

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ray L. Fox,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 3, 2023

Court of Appeals Case No.
22A-CR-1342

Appeal from the
Johnson Superior Court

The Honorable
Peter D. Nugent, Judge

Trial Court Cause Nos.
41D02-2102-F4-9
41D02-2106-CM-477

Memorandum Decision by Judge Vaidik
Judges Riley and Bailey concur.

Vaidik, Judge.

Case Summary

- [1] Ray L. Fox challenges his sentence for Level 4 felony dealing in methamphetamine, arguing the trial court erred in not continuing the sentencing hearing after Fox asked to review the discovery. We affirm.

Facts and Procedural History

- [2] In February 2021, the State charged Fox with Level 4 felony dealing in methamphetamine, Class A misdemeanor possession of marijuana, and Class C misdemeanor possession of paraphernalia. *See* Cause No. 41D02-2102-F4-9. In June, the State charged Fox with Class A misdemeanor driving while suspended. *See* Cause No. 41D02-2106-CM-477. In May 2022, Fox, who was represented by an attorney, and the State entered into a plea agreement under which Fox would plead guilty to Level 4 felony dealing in methamphetamine and the State would dismiss the remaining charges in both cases. The plea agreement called for a fixed six-year sentence. The trial court accepted the plea agreement and set the matter for sentencing.
- [3] Fox's sentencing hearing occurred in June. At the beginning of the hearing, the following exchange occurred:

THE DEFENDANT: Okay. Um, I'm—I don't mean to—to waste anybody's time or anything . . . And, uh, I did not know—I guess I was overwhelmed with everything that happened last week—um, I'm asking for discovery of all the facts and things against me that I may review them and I can feel comfortable just

knowing all the facts and everything against me to sign as opposed to just having the probable cause affidavit.

THE COURT: Well, I'm not sure what all you've seen, but you entered into a plea and I accepted it, so I've already accepted and found you guilty.

THE DEFENDANT: Yeah. Okay. I—I just—

THE COURT: Well, I want people to understand what they're doin', but I never got the impression from you last week when we went through this that you didn't know everything that you were doin' and hadn't gone through everything.

THE DEFENDANT: Well, I haven't seen the depositions or anything.

THE COURT: I don't know if depositions have been taken. I don't know any of that. So are we wantin' to set aside the plea – do we know—what's goin' on? I mean—I'm sure you've seen the discovery?

[DEFENSE COUNSEL]: Of course I've seen the discovery.

THE COURT: I'm sure he's seen the discovery.

[DEFENSE COUNSEL]: Uh, I believe he saw the video. We did taped statements. Uh, I talked to the officers. I told Mr. Fox the pertinent parts of that.

THE COURT: Okay. It's officially a—so he understands what's goin' on—what the State has and the State's case? I mean,

obviously you've discussed with him [who] his witnesses may or may not be and what they would testify to?

[DEFENSE COUNSEL]: Right.

THE COURT: Okay. Um, I'm not sure what all you have Mr. – Mr. Fox, but I'm gonna go ahead and proceed to sentencing today. I've got a set plea.

Tr. Vol. II pp. 16-17. The court sentenced Fox to six years, as provided for in the plea agreement.

[4] Fox now appeals.

Discussion and Decision

[5] Fox argues his “request to review discovery” was effectively “a motion for a continuance” and the trial court erred by not granting it. Appellant’s Br. p. 8. He asks us to vacate his sentence and remand so he can review discovery. But we do not agree that Fox asked the trial court for a continuance. The record indicates neither Fox nor his counsel asked for a continuance or otherwise indicated the sentencing hearing needed to be postponed. Fox asked only for the opportunity to review discovery so he could “feel comfortable.” After defense counsel informed the court that he had reviewed the discovery and discussed it with Fox, including showing him some and discussing the “pertinent” parts of others, no other request was made. Fox has failed to preserve this issue for our review. *See Peacock v. State*, 126 N.E.3d 892, 897 (Ind.

Ct. App. 2019) (failure to present an issue to the trial court waives appellate review of the issue).

[6] But even if we were to accept Fox’s contention that he moved for a continuance, he has failed to show the trial court erred in not granting one. When a defendant moves for a continuance not required by statute, we review the court’s decision to deny the request for an abuse of discretion. *Ramirez v. State*, 186 N.E.3d 89, 96 (Ind. 2022). Rulings on non-statutory motions for continuance are within the trial court’s discretion and will be reversed only for an abuse of that discretion and resultant prejudice. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018). To demonstrate such prejudice, a party must make a specific showing as to how the additional time requested would have aided counsel. *Gibson v. State*, 43 N.E.3d 231, 236 (Ind. 2015).

[7] We see no prejudice here. Fox asserts that, had he been given time to review the discovery, he may have found evidence that would have led him to move to withdraw his guilty plea and the trial court may have granted the motion to withdraw. We first note that this argument is highly speculative and far from the “specific showing” required to demonstrate prejudice. Furthermore, the record indicates the discovery had already been reviewed. Fox’s attorney stated he had seen the discovery, shown Fox some of it, and told him about the remaining “pertinent” parts. Thus, it is unclear how additional time to personally review this discovery would have aided Fox.

[8] The trial court did not err by conducting Fox's sentencing hearing notwithstanding his request for discovery.

[9] Affirmed.

Riley, J., and Bailey, J., concur.