



## 11/03/93 STATE TENNESSEE v. ELVYN EDWARD FERGUSON

1993 | Cited 0 times | Court of Criminal Appeals of Tennessee | November 3, 1993

### I

The defendant, seventy-seven years old, was convicted by a jury of the offense of sale of a controlled substance, Class D, and sentenced as a multiple offender, Range II. He appeals, claiming 1) the court erred in refusing a continuance and 2) in allowing the cross-examination of the defendant about other drug sales made to the state's witness. We affirm.

### II

The defendant, we deduce, filed four motions for a continuance of the scheduled trial, only two of which are in this record. The first two motions apparently were not properly supported and were denied. The latter motions alleged that the defendant suffered a partial loss of vision and possible stroke, and requested further evaluation for purposes of competency. We are somewhat handicapped because these motions were apparently never called up for Disposition, and thus we do not have the findings of the trial Judge. If the grounds for an application to continue are not preserved, and the record does not contain the proceedings relevant to the issue, there is nothing for us to consider. See, *State v. Locke*, 771 S.W.2d 132 (Tenn. Crim. App. 1988). Even so, unless the record reveals that the trial Judge abused his discretion in denying the motion, the judgment will not be reversed. *State v. Wooden*, 658 S.W.2d 553, 558 (Tenn. Crim. App. 1983); and on appeal the defendant must show that he was prejudiced by the denial of the motion. *State v. Goodman*, 643 S.W.2d 375 (Tenn. Crim. App. 1982). As we deduce, the defendant based his motions on his asserted ill health. Whether illness justifies a continuance is a discretionary judgment call. *State v. Seals*, 735 S.W.2d 849, 853 (Tenn. Crim. App. 1987). See also, *Hamilton v. State*, 555 S.W.2d 724 (Tenn. Crim. App. 1977). There is no evidence in this record from which we could infer, much less conclude, that the trial Judge abused his discretion in denying the motions, and this issue is without merit.

### III

The defendant sold twenty-eight Vicodin capsules to an undercover informant, Cheryl Hayes. Vicodin is a Schedule III controlled substance.

During cross-examination of the defendant he was asked about other drug sales to Hayes, and following extended colloquy he admitted that he had sold "any other kind of drugs" to her. The trial Judge allowed the question and answer, but promptly instruct the jury that evidence of other violations was admitted only for the purpose of showing the state of mind of the defendant or to



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prove his intent to commit the offense charged in the indictment. The objection was based solely on fifth amendment grounds, which is apparently abandoned on appeal since the defendant now asserts a Parton argument that evidence of other crimes is not admissible where the only possible purpose is to show a preDisposition to commit the crime charged. *State v. Parton*, 694 S.W.2d 299 (Tenn. 1985). We have held that an appellant cannot assert different grounds for objection on appeal, see, *State v. Brock*, 678 S.W.2d 486 (Tenn. Crim. App. 1984), which essentially forecloses this issue; but, even so, the point is worth a degree of elaboration. In *State v. Elendt*, 654 S.W.2d 411 (Tenn. Crim. App. 1983), the defendant pleaded entrapment, as here, and therefore subjected himself to questions about his preDisposition, thus effectively precluding a Parton defense. Finally, we agree with the argument of the appellee that given the conclusive nature of the evidence against the defendant any error respecting the cross-examination of him was, at best, harmless. *Tenn. R. App. P. 36(b)*; *Tenn. R. Crim. P. 52(a)*.

The judgment is affirmed.

William H. Inman, Senior Judge

CONCUR:

Adolpho A. Birch, Jr., Judge

Gary R. Wade, Judge

