

IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00260 COA

MICHAEL ADCOX

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MARCUS D. GORDON

COURT FROM WHICH APPEALED: SCOTT COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PAT DONALD

ATTORNEY FOR APPELLEES: OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: J. KENNEDY TURNER

NATURE OF THE CASE: BURGLARY

TRIAL COURT DISPOSITION: GUILTY; SENTENCED TO SERVE SEVEN YEARS (7) IN
THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY TO
SENTENCE PRESENTLY SERVING

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

DIAZ, J., FOR THE COURT:

Michael Adcox (Adcox) was tried and convicted of burglary of a business in the Scott County Circuit Court. He was sentenced to serve seven years in the Mississippi Department of Corrections. Aggrieved, Adcox appeals asserting the following issues: 1) that his written confession was not voluntary, and therefore, should not have been admitted into evidence; and 2) that the trial court erred in not granting him a continuance. Finding no reversible error, we affirm the judgment.

FACTS

On August 6, 1992, Omega Morris (Morris), owner of the Kracker Station, a convenience store, locked all doors and windows of the store as she left work for the day. When she returned to the store the next morning at approximately 5:30 A.M., she discovered a hole in the wall big enough for someone to crawl through it. Morris testified that about \$1,000 to \$1,200 worth of cigarettes, gum, and sandwiches were stolen from the store.

Adcox was arrested on August 15, 1992. On August 17, 1992, Adcox was questioned by Roger Thompson and Thomas Spivey of the Scott County Sheriff's Department. After advising Adcox of his rights, as well as a waiver of rights, Adcox signed the waiver. Adcox then proceeded to give a statement, and Officer Thompson reduced it into writing. Adcox was indicted on February 3, 1993, arraigned on February 9, 1993, and brought to trial on February 23, 1993. At the time, apparently, there were two Michael Adcoxes who were arrested about the same time in the same city. The Adcox in the present case was not given an initial appearance. Pat Donald, who was appointed to represent both Adcox's did not realize that there were in fact two Michael Adcoxes until the Adcox in the present case was indicted in February 1993. Apparently, this was through no fault of his own, but due to a mix up at the sheriff's department. Adcox was given a preliminary hearing as soon as the court realized the confusion.

DISCUSSION

WAIVER OF RIGHTS

Adcox asserts that the statement he made to the police was involuntary and therefore should have been suppressed. Now, on appeal, Adcox argues that the trial court erroneously admitted his statement to the police because the statement was involuntary and moreover, because he was never given an initial appearance, this case should be reversed.

Adcox relies on the case *Abram v. State*, where the supreme court reversed and vacated a death sentence because the defendant gave a statement to authorities before he was given an initial appearance. The court held that the confession was given in the absence of, and in violation of defendant's right to counsel. *Abram v. State*, 606 So. 2d 1015, 1029 (Miss. 1992). In *Abram*, the defendant was functionally arrested without a warrant, and questioned three days before he was given an initial appearance. *Abram*, 606 So. 2d at 1029. The court stressed the importance of the initial appearance because it is there where the accused is advised of all of his rights including his right to remain silent, and his right to counsel. *Id.* The initial appearance should be given "without

unnecessary delay." *Id.* This means that it should be given as soon as custody, booking, administrative and security needs have been met. *Id.* Once these needs have been met, the only excuse for delay is the lack of access to a judge. *Id.* Furthermore, the court has stated that an initial appearance must be made within forty-eight hours after the arrest in order to comply with these requirements. *Ormond v. State*, 599 So. 2d 951, 955 (Miss. 1992). In Abram's case, the judge was available the entire time Abram was in custody. *Abram*, 606 So. 2d at 1029. The court went on to state that in Abram's case, there was an obvious and deliberate attempt by the authorities to manipulate the system and deny Abram his benefits until a confession was obtained. *Id.* Despite this however, an unnecessary delay does not void a pre-appearance confession as long as the authorities give *Miranda* warnings and the suspect gives a waiver. *Ormond*, 599 So. 2d at 955. Therefore, a delayed appearance is not per se reversible error, even when a defendant gives evidence prior to the delayed appearance. *Id.*

Adcox's case is distinguishable from *Abram*. In this case, there was obviously some confusion because of the fact that there were two Michael Adcoxes assigned to the same court appointed attorney. Apparently both cases originated from the same city, around the same period of time. Because of the mix up, the authorities confused the Adcox in the case at bar with the other Michael Adcox; however, as soon as the mix up was discovered, the court immediately remedied the situation. Furthermore, the lower court specifically found that Adcox was advised of his rights, voluntarily waived them, and that the statement given to the police was voluntary.

Although we think it was error for Adcox not to have had an initial appearance, he was advised of his rights, and voluntarily waived them. Accordingly, no prejudice resulted and therefore, there is no merit to this argument.

CONTINUANCE

Adcox maintains that the trial court erred in failing to grant him a continuance. On February 16, 1993, Adcox appeared before the court with his attorney. At that time, he advised the court that his mother intended to retain a private attorney for him. The court refused to relieve Mr. Donald from representing Adcox until his retained attorney appeared. The judge gave Adcox two days to decide whether he wanted to keep his appointed counsel, or try and retain private counsel through his mother. At that time, the judge set trial for February 18, 1993. On the day of trial, Adcox told the court that he did not know if his mother had hired an attorney for him. The defense asked the court for a couple more days to get in touch with his mother, and prepare for trial. Without ruling on the defense's motion, the court dismissed the jury and instructed them to reconvene on February 23, 1993. Meanwhile, the judge ordered a preliminary hearing for Adcox. Finally, on February 23, 1993, Adcox renewed his motion for a continuance citing the same reasons as the week earlier. The court denied this motion stating that the case had already been rescheduled twice for this reason, and that Adcox has had more than ample time to employ an attorney of his choice.

The decision to grant or deny a continuance is left to the sound discretion of the trial court. *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995) (citations omitted). Unless manifest injustice appears to have resulted from the denial of the continuance, this Court should not reverse. *Atterberry*, 667 So. 2d at 631. To prevail, the defendant not only must show abuse of discretion, but also that the abuse actually worked an injustice in his case. *Morris v. State*, 595 So. 2d 840, 844

(Miss. 1991).

It is settled law that a defendant is not entitled to a continuance merely so that he could hire a private attorney instead of being represented by his court-appointed attorney. *Atterberry*, 677 So. 2d at 630 (citations omitted). The supreme court has stated that the motion of an indigent person requesting to dismiss his court-appointed attorney is left to the sound discretion of the trial judge. *Id.* Furthermore, the supreme court has refuted the assertion that a defendant has an absolute right to discharge his appointed counsel and retain another at his own expense. *Id.* The court in *Atterberry* relies on *Collins v. State*, where the defendant's court-appointed counsel was not allowed to withdraw because the defendant had sufficient time after arraignment to obtain counsel, and because a motion to replace counsel the day of trial was untimely. *Collins v. State*, 369 So. 2d 500, 501 (Miss. 1979). From these cases, it is settled that the Sixth Amendment does give a criminal defendant a right to choose his counsel, but that right is not absolute. *Atterberry*, 667 So. 2d at 630. Applying this rationale, the trial court was acting well within its discretion when it denied Adcox's motion for a continuance. Adcox's trial had been continued twice based on his statement that his mother was going to hire private counsel for him. On the day of trial, Adcox still had not hired a private attorney, nor did the court see any reason to believe that Adcox would hire a private attorney if the case was continued again. Based on this, we do not find that the lower court erred.

CONCLUSION

Although there is no excuse for the confusion of two separate defendants in two entirely different cases, we do not find that it was reversible error for the court to admit the statement made by Adcox. Adcox was adequately advised of his rights; he voluntarily signed a waiver, and he made his statement accordingly. Furthermore, we are of the opinion that the trial court did not err in refusing to grant Adcox's motion for a continuance. For the reasons stated in this opinion, we affirm the judgment of the lower court.

THE JUDGMENT OF CONVICTION OF BURGLARY OF A BUSINESS AND SENTENCE OF SEVEN (7) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, TO RUN CONSECUTIVELY TO SENTENCE ADCOX IS PRESENTLY SERVING IN THE SCOTT COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO SCOTT COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.