

Summary of SC95094, *State of Missouri v. Claude Chambers*

Appeal from the Crawford County circuit court, Judge Kelly W. Parker

Argued and submitted November 3, 2015; opinion issued February 9, 2016

Attorneys: Chambers was represented by Margaret M. Johnson of the public defender's office in Columbia, (573) 777-9977. The state was represented by Dora A. Fichter of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of sodomy challenges the trial court's denial of his timely filed application for a change of venue. In a decision written by Judge Mary R. Russell and joined by three other judges, the Supreme Court of Missouri affirms the trial court's judgment. The man waived his right to a change of venue by allowing his application to languish for nearly nine months, affirmatively telling the trial court on multiple occasions that there were no pending motions and that the case should remain set for trial. The court did not err in denying his application, which he did not bring up until the day before trial was set to begin. The man has failed to show an alleged error in the instructions caused a manifest injustice or miscarriage of justice. He also failed to show the trial court abused its discretion in overruling his motion for continuance.

Chief Justice Patricia Breckenridge concurs. She agrees with the principal opinion that the man waived his right to change venue as well as with Judge Fischer's opinion that the man was not entitled to a change of venue because he failed to notice his application up for hearing.

In an opinion joined by one other judge, Judge Zel M. Fischer concurs in result. He would find the man did not waive his right to change venue but did fail to satisfy Rule 32.03 by failing to file and service notice of a hearing as required.

Facts: The state charged Claude Chambers with first-degree statutory sodomy for allegations involving the son of a woman with whom Chambers lived. In March 2013, Chambers filed an application for a change of venue as a matter of right under Rule 32.03. He did not call this motion up for a hearing in the months preceding his trial, despite appearing in court four times for hearings in his case. In November 2013 – less than a month before Chambers' case was set for trial – his counsel filed a motion for continuance. At a hearing the next day, the trial court asked if there were any motions on behalf of Chambers. Chambers' counsel answered that there was a pending motion for continuance but that he did not want to take it up at that time. Counsel made no mention of the motion for change of venue. The court asked counsel if the cause was to remain for trial, and counsel answered yes. Four days before trial, Chambers filed an amended motion for continuance, which the trial court overruled following a hearing. The day before trial, defense counsel found the still-pending application for a change of venue and notified the judge, who contacted the prosecutor, who suggested the court take up the application on the record before trial the next day. The court took up the application accordingly and, after hearing, found Chambers waived his right to a change of venue because he did not affirmatively bring it to the court's attention when asked on previous occasions about pending motions. The court denied the application as well as another motion for continuance. Following trial, the jury found Chambers guilty as charged. Chambers appeals.

AFFIRMED.

Court en banc holds: (1) The facts show that Chambers waived his right to a change of venue. Although he timely filed it, he took no further action to pursue a change of venue, allowing his application to languish for nearly nine months. His counsel made no mention of the application during four separate pretrial hearings. Neither did counsel call up the application by filing notice of the time it would be presented in court. Rather, counsel affirmatively represented to the court at least twice that Chambers had no pending motions in the case and, three weeks before trial, told the court the case should remain set for trial. Counsel did not notify the court of the pending application until the day before trial, and argument regarding the application was held after jurors already were waiting to be empaneled and sworn. The record does not suggest counsel knew about the application and purposely withheld it from the trial court, but the effect was the same. It was counsel's responsibility to know the file. Use of an application to change venue as a last-minute delay tactic is not evidence of an intent to exercise the right to a venue change, and Chambers should not be rewarded for manipulating the rule. The trial court did not err in denying Chambers' application.

(2) Chambers has failed to show the alleged instructional error so misdirected or failed to instruct the jury so as to cause a manifest injustice or miscarriage of justice. The court instructed the jury to find Chambers guilty of statutory sodomy if it believed he penetrated the victim's anus with "an object." A person commits statutory sodomy by having deviate sexual intercourse with a person younger than 14 years old. The uncontroverted evidence at trial was that Chambers engaged in penile-to-anal penetration with the victim, who was younger than 14 years old – an act that meets the definition of deviate sexual intercourse. Because no evidence was adduced of Chambers inserting anything else into the victim's anus, the jury could not have been confused by the instruction's use of the word "object" rather than a specific reference to Chambers' penis.

(3) Chambers has failed to show the trial court abused its discretion in overruling his motion for continuance. Defense counsel represented Chambers for about eight months before the date set for trial and did not object in June when the court set the case for trial in December. In November, counsel told the court he did not want his motion for continuance taken up at that time and that he wanted the case to remain set for trial. Counsel did not schedule depositions until three weeks before trial and does not claim the witnesses were unknown or unavailable for deposition prior to that time. Chambers also has not shown he was prejudiced by the court overruling his motion.

Concurring opinion by Judge Breckenridge: The author agrees with the principal opinion that Chambers waived his right to change venue by failing to present his application until the eve of trial. She also agrees with Judge Fischer's opinion that Chambers was not entitled to a change of venue because he failed to comply with Rule 32.03(b) by not providing notice of when the application would be presented to the court.

Opinion concurring in result by Judge Fischer: The author agrees with the result reached by the principal opinion with respect to the application for change of venue, but for a different reason. He would find Chambers did not waive his right because, for there to be a waiver, there must be a clear, unequivocal and decisive act showing such a purpose. Instead, the author would find that Chambers failed to satisfy Rule 32.03 by failing to file and service notice of a hearing as required.