

# Court's failure to grant continuance plain error

The high court rules that a judge's failure to grant defense counsel's request for a continuance in a murder trial was plain error requiring a new trial.

A trial judge's failure to grant defense counsel's request for a continuance of a double murder trial, accompanied by disparaging remarks and an openly hostile attitude toward counsel, was plain error that, 15 years after the conviction, required a new trial, said the Illinois Supreme Court. The case is *People v Walker*, No 105437, 2009 WL 153863 (Ill Sup Ct 2009).

## Background

Defendant Walker was charged with two murders in June 1992. An assistant public defender for Cook County entered an appearance for him. At a status hearing on December 16, 1993, the parties advised that they were ready to set a trial date. By agreement, the court set the trial for January 20, 1994.

On that date, defense counsel told the court that she had mistakenly put the case on her calendar for January 26 instead of January 20. She advised the court that she had not been able to prepare because she had been on trial that week until the evening hours and was not prepared for the defendant's trial that day.

She requested a brief continuance, to which the state did not object. The judge responded that the case had been set, that her lack of preparation was "irrelevant," that "[t]here isn't a private attorney in the business who hasn't tried to pull something like this."

The case proceeded to a bench trial. Defense counsel waived opening statement, did not cross-examine the state's first witness, and conducted only minimal cross-examination of the remaining state witnesses, one of whom testified concerning the defendant's seven-page handwritten inculpatory statement.

For defendant's case in chief, counsel presented only a brief stipulation that two police detectives would, if called,

testify that defendant had said that the victim had accused him of stealing some dope and that he was afraid that they would hurt him or his family. In her closing argument, she asked that defendant be found not guilty of first-degree murder because his inculpatory statement showed that he and his family had been threatened by the victims.

The court immediately found defendant guilty of both murders, explicitly stating that it was relying exclusively on his inculpatory statement, which, it said, was not disputed.

Defense counsel did not file a motion for a new trial. The opinion reflects that after sentencing, the defendant made a series of unsuccessful pro se attempts to appeal.

Ten years later, represented by new counsel, the defendant filed a motion for supervisory order, alleging that the court's admonishment regarding his right to appeal was insufficient under SCR 605(a) as it then read and that the insufficiency prejudiced him in his pro se attempts to preserve his appellate rights. The supreme court granted defendant's motion in early 2006, and ordered that he be permitted to appeal his conviction.

Defendant did so, arguing that the trial court had abused its discretion in denying his counsel's request for a continuance and that he had received ineffective assistance of counsel. In an unpublished order under SCR 23, the appellate court affirmed.

## An "immediat[e] and reflexiv[e]" denial

Having allowed the defendant's petition for leave to appeal, the supreme court decried the trial judge's denial of defense counsel's continuance request. "[T]he circuit court completely abdicated its responsibility to conduct an informed deliberation of defense counsel's motion and, instead, immediately

and reflexively denied the continuance request...."

The court further criticized the trial judge's "disparaging remarks" and "openly hostile attitude toward defense counsel" and used its opinion as an

opportunity to remind our bench and bar that at issue in a request for a continuance in a criminal trial is not only a circuit court's discretion as to whether to grant that request, but also a defendant's constitutional right to a fair, procedurally sound trial....

Id at \*8.

In ruling as the trial judge had, said the high court, its "error was so serious as to affect the fairness of defendant's trial and challenged the integrity of the judicial process." Id at \*9. The defendant had, therefore, established plain error that required a new trial, the court held.

Defense attorneys greeted the court's opinion with satisfaction. "Most judges are human beings and will understand a problem," commented Du Page County attorney Stephen Baker. "But there are a few judges who are not considerate, just as there are some state's attorneys and some defense attorneys who are inconsiderate to each other."

St. Clair County lawyer John O'Gara agreed with Baker. Terming the trial judge's behavior in the Walker matter "unwarranted," O'Gara said. "You have to assume that counsel is an officer of the court. Here, there was no reason on the record to think that counsel was lying."

But, O'Gara continued, "The tension is that judges want to move their dockets. A guy shouldn't have to sit in the county jail forever and ever before he gets his trial, and it's understandable that victims and their families are put out when a trial isn't held as scheduled. But a judge has to balance all of these factors and can't just perfunctorily say 'no continuances.'" ■