

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-804

LYDIA M. DELGADO

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered FEBRUARY 16, 2011

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
FORT SMITH DISTRICT
[NO. CR-2009-756]

HONORABLE STEPHEN TABOR,
JUDGE

AFFIRMED

ROBIN F. WYNNE, Judge

Lydia M. Delgado appeals from her conviction on one count of possession of a controlled substance (methamphetamine) with intent to deliver and one count of possession of drug paraphernalia. Appellant argues on appeal that the trial court erred by denying her motion for a continuance and by denying her motion to suppress evidence seized by police. We affirm.

Appellant was charged by information with one count of possession of a controlled substance (methamphetamine) with intent to deliver and one count of possession of drug paraphernalia. On November 16, 2009, appellant filed a motion to suppress evidence that was seized by police. At the hearing on the motion to suppress, Eric Fairless with the Fort Smith Police Department testified that a confidential informant placed a phone call in his presence

to a woman named Lydia, who indicated that she would be driving a red Chevrolet pickup truck from Witcherville to the Hometown Inn and Suites in Fort Smith and would be bringing methamphetamine with her to deliver.

Officer Brian Rice with the Fort Smith Police Department testified that he was assisting the department's narcotics unit by watching a hotel for the arrival of a red Chevrolet pickup truck. Officer Rice saw a red Chevrolet truck driving at a high rate of speed when it turned, without signaling, into the hotel parking lot. Shortly thereafter, Officer Rice saw the truck leave the lot, at which time he pulled behind the truck, which stopped at a light. The driver, who was identified as appellant, signaled and made a wide right turn. Officer Rice turned behind the truck and activated his lights. Appellant drove to the next street, made another wide turn, and stopped. As Officer Rice walked up to the truck, he saw appellant put her hand up by her chest, then quickly pull it back down to the steering wheel. He testified that he saw a bulge under her shirt between her breasts. Officer Rice ordered appellant out of the vehicle and then had her place her hands on the vehicle while he retrieved the item from her shirt. When Rice asked appellant what the item was, she first replied, "stuff," and then said, "drugs." The item in appellant's shirt was a black pouch that Rice testified contained drug paraphernalia and a large bag of what he suspected was methamphetamine. It is not clear from the abstract of the testimony at the suppression hearing whether Rice testified regarding the search of the vehicle; however, the abstract of the testimony from the

trial indicates that Rice also searched appellant's truck and found in excess of \$1000 in cash and a set of digital scales in appellant's purse.

At the conclusion of the hearing, counsel for appellant argued that the evidence seized by police should be suppressed for the following reasons: the confidential informant was not reliable, appellant committed no traffic violation that would have justified the stop of her vehicle, there was no action by appellant after her vehicle was stopped that justified a search of her person, and there was no indication that appellant consented to a search of her person or her vehicle. The trial court denied the motion to suppress finding that Officer Rice had cause to stop appellant either due to the information from the informant or the "multiple traffic violations" he observed appellant commit. The trial court further found that, once the vehicle was stopped, Officer Rice had a right to search appellant's person for his own safety due to the bulge in her shirt.

On March 25, 2010, appellant filed a motion for a continuance. In the motion, appellant stated that she had funds to hire counsel and that a specific attorney indicated that he would enter an appearance if the case were continued for sixty days. The State opposed the motion, arguing that the matter was set for trial on April 5, 2010, and that the State had subpoenaed witnesses from Little Rock who had arranged their schedules so as to be available on that date. The State further argued that the attorney named by appellant in the motion for continuance had not entered an appearance and that appellant made neither a showing of good cause for continuance nor one of prejudice from the denial of the motion. On March

29, 2010, the trial court denied appellant's motion for a continuance. On the morning of trial, prior to the empaneling of the jury, appellant renewed her motion for a continuance, seeking to have her current appellate counsel replace the appointed counsel who represented her at trial. Appellant's motion was again denied.

Following the guilt phase of the trial, the jury found appellant guilty of possession of a controlled substance (methamphetamine) with intent to deliver and possession of drug paraphernalia. In a judgment and commitment order entered on April 9, 2010, the trial court sentenced appellant to 360 months' imprisonment. Appellant has now appealed to this court.

Appellant's first point on appeal is that the trial court erred by denying her motion for a continuance. A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reversed on appeal in the absence of a clear abuse of that discretion. *Jackson v. State*, 2009 Ark. 336, 321 S.W.3d 260. The burden of establishing an abuse of discretion falls squarely on the shoulders of the appellant. *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008). An appellant must not only demonstrate that the trial court abused its discretion by denying a motion for a continuance, but must also show prejudice that amounts to a denial of justice. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

It is also well established that the right to counsel of one's choice is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004). Once competent counsel is obtained, the request for a change in counsel must

be considered in the context of the public's interest in the prompt dispensation of justice. *Id.* The trial court may also consider such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to the defendant. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995).

In appellant's written motion for continuance, filed less than two weeks before trial, appellant never indicated any reason why she wished to change counsel, nor did she indicate what prejudice she would suffer if the motion were not granted. The same is true for the oral motion for continuance made the morning of trial. The trial court specifically stated on the morning of trial that if appellant's desired counsel appeared that day, he would be allowed to participate, meaning that the denial of the motion did not operate to deny her the counsel of her choosing. In her brief on appeal, appellant argues that her thirty-year sentence is proof that her trial counsel committed "several important material error[s]," but she does not indicate what those errors were. Appellant makes no argument, other than the conclusory statement regarding her sentence, to indicate how she was prejudiced by the denial of her motion for a continuance. As appellant has failed to demonstrate either that the trial court abused its discretion or that she was prejudiced by the trial court's exercise of its discretion, her argument on this point is without merit.

Appellant's second point on appeal is that the trial court erred by denying her motion to suppress. The State argues in its brief that appellant has not preserved the argument she is

making on appeal because it is different from the one she made before the trial court. We agree with the State. A party cannot change the grounds for a motion on appeal but is bound by the scope and nature of the argument made at trial. *Ellison v. State*, 354 Ark. 340, 123 S.W.3d 874 (2003). Our review of the argument appellant made before the trial court regarding her motion to suppress reveals that it was not the same argument she now makes on appeal.

Before the trial court, appellant argued that all of the evidence seized, including that seized from her person as well as that seized as a result of a search of her vehicle, should be suppressed because the information from the confidential informant was not reliable and appellant's actions prior to the stop of her vehicle and prior to the search of her person did not give rise to probable cause. On appeal, appellant only challenges the search of her vehicle; she does not challenge the admission of the evidence seized from her person. Nor does appellant challenge the stop of her vehicle. Instead, she argues that, pursuant to the United States Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332 (2009), Officer Rice did not have probable cause to search her vehicle because, at the time the vehicle was searched, she was handcuffed away from the vehicle and Rice had no reasonable suspicion to believe that there was other evidence of the crime contained in the truck. This argument differs substantially from the one made at trial and, as a result, we cannot consider the argument on appeal. *Ellison, supra*.

Affirmed.

HART and BROWN, JJ., agree.