

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-002091-MR

STEVEN W. FLORENCE

APPELLANT

v. APPEAL FROM BRACKEN CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 06-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: Steven W. Florence (Florence) was indicted by a Bracken County grand jury on one count of flagrant non-support<sup>1</sup> and being a persistent felony offender (PFO) in the second degree.<sup>2</sup> On the morning his jury trial was to begin, the court ruled on several motions. In particular, the court (1) denied a

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<sup>1</sup> Kentucky Revised Statutes (KRS) 530.050(2), a Class D felony.

<sup>2</sup> KRS 532.080.

motion by Florence to continue the trial so he could arrange for testimony from several medical witnesses; (2) denied a motion by Florence to set aside the indictment because it was allegedly based upon faulty information; and (3) sustained a motion *in limine* filed by the Commonwealth which prohibited Florence from introducing proof of the \$4,645.88 he had paid in child support since being indicted and allowed the Commonwealth to calculate the arrearage forward from January 1, 2001. Thereafter, Florence entered a conditional guilty plea, reserving several issues for appeal, and received a probated sentence of five years. Florence filed a timely notice of appeal and now challenges the previously mentioned orders entered by the Bracken Circuit Court on September 24, 2007. We affirm.

Florence's first argument is that the trial court abused its discretion in denying his only request for a continuance. "[T]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004).

RCr<sup>3</sup> 9.04 authorizes a court to postpone trial at the request of a party "upon a showing of sufficient cause." *Stump v. Commonwealth*, 747 S.W.2d 607, 609 (Ky. App. 1987). When a continuance is requested due to the unavailability of a known witness, the movant must submit an affidavit showing the materiality of the absent witness's testimony and the diligence used to procure the witness or the

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

evidence. *Gray v. Commonwealth*, 203 S.W.3d 679, 688 (Ky. 2006). *Gray* and *Pennington v. Commonwealth*, 371 S.W.2d 478, 479 (Ky. 1963), are just two of many examples in which the denial of a motion to delay trial due to an absent witness was not deemed an abuse of discretion because no supporting affidavit was submitted and thus the court had no basis upon which to evaluate the merits of the motion and determine whether the moving party would be prejudiced by proceeding without more time. *Gray*, at 689. Whether to grant a continuance lies solely within the trial court's sound discretion, and unless our review of the complete record demonstrates an abuse of that discretion, we will not disturb the trial court's ruling on appeal. *Williams v. Commonwealth*, 644 S.W.2d 335 (Ky. 1982); *Davidson v. Commonwealth*, 555 S.W.2d 269 (Ky. 1977).

Before granting or denying a motion for a continuance, the court should consider various factors. Those factors include "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991) (citation omitted) overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

Florence argues the court abused its discretion because it did not consider and apply the factors mentioned in *Snodgrass*. He claims trial should have been continued because it was his first request for a continuance, no prior

delay in the case was attributable to him, the pre-trial conference that had been scheduled for the case had been cancelled, and delaying trial would have caused little inconvenience to the Commonwealth, the witnesses, counsel or the court.

In contrast, the Commonwealth argues first that the issue was waived because it was not reserved in writing. In reviewing the video record and the written order entered by the court, we are convinced the continuance was preserved for appellate review and therefore we will consider the substance of the claim. As for the merits, the Commonwealth argues Florence was indicted in December 2006 and the trial date of August 20, 2007, was set on April 20, 2007. Despite significant advance notice, Florence had never subpoenaed any of the many doctors he alleged would establish his defense, nor had he submitted an affidavit summarizing their anticipated testimony as required by RCr 9.04. The Commonwealth further argues a continuance was unjustified because the case was not complex and the Commonwealth had subpoenaed at least one witness.

Florence makes much of the fact that he had not requested any other continuances, however that is but one of many factors to be considered by the court under *Snodgrass* and we are unaware of any entitlement to a continuance in every case. The trial court stated from the bench that he was not inclined to grant a continuance because he would have expected counsel to subpoena the witnesses he anticipated calling at trial and potential jurors<sup>4</sup> were waiting to begin *voir dire*. In

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<sup>4</sup> On the morning of trial, Florence argued a motion for a bench trial. That motion was denied because the Commonwealth demanded a jury trial.

light of the absence of the affidavit required by RCr 9.04, we are not inclined to say the court abused its discretion in denying the motion to continue the trial.

Florence's other contention is that the court erred in overruling his motion to set aside the indictment and sustaining the Commonwealth's motion *in limine* and calculation of the child support arrearage. We disagree and affirm the trial court *in toto*.

We begin our discussion by noting the Commonwealth must agree to the dismissal of an indictment. RCr 9.64. Furthermore, "[i]t is premature for the trial court to weigh the evidence prior to trial to determine if the Commonwealth can or will meet [its] burden." *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003) (quoting *Commonwealth v. Hamilton*, 905 S.W.2d 83, 84 (Ky. App. 1995)).

Florence's child support obligation for one child began in the mid-1990's. While he made some payments, he fell into arrears resulting in his indictment on one count of flagrant non-support on December 15, 2006. On April 12, 2006, Florence signed an agreed order acknowledging he was \$4,624.44 in arrears through February 28, 2006. His own counsel acknowledged Florence was \$3,600.00 in arrears at the time of the indictment. The Commonwealth proceeded under KRS 530.050(2)(a) which requires proof of the accused's persistent failure to pay a known child support obligation he can reasonably pay and "[a]n arrearage of not less than one thousand dollars (\$1,000)[.]" It is undisputed that Florence was at least \$1,000.00 in arrears when he was indicted in December 2006.

According to Florence, the seminal question of this appeal is the proper method for calculating a child support arrearage. Because a new child support order entered in April 2006 changed the amount he was to pay, Florence contends only arrearages incurred after entry of that order could be used to calculate the arrearage for purposes of KRS 530.050(2)(a). As a result, he claims the indictment was based on faulty information and should have been set aside. This approach is highly favorable to Florence since he had paid more than required under the April 2006 order. However, Florence still had a sizeable arrearage and he has offered no legal authority to persuade us to adopt his theory.

In contrast, the Commonwealth argues all arrearages between January 2001 and December 15, 2006, the full period of the indictment, should be counted. This approach is more reasonable to us since the April 2006 child support order did not erase the arrearage, it merely changed the amount Florence had to pay to remain current and pay off the arrearage. As the trial court stated, there was probable cause for the indictment because it was agreed by all that Florence was at least \$1,000.00 in arrears when he was indicted. Thus, the court did not err in denying the motion to set aside the indictment.

Finally, the trial court did not err in sustaining the Commonwealth's motion *in limine* to exclude any use or reference to child support arrearage payments made after December 15, 2006. We agree with the trial court that any payments made by Florence *after* his indictment were irrelevant since they did not

make it more or less probable that he was in arrears during the period covered by the indictment which ended on December 15, 2006. KRE<sup>5</sup> 401 and 402.

For the foregoing reasons, we affirm the orders of the Bracken Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mary Ann B. Leichy  
Fisherville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Jeffrey A. Cross  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>5</sup> Kentucky Rules of Evidence.