

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1347

STATE OF LOUISIANA

VERSUS

GAVIN GALJOUR

***DATE OF JUDGMENT:*** SEP 23 2008

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT  
DOCKET NO. 427,485, DIV. B, PARISH OF LAFOURCHE  
STATE OF LOUISIANA

THE HONORABLE JEROME J. BARBERA, III, JUDGE

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Attorney for Appellee  
State of Louisiana

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Attorney for Defendant-Appellant  
Gavin Galjour

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**BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.**

**Disposition: CONVICTIONS AND SENTENCES AFFIRMED.**

*Guidry, Jr. concurs.*

Kuhn, J.

The defendant, Gavin Galjour, was charged by bill of information with armed robbery (count one), a violation of La. R.S. 14:64, and possession of a firearm by a convicted felon (count two), a violation of La. R.S. 14:95.1. He pleaded not guilty. The defendant waived his right to a jury trial. Following a bench trial, the defendant was convicted as charged. He filed a motion for a new trial, which the trial court denied. The defendant was sentenced to imprisonment at hard labor for twenty years without benefit of probation, parole, or suspension of sentence on count one and fifteen years at hard labor without benefit of probation, parole, or suspension of sentence on count two. The trial court ordered that the sentences be served consecutively. The State subsequently filed a bill of information seeking to have the defendant adjudicated and sentenced as a habitual offender. Following a hearing, the trial court adjudicated the defendant a fourth felony habitual offender and resentenced him to 99 years at hard labor on the armed robbery conviction.<sup>1</sup> The defendant now appeals. In a single assignment of error, the defendant challenges the trial court's denial of his request to recess the trial. Finding no merit in the assigned error, we affirm the defendant's convictions and sentences.

### **FACTS**

On February 18, 2006, Laramie Duet contacted the Lafourche Parish Sheriff's Office and advised that he had been robbed at gunpoint two days earlier. He identified his assailant as the defendant, Gavin Galjour. Duet explained that he

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<sup>1</sup> The habitual offender proceedings were instituted under a separate district court docket number (17<sup>th</sup> Judicial District Court docket number 439945) and are not part of the instant appeal.

was riding down Jerica Street in Galliano, Louisiana, when the defendant's girlfriend, Audrey Cheramie, and her friend, Shantell Taylor, stopped him and invited him into Cheramie's trailer. According to Duet, once they were inside the trailer, the defendant emerged from an adjoining room, pointed a gun at Duet's eye and demanded his money. Because he and the defendant were friends, Duet initially did not take the matter seriously, believing it to be a joke. However, once the defendant cocked the weapon and threatened to shoot him, Duet realized he was actually being robbed. According to Duet, the defendant pushed him onto the sofa and removed approximately \$5,500.00 from his pocket. The defendant also took Duet's wallet and cellular telephone.

In response to the robbery report, Lafourche Parish Sheriff's officials reported to Cheramie's trailer to investigate. Shantell Taylor confirmed the crime and said she had witnessed it. Taylor advised the officials that the defendant was inside the trailer armed with a handgun. The defendant did not come out of the trailer immediately. Approximately thirty minutes elapsed before he surrendered to the police. A handgun was found concealed inside a stuffed teddy bear inside the trailer.

At the defendant's trial, Darren Charpentier testified that the handgun recovered from Cheramie's trailer belonged to him and was purchased in December 2005. Charpentier explained that a few days after he purchased the gun, he left the gun in the defendant's vehicle. Despite several requests, the defendant refused to return the gun to Charpentier. Charpentier claimed he never possessed the gun again.

### **DENIAL OF THE DEFENDANT'S REQUEST FOR A RECESS**

In his sole assignment of error, the defendant argues that the trial court erred in refusing to allow additional time for him to produce a crucial witness for whom he had requested a subpoena, but which was never served by the Sheriff's Office. The defendant contends Craig Griffin was a material witness whose testimony would have served to impeach the testimony of Darrin Charpentier and would likely have changed the result of the case. He also asserts that the defense exercised due diligence in attempting to procure the presence of this witness at trial.

The right to compulsory process is the right to demand subpoenas for witnesses and the right to have those subpoenas served. **State v. Latin**, 412 So.2d 1357, 1361 (La. 1982). This right is embodied in both the federal and state constitutions and in this state's statutory law. U.S. Const. amend. VI; La. Const. art. 1, § 16; La. Code Crim. P. art. 731. However, this right does not exist in a vacuum, and a defendant's inability to obtain service of requested subpoenas will not be grounds for reversal of his conviction or new trial in each and every case. In order for defendant to show prejudicial error, he must demonstrate the testimony the witness might give which would be favorable to the defendant and which would indicate the possibility of a different result if the witness were to testify. See State v. Green, 448 So.2d 782, 787 (La. App. 2d Cir. 1984).

Louisiana Code of Criminal Procedure article 708 provides, "A continuance is the postponement of a scheduled trial or hearing, and shall not be granted after the trial or hearing has commenced. A recess is a temporary adjournment of a trial or hearing that occurs after a trial or hearing has commenced." A motion for

recess is evaluated by the same standards as a motion for a continuance. The decision to grant a recess is within the sound discretion of the trial judge and will not be reversed in the absence of a showing of an abuse of that discretion. **State v. Brown**, 95-0755, p. 9 (La. App. 1st Cir. 6/28/96), 677 So.2d 1057, 1065.

Louisiana Code of Criminal Procedure article 709 provides:

A motion for a continuance based upon the absence of a witness must state:

(1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;

(2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and

(3) Facts showing due diligence used in an effort to procure attendance of the witness.

In the instant case, the defendant argues the trial court abused its discretion in failing to grant his motion for a recess of the trial to ensure the presence of Craig Griffin, a key witness. He argues that Griffin's testimony was both relevant and material. He further notes that the motion for a recess was requested on November 30, 2006, and the witness would have been available to testify on December 17, 2006; thus, the delay of the trial would have been less than one month. In response, the State asserts the trial court did not abuse its discretion in denying the defendant's motion. The State notes that the proffered testimony would not have proven that the defendant did not rob the victim or that he did not possess the firearm in question. Consequently, the State argues that the testimony was not material. The State further notes that the defense failed to produce any evidence that Griffin would have actually been available to testify on December

17, 2006, and the defense failed to exercise due diligence in requesting service of the subpoena upon Griffin at the rehabilitation center.

On November 29, 2006, the day trial commenced in this matter, counsel for the defense advised the court that the subpoena issued to ensure Griffin's presence at the defendant's trial was never served. Counsel explained that although the subpoena was timely requested, it was returned unserved due to the fact that Griffin was in a rehabilitation center outside the state. Despite noting that the defense intended to call Griffin as an impeachment witness, counsel did not request a continuance of the trial at this point. Instead, counsel stated, "If the State, if that witness testifies consistently with what we are hoping he says, then maybe Mr. Griffin will not be necessary."

Later, during the trial, counsel for the defendant noted that the defense wished to call Griffin to testify. Based upon Griffin's unavailability due to the fact that the requested subpoena had not been served, counsel requested a recess in the trial until Griffin could be subpoenaed and secured as a witness. The State objected to the delay based upon the timing of the request for the subpoena.

In denying the defense's request to delay the trial, the court noted the difference between a continuance (a postponement) and a recess (a temporary adjournment) of a trial or hearing. The court later concluded that an eighteen-day delay of the trial based upon a subpoena that was requested three weeks prior to trial was beyond the scope of a recess. The court further noted that there had been no factual showing that the witness would be available to testify at the conclusion of the delay. However, the court agreed to allow the defense to proffer the

substance of Griffin's testimony. Because the matter was being tried by the bench, the judge stepped down and left the courtroom to allow the proffer to be made.

Counsel for the defendant advised that contrary to Charpentier's claim that he forgot his gun in the defendant's vehicle and the defendant never returned it, Griffin would testify that he picked Charpentier up from Cheramie's trailer on the date of the alleged robbery and personally observed Charpentier in possession of the same gun. Griffin would further testify that, when Charpentier attempted to enter Griffin's vehicle while armed with the weapon, Griffin told him not to bring the gun. Charpentier then returned to the trailer and left the gun behind.

We find no abuse of discretion in the trial court's denial of the defendant's request for a recess of the trial. The record reflects that the defendant did not satisfy the requirements of La. Code Crim. P. art. 709. As the State notes in its brief, the materiality of the testimony in question was not established. Griffin's testimony reconnecting Charpentier with the gun does not prove that the defendant was not in possession of the gun and did not use it to rob Duet. Furthermore, the defendant failed to show a probability that the witness would have been available to testify at trial at a later time, if the motion for a recess had been granted. Although defense counsel argued that Griffin was in a rehabilitation program and would soon be released, no evidence was presented to support this assertion. Finally, counsel did not present facts showing due diligence was used in an effort to procure attendance of the witness, as required by La. Code Crim. P. art. 709(3). As the trial court noted, the subpoena was not requested until approximately three weeks before the trial was scheduled to commence. Also, as the State notes, despite being aware of Griffin's presence at the rehabilitation center, the defense

made no effort to have Griffin served there. Thus, we find that the defendant has failed to meet the criteria of La. Code Crim. P. art. 709. The trial court did not abuse its discretion in denying the motion to recess the trial. This assignment of error is without merit.

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

**CONVICTIONS AND SENTENCES AFFIRMED.**