendance at the trial." *Id.*

The case before the Court now is distinguishable from Damboise because unlike the defendant in Damboise, the Defendant offered clear evidence as to the

relevancy and competency of Mr. Johnson's testimony, the fact that Mr. Johnson is unavailable due to law enforcement not executing a warrant for his arrest, and outlined what efforts were taken to secure Mr. Johnson's attendance for trial. Therefore, the Defendant here meets the standard of proof by establishing each element necessary for the Court to grant a continuance, and the continuance should have in fact been granted by the trial court.

In State v. Dube, Defendant moved for a continuance on the eve of trial to seek the alleged victim's counseling records after he revealed to his attorney a few days before his trial "the victim's motive to fabricate events at issue." State v. Dube, 2014 ME 43, ¶ 14, 87 A.3d 1219, 1224. The Defendant argued the records sought could impeach the victim, a continuance would have made it likely for counsel to obtain records, counsel demonstrated due diligence to obtain evidence prior to trial, and the request was reasonable. *Id.* The Court disagreed, holding that the Defendant "had been given sufficient time to prepare a defense and further postponement ... was unreasonable." *Id.*

The case here is distinguishable from Dube because while the holding in Dube was based on the fact that Defendant had sufficient time to prepare a defense, this case is based on an unavailable witness that is the only witness able to testify that there was an alternate driver. The Defendant in Dube did not disclose the alleged victim's motive to lie until a few days before trial. Had he done so sooner,

his attorney could have obtained the records necessary to impeach the victim. Here, the Defendant and her attorney have been working to secure Mr. Johnson's presence for months. Ultimately, Defendant was unsuccessful, so the court issued the capias, that was never executed. (A. 17, 19).

This Court recently addressed the denial of a motion to continue State v. Hunt. In that case, Defendant filed a motion to continue the day before trial began because subpoenas had been served to obtain records from Massachusetts, but those records had not yet been produced. *See State v. Hunt*, 2023 ME 26 ¶ 12, 293 A.3d 423, 428-29. The Court affirmed the trial court's denial of a continuance because of the age of the case, the number of continuances over the span of several years without affirmative action by trial counsel to enforce the subpoenas in Massachusetts courts, the timing of the continuance being the day before trial, question as to whether the records offered strategic value, and counsel's representation that he was "fully prepared to go forward." *Id.*

The only similarity between the case before the Court now and *State v. Hunt* is the age of the cases¹ – all other reasons for the denial of the continuance are

¹ Although both cases were quite old by the time of trial, they are old for different reasons. The docket record in this case shows the only continuance once the capias was ordered was due to an unexpected hospitalization of defense counsel. (A. 16, 44). In contrast, Hunt had been continued in September of 2018 and in February of 2020 to allow defense counsel more time to obtain and review records subpoenaed back in June of 2019. *State v. Hunt*, 2023 ME 26, ¶¶ 10-11, 293 A.3d 423, 428. The last continuance was granted, but the trial court noted that it would be the final continuance. *Id.* Two years later on the eve of trial, defense counsel filed a Motion to Enforce Subpoenas because he never received the records subpoenaed back in 2019. *Id.* The court denied defendant's motion to continue. *Id.* at ¶ 15.

distinguishable. First, while the issue of the unavailable witness has been known to the parties and the trial court for several months, it was not the basis for a continuance once the capias was ordered. (A. 16-19). Second, although this oral motion to continue was made the day of trial, it is still distinguishable from Hunt because the Defendant in this case did not have an opportunity to raise the motion any earlier, as the Defendant would have no way to know whether or not the witness would appear until the day of trial. Third, while the Court in Hunt questioned the strategic value of the records, it is clear that Mr. Johnson's testimony was invaluable to the Defendant's case. Lastly, and most importantly, trial counsel in Hunt articulated that he was "fully ready to proceed" with the trial. Here, Mr. Johnson was the Defendant's only witness. Without him present, she had no case, which is clear by her choice to enter a conditional guilty plea rather than proceed to trial. Therefore, based on the substantial differences between Hunt and Defendant's case, the factors used to determine the outcome in Hunt favor overturning the trial court's denial of Defendant's motion to continue.

CONCLUSION

WHEREFORE, for the reasons set forth above, Appellant respectfully requests the Court overturn the lower court's decision denying the motion to continue and issue an order granting Defendant's motion to continue, thus

vacating her conditional guilty plea, because denying Defendant's motion to continue violated her right to compulsory process under both the United States and Maine Constitution and denying Defendant's motion was an abuse of discretion based on the Court's finding of witness unavailability.

Respectfully submitted, dated at Brunswick, Maine this 8th day of April, 2025.

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CERTIFICATE OF SERVICE

I, Julia R. Casey, certify that I served two copies of this Brief of Appellant upon the other parties in this matter by regular U.S. mail, postage paid, with a copy by email, at the addresses below:

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