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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,766

THE STATE OF FLORIDA,

Petitioner,

vs.

E.L.S., a juvenile,

Respondent.

FILED  
 NOV 10 1985  
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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON THE MERITS

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## INTRODUCTION

The State of Florida was the petitioner in the juvenile court. The juvenile, E.L.S., was the respondent below. The parties will be referred to in this brief respectively as the State and the respondent.

References to the record on appeal will be indicated by "R" followed by the page number. References to the transcript will be indicated by "T" followed by the page number.

## STATEMENT OF THE FACTS AND CASE

Respondent was charged on August 23, 1984, in a petition for delinquency with one count of possession of marijuana and one count of possession of narcotic paraphernalia, both first-degree misdemeanors. He was not detained. (R-1).

Speedy trial under Florida Rule of Criminal Procedure 3.191 would have run on October 13, 1984. (R-1). The matter was first set for adjudicatory hearing on October 11. (R-3). On that day, at a 10:14 a.m. hearing (T-1), the Assistant State Attorney advised the court that a necessary witness, Officer Dawson, the lead investigator, had just had surgery, and was in or just out of the hospital. She would,

however, be back to work in about a week. (T-3).

The State moved, then, for a continuance and for an extension of speedy trial time to obtain the presence of Officer Dawson. Defense counsel moved for dismissal "for lack of prosecution." The court dismissed the case. (T-3).

This appeal followed.

ISSUE ON APPEAL

WHETHER TRIAL COURT ERRED IN DISMISSING THE PETITION FOR DELINQUENCY WHERE THE STATE'S MOTION FOR CONTINUANCE WAS MERITORIOUS, AND EXCEPTIONAL CIRCUMSTANCES WARRANTING AN EXTENSION OF TIME UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.191(F) WERE SHOWN TO EXIST.

SUMMARY OF ARGUMENT

The trial court erred in dismissing the juvenile petition for delinquency where the State moved for a continuance and an extension of speedy trial for meritorious reasons contemplated by Florida Rule of Criminal Procedure 3.191(f).

The reasons for the requested continuance and extension comported with the criteria required by the rule and they should have been granted. Dismissal is a sanction so severe that it ought not to be used unless no viable alternative exists.

ARGUMENT

TRIAL COURT ERRED IN DISMISSING THE PETITION FOR DELINQUENCY WHERE THE STATE'S MOTION FOR CONTINUANCE WAS MERITORIOUS, AND EXCEPTIONAL CIRCUMSTANCES WARRANTING AN EXTENSION OF TIME UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.191(F) WERE SHOWN TO EXIST.

The test for granting a motion for extension of time to try a defendant is set out in Florida Rule of Criminal Procedure 3.191(f), requiring that exceptional circumstances must be shown. Among the circumstances that warrant extending the time are "unexpected illness or unexpected incapacity or unforeseeable and unavoidable absence of a [necessary witness]." Fla.R.Crim.P. 3.191(f)(1). The prosecutor here, in moving for a continuance and an extension of time, told the court that the necessary witness was absent for virtually all of those reasons.

On the day set for adjudicatory hearing the State learned that a necessary witness, the lead investigator in the case, was just out of the hospital after surgery, and would not be available for trial for about a week. (T-3). After advising the court of these facts, the State moved for a continuance and for an extension of speedy trial time, citing exceptional circumstances. The court dismissed the case. (T-3).



The granting of an extension of speedy trial for exceptional circumstances is ordinarily a matter for the discretion of the trial judge. Dedmon v. State, 400 So.2d 1042 (Fla. 1st DCA 1981)(witness was uniquely necessary, and her unavailability was not due to absence of due diligence. Motion for continuance and extension of time were properly granted). Here, the respondent was not detained, there had been no prior continuances, and the prosecutor estimated that only one week's continuance would be needed. (T-4). Thus there was no prejudice to the respondent. State v. Gleason, 374 So.2d 1039 (Fla. 2d DCA 1979).

There was, on the other hand, an affirmative showing by the State of the propriety of its motion, and an explanation by the State for its inability to have moved earlier for the desired relief. (T-3). The court's stated reason for the dismissal seems to be based upon the timing of the motion:

THE COURT: Case is dismissed.  
If you had brought this to the  
Court[']s attention just yester-  
day--

MS. YONKS [the prosecutor]: Your  
Honor, it was not brought to the  
State's attention until this  
morning.

THE COURT: I know....

(T-3).

The court indicated no other reason in law or fact for denying the State's motions, nor any other reason for granting the defense motion to dismiss "for lack of prosecution," a misnomer in the circumstances. In this case, the court abused its discretion.

The grounds upon which the State moved for a continuance of the trial are recognized by the rule itself as well as in the cases interpreting the rule. See, for example, State ex rel. Norman v. Merckle, 369 So.2d 964 (Fla. 2d DCA 1979), where speedy trial was extended while the State sought to secure the presence of a needed but reluctant witness in the Bahamas, beyond reach of a subpoena. The absent witness in this case was amenable to subpoena, she would be available for trial shortly, and her whereabouts in the interval were known.

Dismissal of criminal charges is "an action of such magnitude that resort to such a sanction should only be had where no viable alternative exists." State v. Lowe, 398 So.2d 962 (Fla. 4th DCA 1981), quoted in State v. Evans, 418 So.2d 459 (Fla. 4th DCA 1982). The Evans court, deciding a case where the court denied the State's third request for a continuance which was made only after the State had announced ready for trial, reversed the dismissal and remanded, holding that dismissal was "precipitous and

unwarranted," at 460. The instant case presents a far stronger case for reversal and reinstatement of the petition.

A continuance, over opposing party's objection, is preferred to dismissal, even where an agency of the State has been dilatory in performing discovery obligations. State v. Lowe, supra. Here, the State's request for a continuance was as timely as circumstances permitted ("[W]e just got a message this morning" that the needed officer was hospitalized (T-3)), and was meritorious.

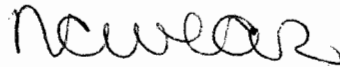
The trial court erred in denying the State's motion for continuance and for extension of speedy trial. The court's order must be reversed and the cause remanded for adjudicatory hearing.

CONCLUSION

Where the State's motion for continuance is meritorious, and exceptional circumstances warranting an extension of speedy trial time are shown to exist, it is an abuse of discretion for the trial court to dismiss the petition for delinquency. The cause must be reversed and remanded for adjudicatory hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to HENRY HARNAGE, Assistant Public Defender, 1351 N.W. 12th Street, on this 15th day of November, 1985



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NANCY C. WEAR  
Assistant Attorney General

/vbm