

Affirmed and Opinion filed June 15, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00461-CR

JOSEPH MURPHY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law, Number One
Harris County, Texas
Trial Court Cause No. 97-12331**

OPINION

Appellant, Joseph Murphy, was charged with driving while intoxicated. He entered a guilty plea and the trial court found him guilty and assessed punishment at 180 days' confinement in the Harris County Jail, suspended while he was under community supervision for one year, plus a fine of \$250.

In three points of error, appellant argues the trial court's denial of his oral motion for continuance: (1) deprived him of the right to compulsory process; (2) deprived him of his federal and state due process guarantees; and (3) deprived him of the effective assistance of counsel. Because appellant has not preserved error, we affirm.

Appellant sought to call Sebastian Frommhold as his blood alcohol extrapolation expert, but he was not available as a witness. Appellant's counsel requested a continuance, explaining Frommhold's testimony would be directly opposite to the State's evidence. The trial court denied appellant's oral request for a continuance.

Each of appellant's points of error relate to the trial court's denial of his motion for continuance. Appellant cites *Ashcraft v. State*, 900 S.W.2d 817, 833 (Tex. App.—Corpus Christi 1995, pet. ref'd), for the proposition that the denial of an oral motion for continuance must be reviewed under the abuse of discretion standard. In *Ashcraft*, appellant argued the trial court erred in overruling his oral motion for continuance because he was awaiting the execution of a bench warrant for a material witness. Appellant also argues an oral motion for continuance may be permitted under equitable principles, citing *Deaton v. State*, 948 S.W.2d 371, 374 (Tex. App.—Beaumont 1997, no pet.) and *Darty v. State*, 149 Tex. Crim. 256, 193 S.W.2d 195 (1946).

Article 29.03 of the *Texas Code of Criminal Procedure* provides for continuance of a criminal action on the *written motion* of the State, or of the defendant, upon a showing of sufficient cause. See TEX. CODE CRIM. PROC. ANN. art. 29.03. Article 29.08 requires a person having personal knowledge swear to the facts in the motion for continuance. See TEX. CODE CRIM. PROC. ANN. art. 29.08.

Appellant's oral motion for continuance did not comply with the statutory requirements and was addressed only to the trial court's equitable powers. See *Darty*, 149 Tex. Crim. 256, 193 S.W.2d at 195. Appellant attempts to use the court's equitable powers to circumvent the long-standing requirement that to preserve error from the denial of a motion for continuance, it must be written. See TEX. CODE CRIM. PROC. ANN. arts. 29.03 and 29.08; *Miller v. State*, 131 Tex. Crim. 166, 97 S.W.2d 471 (1936); *Walker v. State*, 119 Tex. Crim. 330, 45 S.W.2d 987, 988 (1932); *White v. State*, 982 S.W.2d 642, 646-47 (Tex. App.—Texarkana 1998, pet. ref'd, untimely filed). Stated another way, although the granting or denial of either a written or oral motion for continuance is left to the sound discretion—and equitable powers—of the trial judge, an oral motion for continuance does not preserve error and may not be a ground for

reversal. *See Dewberry v. State*, 4 S.W.3d 735, 755 (Tex. Crim. App. 1999); *Matamoros v. State*, 901 S.W.2d 470, 478 (Tex. Crim. App. 1995). Accordingly, appellant's oral motion for continuance does not preserve any error for us to review. *See Dewberry*, 4 S.W.3d at 755. Thus, we overrule the three issues he presented for review and affirm the trial court's judgment.

/s/ Ross A. Sears
 Justice

Judgment rendered and Opinion filed June 15, 2000.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.