

Cite as 2024 Ark. App. 26
ARKANSAS COURT OF APPEALS
DIVISION II
No. CR-23-390

MERCEDES CUELLAR

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 17, 2024

APPEAL FROM THE GRANT
COUNTY CIRCUIT COURT
[NO. 27CR-18-112]

HONORABLE STEPHEN L. SHIRRON,
JUDGE

AFFIRMED

CINDY GRACE THYER, Judge

The Grant County Circuit Court revoked the probation of appellant Mercedes Cuellar following a hearing on March 6, 2023. Cuellar appeals that decision but does not challenge the revocation itself. Instead, she argues that the circuit court abused its discretion in denying her motion for continuance. We find no error and affirm.

I. Factual and Procedural Background

Cuellar was charged with one count each of theft by receiving and possession of drug paraphernalia on November 13, 2018. She pled guilty to those offenses on May 20, 2019, and was sentenced to five years' probation. The State filed a petition to revoke Cuellar's probation on February 10, 2020, alleging that she had committed numerous violations of the terms and conditions of her probation. For reasons that are unclear from the record,

three years then elapsed. Eventually, the circuit court scheduled a hearing on the State's revocation petition for March 6, 2023.

When that hearing convened, Cuellar's counsel asked for a continuance, asserting that Cuellar had "not provided any evidence that would be useful in her defense up till today." Counsel specifically asserted she needed that evidence to rebut the State's claims that Cuellar had not maintained employment or been enrolled in school. The court agreed to grant the requested continuance and reset the hearing for April 3.

The State objected, asserting that Cuellar had not reported to her probation officer for three years. The court asked her probation officer, Randy Zimmerman, who was present to testify for the State, whether he had had an issue with her not reporting as required. Zimmerman answered that he had not seen her in about three years. He added that she did "show up at the office last month after court like she was told to, but she did not stay like she was told to; [she] left [and] left me a message saying she showed up." The court then announced that it had reconsidered its decision, denied the continuance, and proceeded with the hearing.

The State then called Zimmerman to the stand. After the State introduced the terms and conditions of Cuellar's probation, Zimmerman testified that Cuellar failed to report as required by the terms of her probation on at least six occasions. In addition, she failed to maintain employment, changed her residence without permission, failed to appear in court cases in other counties, tested positive for drugs on several occasions, had made no payment on her court-ordered financial obligations since she had been placed on probation, failed to

report for several scheduled drug-and-alcohol assessments, and failed to abide by her warrantless search waiver.

Cuellar then testified on her own behalf. She explained that she had been trying to get her probation transferred to Little Rock because it was closer to where she lived and said she “never meant to not come” to meetings with Zimmerman. She said she had been employed for four months, was currently in her second semester at Shorter College, and had lived at the same apartment for four or five years. She admitted using marijuana within the last two or three weeks. She acknowledged that she had not made any payments toward her fines and fees but explained that she did not have a job when she was originally ordered to pay them.

The court found that Cuellar was in violation of six different terms and conditions of her probation, adding that she had “done absolutely nothing” that she was supposed to have done on probation. The court revoked her probation and sentenced her to six years in the Arkansas Department of Correction. A sentencing order was entered on March 9, 2023, and Cuellar filed a timely notice of appeal. On appeal, as noted above, Cuellar argues only that the circuit court erred in denying her motion for continuance.

II. *Standard of Review*

A continuance should be granted only upon a showing of good cause. Ark. R. Crim. P. 27.3. The decision to deny a continuance is within the sound discretion of the circuit court and will not be disturbed absent a clear abuse of that discretion. *Hendrix v. State*, 2019 Ark. 351, at 3, 588 S.W.3d 17, 19. An appellant must establish that the circuit court abused

its discretion and show that the decision resulted in prejudice amounting to a denial of justice. *McCauley v. State*, 2023 Ark. 68, at 5, 663 S.W.3d 383, 386. Prejudice is not presumed in this context. *Id.*

III. Analysis

On appeal, Cuellar argues that the circuit court abused its discretion when, after first granting her motion for a continuance, it changed its mind and denied the request. Specifically, she asserts that the court erred when it failed to give her an opportunity to respond to Zimmerman’s “unsworn testimony” that she had not reported for three years. Framing her argument as a due-process claim, Cuellar contends that by proceeding with the trial, the circuit court “violated [her] constitutional right to present a defense.”

Cuellar’s argument is not preserved for appellate review because she did not make a due-process argument before the circuit court. In criminal cases, issues raised, including constitutional issues, must be presented to the circuit court to preserve them for appeal. *Railey v. State*, 2023 Ark. App. 433, at 4, 675 S.W.3d 912, 915. A party cannot change the grounds for an objection or motion on appeal but is bound by the scope of the arguments made at trial. *Id.* When there is no evidence that a defendant raised his or her due-process argument to the circuit court, it may not be raised for the first time on appeal. *Pinegar v. State*, 2022 Ark. App. 482, at 3.

Even if Cuellar had preserved her argument, however, we would find no merit to it. An appellant who complains about the denial of a continuance must also demonstrate that as a result of the ruling on the motion for a continuance, he or she suffered prejudice that

amounts to a denial of justice. *Davis v. State*, 2017 Ark. App. 496, at 4, 532 S.W.3d 589, 592. In her brief, Cuellar offers no argument *that* she suffered prejudice that amounts to a denial of justice from the court’s denial of her request for a continuance, much less *how* she suffered prejudice. *Id.* (affirming denial of continuance when appellant offered no argument on appeal about how he suffered prejudice as a result of that ruling).¹

Affirmed.

ABRAMSON and GRUBER, JJ., agree.

Gregory Crain, for appellant.

Tim Griffin, Att’y Gen., by: A. Evangeline Bacon, Ass’t Att’y Gen., for appellee.

¹We note that Cuellar’s argument is that the circuit court “did not give due consideration to [her] need to gather evidence to present a defense.” As mentioned above, counsel asked the court for a continuance because Cuellar had not provided any evidence that would be useful to her defense. The court asked what counsel and Cuellar had discussed to date; counsel replied that there were going to be “allegations that she’s not maintained employment, she has said she has proof of employment and being a student.” In her subsequent case in chief, Cuellar testified that she had been employed for several months and had been enrolled at Shorter College for two terms. Cuellar thus presented testimony regarding the very issues counsel would have pursued had the continuance been granted. As such, if we were to address the merits of Cuellar’s arguments, we would be unable to conclude that she suffered prejudice as a result of the circuit court’s denial of her continuance.