

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL
CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

STATE OF FLORIDA

Appellant,

v.

Appeal No. CRC 09-00032APANO
UCN ~~522008CT142215XXXXXX~~

DAVID KING ROGERS

522009AP000032XXXXCR

Appellee.

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Opinion filed 4/20/12.

Appeal from a judgment entered
by the Pinellas County Court
County Court Judge John Carassas

Erin M. Whittemore, Esquire
Assistant State Attorney
Attorney for the Appellant

Katherine Earle Yanes, Esquire
Attorney for the Appellee

ORDER AND OPINION

PER CURIAM

THIS MATTER is before the Court on Appellant's appeal from an order granting Appellee's Motion to Suppress. After review of the record and the briefs, this Court reverses the order of the trial court.

Relevant Factual Background and Trial Court Proceedings

On October 30, 2008 Appellee was charged with Driving Under the Influence of Alcohol after a traffic stop. On March 26, 2009 Appellee filed a Motion to Suppress that was set for hearing on May 27, 2009. Appellant subpoenaed its necessary witness, Deputy Dimundo, however on the day of the hearing the deputy never appeared. The trial court denied Appellant's Motion to Continue based on the failure to appear and subsequently granted Appellee's Motion to Suppress.

Additionally during the hearing, parts of the record were not preserved. Appellant's motion to supplement the record was not successful as the recording equipment had malfunctioned. This Court resolved the matter by remanding and submitting the following questions to the trial judge asking for clarification of the record. Specifically, this Court sought an answer to these questions if the answers could be determined:

1. Did the State Move for a Continuance?
2. Were the grounds for the motion that its witness was not present?
3. Was the witness subpoenaed?
4. Was the witness the arresting officer?
5. Did the trial judge deny the motion?

The trial court then responded with the following:

1. Yes the State did move for a continuance.

2. Yes the grounds for which the State moved to continue were that its witness, Deputy Claudio Dimundo was not present.
3. Yes the witness, Deputy Claudio Dimundo, was subpoenaed.
4. No the witness was not the arresting officer. The witness subpoenaed was Deputy Claudio Dimundo. The arresting officer who signed the arrest affidavit was Deputy Paul Langlais.
5. Yes, the trial court denied the State's Motion for Continuance and granted the Defendant's Motion to Suppress.

This Court rules primarily based on the answers to these questions.

Issue

Whether the trial court erred in denying Appellant's Motion to Continue, and instead granted Appellee's Motion to Suppress.

Analysis

A party seeking a continuance due to the unavailability of a witness must establish the following factors: "(1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance caused material prejudice." *State v. Humphreys*, 867 So.2d 596, 598 (Fla. 2d DCA 2004) citing *Geralds v. State*, 674 So.2d 96, 99 (Fla.1996).

In *Humphreys*, the Second District reversed after finding that the four factors necessary for a continuance had been met. *Id.* First, the State had exercised due diligence to secure the presence of the witnesses by issuing subpoenas. *Id.* Second, the witnesses were still employed by Pasco County Sheriff's Office and would have been available and willing to testify in a way likely favorable to the State which satisfies the second and third factors. *Id.* Finally, the State was prejudiced because without the officers, the State could not adduce any testimony to support

admission of the evidence, and the resulting suppression of the evidence was tantamount to a dismissal of the charges against Humphreys. *Id.*

Here Appellant has also satisfied all four factors. First, Appellant practiced due diligence by issuing a subpoena to its necessary witness. This witness was necessary because while he was not the arresting officer, he was the deputy who conducted the traffic stop. Second, it was obvious that the witness would testify favorably because on December 30, 2008 he had testified favorably for the Department of Highway Safety and Motor Vehicles regarding this case. Third, based on the foregoing considerations, it is reasonable that the deputy would have been available and willing to testify. Fourth, denial of the continuance was certainly prejudicial because the trial court acknowledged Appellant would be unable to succeed against Appellee's motion without the witness's testimony. The judge said "Without the deputy's testimony, there is no way the State could prevail." Just as in *Humphreys*, denying the Motion for Continuance in the instant case was "tantamount to a dismissal of the charges." *Id.*

Appellee argues the record was not adequately preserved for review and therefore there is a presumption of correctness regarding the trial court's findings. *Estes v. Sassano*, 47 So.3d 383 (Fla. 1st DCA 2010). We disagree and find that the trial judge's responses on remand have developed a sufficient record for review.

Conclusion

ACCORDINGLY, we find that the trial court committed reversible error in denying Appellant's Motion for Continuance and Appellant is entitled to a new hearing on the Motion to Suppress. We therefore REVERSE AND REMAND WITH INSTRUCTIONS THAT THE TRIAL JUDGE TAKE ACTION CONSISTENT WITH THIS OPINION.

ORDERED at St. Petersburg, Pinellas County, Florida this 20~~th~~ day of April,
2012.

Original order entered on April 20, 2012, by Circuit Judges Thane B. Covert,
David A. Demers, and Chris Helinger.

cc: Honorable John Carassas
Erin M. Whittemore, Assistant State Attorney
Katherine Earle Yanes, Esquire