

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Thursday the 4th day of June, 2015.*

Kenneth Matthews, Appellant,

against Record No. 141182
Court of Appeals No. 1170-13-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a
judgment rendered by the Court
of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the Court of Appeals did not err when it ruled that the Circuit Court of the City of Colonial Heights ("trial court") did not abuse its discretion by denying Matthews' motion for a continuance. Therefore, we will affirm the judgment.

On September 7, 2012, Matthews was arrested on three felony warrants for grand larceny, conspiracy to commit grand larceny, and larceny with intent to sell. Matthews was indicted on all three charges on November 13, 2012, and that same day, the presiding judge scheduled a bench trial for December 11, 2012. On Friday, December 7, 2012, Matthews' counsel filed a demand for a jury trial after appellant left a telephone message for his counsel the previous day requesting a jury trial.

On December 11, 2012, the trial court summoned a jury panel and scheduled a jury trial in place of the originally scheduled bench trial. Prior to the start of trial, Matthews made a motion for a continuance contending that he was unprepared for a jury

trial and had not received a list of the jurors at least three business days prior to trial pursuant to Code § 8.01-353. Matthews stated that he was unprepared for trial because he had not been able to meet with his counsel in person, had considered but had not yet acquired means to hire a paid investigator, and was speaking with a private attorney who had allegedly agreed to represent appellant if his family posted the required funds. Matthews also requested new counsel. Matthews' counsel stated that they "had several discussions on the phone" and that she had "continually asked him to come into my office, but there were transportation issues on his part."

Matthews' motion for new counsel was denied after the trial court noted that Matthews had not "given [him] any reason as to what [Matthews' counsel] hasn't done or has done" to convince him to relieve his counsel. The trial court noted that between the date of his indictment and the date of trial, Matthews had "adequate . . . [time] to hire his own attorney" and that Matthews "represented he needed a court appointed attorney" and "didn't have any money." Matthews' motion for a continuance was also denied. Regarding the list of jurors not received at least three business days prior to trial, the trial court noted that "[i]t's an exercise in futility" to "accomplish what the statute wants us to accomplish if, in fact, we don't get the notice" that Matthews desired a jury trial within three business days prior to trial.

The jury convicted Matthews on all charges and imposed a thirty-five year sentence. Matthews filed a petition for appeal with the Court of Appeals, contending that the trial court erred in denying his motion for a continuance.

By per curiam order, the Court of Appeals denied his petition, Matthews v. Commonwealth, Record. No. 1170-13-2 (February 26, 2014). The Court of Appeals found that Matthews had failed to assert any specific prejudice that would result from proceeding to trial.

On appeal to this Court, Matthews contends that the trial court erred in refusing to grant his motion for a continuance because the trial "had been set for a bench trial on that date four weeks earlier" and counsel "was only informed that that same date would be used for [Matthews'] recently requested jury trial only two hours before the trial began."

"Whether to grant or deny a continuance of a trial is a matter that lies within the sound discretion of a trial court, and its ruling will not be reversed on appeal unless it is plainly wrong." Cardwell v. Commonwealth, 248 Va. 501, 508, 450 S.E.2d 146, 151 (1994). "The circuit court's ruling on a motion for a continuance will be rejected on appeal only upon a showing of abuse of discretion and resulting prejudice to the movant." Haugen v. Shenandoah Valley Dep't of Soc. Servs., 274 Va. 27, 34, 645 S.E.2d 261, 265 (2007). "[T]he need to investigate and evaluate the evidence and the prejudice allegedly resulting from the denial of a continuance cannot be based upon mere speculation." Cardwell, 248 Va. at 509, 450 S.E.2d at 151.

Here, Matthews has neither asserted prejudice nor demonstrated any prejudice. Matthews filed a request for a jury trial on December 7, 2012, four days before his scheduled bench trial on December 11, 2012. Matthews did not request a copy of the jury panel list pursuant to Code § 8.01-353. Additionally, "the

provisions of Code § 8.01-353 . . . are directory rather than mandatory. Thus, a failure to comply with those provisions is not a per se basis for reversing a trial court's judgment in either a civil or a criminal case." Butler v. Commonwealth, 264 Va. 614, 620, 570 S.E.2d 813, 816 (2002). The trial court noted that complying with Code § 8.01-353 would be "an exercise in futility. We can't accomplish what the statute wants us to accomplish if, in fact, we don't get the notice."

Matthews further argues that his counsel only had two hours to prepare for a jury trial; however, neither Matthews nor his counsel pointed to any specific prejudice that would result from holding a jury trial on December 11, 2012 rather than a bench trial. Counsel merely noted that the manner of trial preparations are different. Matthews argued that he had not seen a video of the alleged larceny and that he was considering obtaining different counsel. However, the Commonwealth stated that they had an open file discovery policy and Matthews' counsel stated that Matthews had cancelled two meetings with her to discuss his trial and had "not made himself available to her."

In denying Matthews' motion for a continuance, the trial court noted that Matthews' counsel had "prepared for a trial" since a bench trial had originally been scheduled for that date. "The trial judge further noted that [Matthews'] counsel had sufficient opportunity to prepare for a jury trial since appellant notified her of his desire for a jury trial several days prior and that she 'does an excellent job . . . day in and day out.'" Matthews, slip op. at 5. Accordingly, the trial court did not abuse its discretion in denying Matthews' motion for a continuance.

Justice Kelsey took no part in the consideration of this case.
This order shall be certified to the Court of Appeals of
Virginia and the Circuit Court of the City of Colonial Heights.

A Copy,

Teste:

Oath & Hamisto

Clerk