

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Thomas Wagner,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

May 11, 2022

Court of Appeals Case No.  
21A-CR-2416

Appeal from the Vanderburgh  
Circuit Court

The Honorable Kelli E. Fink,  
Magistrate

Trial Court Cause No.  
82C01-2005-F3-2977

**Bradford, Chief Judge.**

## Case Summary

[1] On May 9, 2020, after observing a vehicle being driven in an erratic manner, a police officer stopped the vehicle, which was being driven by Thomas Wagner. Various drugs and paraphernalia were recovered during a search of Wagner's person and the vehicle. The State charged Wagner with Level 3 felony dealing in methamphetamine, Level 3 felony dealing in a narcotic drug, Level 6 felony unlawful possession of a syringe, Class A misdemeanor possession of a controlled substance, and Class A misdemeanor possession of marijuana. After Wagner's initial trial counsel withdrew his appearance, Wagner's successive counsel requested two continuances. The trial court granted the first and denied the second.

[2] Prior to trial, the State reduced the Level 3 felony dealing-in-methamphetamine charge to a Level 4 felony and dismissed the Class A misdemeanor possession-of-a-controlled-substance charge. On the day of trial, Wagner indicated that he wished to proceed *pro se*. After questioning Wagner, the trial court allowed him to represent himself, and the case proceeded to trial. At the conclusion of the trial, the jury found Wagner not guilty of Level 6 felony unlawful possession of a syringe and guilty of Level 4 felony dealing in methamphetamine, Level 3 felony dealing in a narcotic drug, and Class B misdemeanor possession of marijuana. The trial court subsequently imposed an aggregate eleven-year sentence.

[3] On appeal, Wagner contends that the trial court abused its discretion in denying his counsel's second request for a continuance. We affirm.

## Facts and Procedural History

[4] The underlying facts, as outlined in our prior memorandum decision in this case, are as follows:

On May 9, 2020, Officer Ben Hallmark (“Officer Hallmark”) of the Evansville Police Department was patrolling a high-crime area in Evansville, Indiana around 2:00 a.m. when he noticed a black Pontiac G6 driven by Wagner exit the parking lot of the Econo Lodge motel. Tr. Vol. II at 4, 6–7. Officer Hallmark pulled up behind Wagner as Wagner was stopped at a stop light. *Id.* at 7. Officer Hallmark observed Wagner sit through an entire traffic light cycle without proceeding through the intersection during the green light even though there was no other traffic that impeded his ability to proceed. *Id.* Once Wagner resumed driving, Officer Hallmark continued following him because he found it “odd” that Wagner would sit through an entire traffic light cycle, so Officer Hallmark wanted to make sure that Wagner was not impaired. *Id.* at 13. Wagner pulled into a gas station, stopped at a pump, and sat in his car for three to four minutes. *Id.* at 7–8, 13–14. Officer Hallmark continued watching Wagner from a parking lot across the street. *Id.* at 16. A sheriff's deputy pulled into the parking lot while Wagner was sitting in his car. *Id.* at 8. As soon as the sheriff's deputy left, Wagner also exited the gas station and continued driving down the street. *Id.* Officer Hallmark continued following Wagner and observed Wagner's vehicle cross the fog line. *Id.* at 8, 16. Believing Wagner could be impaired, Officer Hallmark stopped Wagner. *Id.* at 8, 18–19.

Officer Hallmark approached the passenger side of Wagner's

vehicle, and as he spoke to Wagner through the vehicle's window, he observed two orange syringe caps in the cup holder. *Id.* Officer Hallmark noticed that Wagner appeared to be nervous and asked Wagner to exit his vehicle. *Id.* at 9, 24–25. As Wagner exited the vehicle, Officer Hallmark walked around to the driver's side of the vehicle and observed a baggy with a white substance tucked inside the door pull. *Id.* at 9, 23. Because Officer Hallmark believed the baggy contained narcotics, he handcuffed Wagner and asked him if he had any weapons or other items “he should not have.” *Id.* at 9–10. Wagner responded that he had methamphetamine and a syringe in his pocket. *Id.* at 10. Officer Hallmark searched Wagner, placed him in the patrol car, and read Wagner his *Miranda*<sup>[1]</sup> warnings, which Wagner said he understood. *Id.* Wagner then told Officer Hallmark that there might be additional drugs inside his vehicle. *Id.*

*Wagner v. State*, 2021 WL 1846826 \*1 (Ind. Ct. App. 2021), *trans. denied*. Officer Hallmark searched the vehicle and located additional narcotics, a metal spoon with a white crystal substance on it, a digital scale that had white powder residue on it, four glass smoking pipes, plastic baggies, and seventy-seven syringes. Laboratory testing of the drugs and items recovered from Wagner and his vehicle revealed that at the time of the search, Wagner was in possession of 4.96 grams of methamphetamine, 5.41 grams of cocaine, 1.65 grams of marijuana, and 12.55 grams of Fluoro-MDMB-PICA, which is a controlled substance.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

- [5] On May 11, 2020, the State charged Wagner with Level 3 felony dealing in methamphetamine, Level 3 felony dealing in a narcotic drug, Level 6 felony unlawful possession of a syringe, Class A misdemeanor possession of a controlled substance, and Class A misdemeanor possession of marijuana. “On August 18, 2020, Wagner filed a motion to suppress evidence, asking the trial court to exclude from evidence any narcotics, items used to produce narcotics, and drug paraphernalia.” *Wagner*, 2021 WL 1846826 \*2. The trial court denied Wagner’s motion to suppress on September 29, 2020. *Id.* We affirmed the judgment of the trial court on interlocutory appeal. *Id.* at \*4.
- [6] On August 2, 2021, Wagner requested that the trial court set the matter for trial within seventy days pursuant to Criminal Rule 4(B)(1). The next day, the trial court granted Wagner’s motion and set the matter for trial on September 20, 2021. On August 12, 2021, Wagner’s attorney filed a motion to withdraw, citing “a breakdown in the Client-Lawyer relationship” and Wagner insisting on “counsel taking action that counsel fundamentally disagrees with.” Appellant’s App. Vol. II p. 87. The trial court granted counsel’s motion the following day.
- [7] New counsel for Wagner entered his appearance on August 26, 2021. The trial court held a hearing on August 30, 2021, and inquired whether Wagner’s trial would still proceed on September 20, 2021, as scheduled. Wagner requested a continuance, which the trial court granted. The trial court scheduled a pretrial conference for September 8, 2021, and set the matter for trial on September 29,

2021, without objection. During the pretrial conference, the trial court notified the parties that no further continuances would be granted.

[8] On September 24, 2021, Wagner filed another request for a continuance. At a hearing held the same day, Wagner’s counsel indicated that he had “had the case less than four weeks” and that “between trials and prepping for trials [he] lost one week there, another week here on vacation, so essentially [he had] had the case for two weeks and essentially [he] just [couldn’t] guarantee [e]ffective assistance of counsel” if trial proceeded as scheduled. Trial Tr. Vol. II p. 33. Counsel did not state with any specificity in either his written request for a continuance or during the hearing on his request what additional steps counsel wished to take or why a continuance was necessary, merely stating that he “required additional time to investigate and become familiar with the case.” Appellant’s App. Vol. II p. 98. In denying Wagner’s second request for a continuance, the trial court observed that this case had been pending for over 500 days. On September 27, 2021, the State dismissed the Class A misdemeanor possession-of-a-controlled-substance charge and reduced the dealing-in-methamphetamine charge to a Level 4 felony.

[9] During his opening argument at trial, Wagner’s counsel stated that “[t]he idea that Mr. Wagner is a user is absolute, its 100%, I don’t mean to be insensitive, but you can see for yourself in the bodycam of how Mr. Wagner looked at the time versus how he looks today in court.” Trial Tr. Vol. II p. 107. Wagner objected to counsel’s argument and stated that “I choose to represent myself.” Trial Tr. Vol. II p. 107. The trial court then held a hearing outside the presence

of the jury, ultimately determining that Wagner could represent himself. The trial proceeded as scheduled. At the conclusion of the trial, the jury found Wagner not guilty of Level 6 felony unlawful possession of a syringe and guilty of Level 4 felony dealing in methamphetamine, Level 3 felony dealing in a narcotic drug, and Class B misdemeanor possession of marijuana. On October 27, 2021, the trial court imposed an aggregate eleven-year sentence.

## Discussion and Decision

[10] “When, as here, a party moved for a continuance not required by statute, we review the court’s decision for abuse of discretion.” *Tharpe v. State*, 955 N.E.2d 836, 843 (Ind. Ct. App. 2011). “An abuse of discretion occurs when the ruling is against the logic and effect of facts and circumstances before the court or where the record demonstrates prejudice from denial of the continuance.” *Id.* “Continuances to allow more time for preparation are generally disfavored in criminal cases.” *Id.*

[11] Wagner contends that the trial court abused its discretion in denying his second request for a continuance, which he claims was necessary because his counsel lacked sufficient preparation time. In requesting a second continuance, Wagner’s counsel asserted that he “require[d] additional time to investigate and become familiar with the case” because since his appointment as counsel, he had been preparing for a different jury trial, had been on vacation, and had “only had the opportunity to meet with [Wagner] one meaningful time to discuss the case.” Appellant’s App. Vol. II p. 98. For its part, the State notes

that Wagner’s case “was not a complex case” and at the time the trial court denied the request for a continuance, it “had been pending for over 500 days.” Appellee’s Br. p. 8. Thus, the State asserts that “it was within the trial court’s discretion to determine that no further continuances would be granted.” Appellee’s Br. p. 8.

[12] The Indiana Supreme Court considered a similar claim in *Elmore v. State*, 657 N.E.2d 1216 (Ind. 1995). In *Elmore*, “[a]fter several lawyers withdrew representation because appellant was uncooperative, appellant’s trial counsel entered their appearance on July 8, 1994.” 657 N.E.2d at 1218. Counsel requested a continuance of Elmore’s trial which was scheduled to begin on July 14, 1994. *Id.* The trial court granted counsel’s request for a continuance and rescheduled Elmore’s trial for August 11, 1994. *Id.* On August 10, 1994, counsel filed a second request for a continuance arguing that “they had not had sufficient time to confer with their client and, given the seriousness of the charge, needed more time in order to provide adequate representation.” *Id.* The trial court denied the second request for a continuance. *Id.* On review, the Indiana Supreme Court held that “[i]n appellant’s case, counsel had more than a month to prepare for trial. There were multiple charges, but none of them was particularly complex.... When appellant’s counsel requested yet an additional continuance, the trial court acted well within its discretionary authority in denying the request.” *Id.* at 1218–19.

[13] We also considered a similar claim in *Tharpe*. Tharpe was charged in October 2009. 955 N.E.2d at 843. After a number of attorney’s withdrew their

representation, his fourth attorney entered an appearance on August 20, 2010. *Id.* Tharpe’s trial was schedule for November 22, 2010, “over one year after his initial hearing.” *Id.* On November 19, 2010, Tharpe’s attorney “sought a continuance, claiming she did not have adequate time to prepare for trial.” *Id.* Specifically, Tharpe’s counsel asserted that she had not received the case file until September 1, 2010, the case file did not include transcripts of interviews taken before she entered her appearance, and she did not receive important documents from the State until a week before the trial. *Id.* at 843–44. Counsel requested that Tharpe’s trial be rescheduled “at the court’s earliest convenience, but not prior to February 1, 2011,” because she would be starting “a fifteen (15) day jury trial in federal court on January 7, 2011.” *Id.* at 844 (internal citation omitted). The trial court denied counsel’s request for a continuance. *Id.* at 843.

[14] In this case, counsel was appointed to replace prior counsel that had withdrawn. After an initial continuance was granted, counsel requested a second continuance, arguing that the month that had elapsed between his appointment and the scheduled trial date was not enough to adequately prepare for trial. The trial court, who had previously indicated that no additional continuances would be granted, denied the request.

[15] We agree with the State that this is not a particularly complex case. As Wagner himself has acknowledged, “the vast majority of the evidence presented at trial” was obtained during the search of his vehicle and the case was “largely be decided on” the court’s ruling regarding the admissibility of said evidence. Appellant’s App. Vol. II pp. 60, 64. Both the relevant evidence and the

substance of the testimony provided by the police officer who initiated the stop and conducted the search was readily available to the parties as the officer had testified and the evidence had been discussed at the suppression hearing. There was a clear record of all of the evidence and the claims, all of which were based on the items found on Wagner's person and in his vehicle, were not so complex as to warrant additional investigation.

[16] Further, to the extent that Wagner relies on *Barber v. State*, 911 N.E.2d 641 (Ind. Ct. App. 2009), the facts of *Barber* are easily distinguishable from the facts of the instant case. In *Barber*, counsel requested a continuance on the morning of the scheduled bench trial because counsel claimed to have, during the weekend before the trial was to commence, located two new witnesses, both of whom counsel claimed would be essential to Barber's case, and counsel "needed time to secure their presence for trial." 911 N.E.2d at 646. In this case, however, Wagner does not argue that his counsel discovered any new witness or evidence that would require more time to examine and/or secure for trial. Instead, Wagner's counsel simply made a generic claim that because of other unrelated travel and work responsibilities, he needed additional time to prepare. This is not the same as the situation which we found warranted a continuance in *Barber*, but rather is more akin to those discussed in *Elmore* and *Tharpe*.

[17] We are also unconvinced that any alleged deficiency in Wagner's initial counsel's withdraw prejudiced Wagner or necessitated a second continuance for his successive counsel. Wagner did not make any argument below relating to his initial counsel's withdrawal in making his request for a second continuance

and has therefore waived any appellate claim that his initial counsel's withdrawal necessitated a second continuance. *See Grace v. State*, 731 N.E.2d 442, 444 (Ind. 2000) (providing that the grounds for an objection or motion must be specific and "any grounds not raised in the trial court are not available on appeal"). We are further unconvinced that the trial court abused its discretion by denying counsel's second request for a continuance while also allowing the State to reduce one charge and dismiss another. We agree with the State that "because this amendment was made after the denial of the motion for a continuance that [Wagner] challenges on appeal, it has no bearing on the trial court's ruling on the request for a continuance." Appellee's Br. p. 12.

[18] The judgment of the trial court is affirmed.

Bailey, J., and Weissmann, J., concur.