

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

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA  
Appellant,

Appeal No. CRC 13-00032APANO  
UCN: 522013AP000032XXXXCR

SAMANTHA KEEFER  
Appellee.

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Opinion filed November 18, 2013.

Appeal from an Orders  
Denying a Motion for Continuance  
and Granting a Motion to Dismiss  
Entered by the Pinellas County Court  
County Judge Paul A. Levine

Michael Schaub, Esquire  
Office of the State Attorney  
Attorney for Appellant

Samantha Keefer, Pro Se  
Appellee,

**ORDER AND OPINION**

PETERS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's appeal from an order denying a motion for a continuance and an order granting a motion to dismiss entered by the Pinellas County Court. This court entered a recent opinion addressing the

issue raised in this appeal. *See State of Florida v. Sami Abraham*, 20 Fla. L. Weekly Supp. 843a (Fla. 6<sup>th</sup> Jud. Cir. App. Ct. June 10, 2013). We write again to emphasize the same point of law. The trial court's order dismissing the present case was an abuse of discretion. We reverse.

### *Background*

Appellee, Samantha Keefer, was charged with Sale of Alcohol to a Minor. The case was scheduled for a non-jury trial. It was the first trial date. Ms. Keefer was not in custody. The State Attorney moved to continue the trial because the subpoena to the victim had not been served. He was out of town but knew of the trial. After brief discussion concerning the subpoena and the whereabouts of the victim the following exchange occurred:

THE COURT: Ma'am, apparently their witness could not be subpoenaed for today. Okay? Apparently Mr. Moser. He wasn't subpoenaed, and they talked to him and he couldn't be here today because he's in Jacksonville. So if you want me to dismiss the case, I will do so. Do you want me to dismiss the case?

THE DEFENDANT: Yeah.

THE COURT: Motion granted. Case is dismissed.

The court provided no opportunity for discussion or argument on the motion it had suggested to Ms. Keefer. The case was summarily dismissed.

### *Standard of Review*

A trial court's ruling on a motion for continuance is reviewed under the abuse of discretion standard. *Overton v. State*, 976 So.2d 536, 548 (Fla.2007); *Kearse v. State*, 770 So.2d 1119, 1127 (Fla.2000); *Boatman v. State*, 39 So.3d 391, 394 (Fla. 1st DCA 2010). A trial court's ruling on a motion to dismiss entered without an evidentiary hearing is reviewed de novo. *See State v. Pasko*, 815 So2d 680, 681 (Fla. 2nd DCA 2002).

*Prosecution Motions for Continuance  
Dismissals of Criminal Charges*

The decision to grant or deny a continuance is within the sound discretion of the trial judge. *Hernandez–Alberto v. State*, 889 So.2d 721, 730 (Fla. 2004).

While trial courts necessarily enjoy broad discretion in deciding whether to grant or deny a motion for continuance, the exercise of that discretion is not absolute. [...] In determining whether a trial court has abused its discretion in ruling on a motion for a continuance, appellate courts have considered the following factors: “1) whether the movant suffers injustice from the denial of the motion; 2) whether the underlying cause for the motion was unforeseen by the movant and whether the motion is based on dilatory tactics; and 3) whether prejudice and injustice will befall the opposing party if the motion is granted.”

*Brown v. State*, 38 So.3d 212, 214 (Fla. 2nd DCA 2010) (internal citations omitted).

Trial courts do not have absolute discretion to deny a prosecution motion for continuance based on the absence of a witness and summarily dismiss pending charges.<sup>1</sup> “[D]ismissal of criminal charges is an extreme sanction reserved solely for those instances where no feasible alternative exists. *State v. L.E.*, 754 So.2d 60, 61 (Fla. 3d DCA 2000); accord

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<sup>1</sup> *State v. Hamilton*, 387 So.2d 555, 556 (Fla. 2nd DCA 1980) (finding that where on the second trial date, when the state again moved for continuance because of the lack of the presence of a law enforcement officer who was unavailable and two weeks remained before the time for speedy trial would have run, the dismissal of an otherwise valid information was too extreme a sanction where there was no showing of prejudice or unfairness to the defendant); *State v. Lundy*, 531 So.2d 1020, 1020 (Fla. 2nd DCA 1988) (finding the trial court abused its discretion in denying the state's motion for a continuance and dismissing the case where it was the first continuance requested by the state and the defense did not make a motion for discharge at the time the trial court dismissed the case); *State v. Thomas*, 519 So.2d 1091, 1091 (Fla. 2nd DCA 1988) (finding dismissal with prejudice, after State requested second continuance due to inability to locate victim, was too severe a sanction, particularly in view of fact that defendant had been released from jail at a preliminary probable cause hearing and suffered no apparent prejudice as result of State's delay); *State v. Soles*, 661 So.2d 62 (Fla. 2nd DCA 1995) (finding information should not have been dismissed following denial of state's motion for continuance to arrange for victim to return from out of state and after assistant state attorney would not go forward to trial, where a few days delay would not have violated defendant's entitlement to speedy trial and record revealed no conduct engaged by state to abandon prosecution or delay proceeding, and trial court had alternatives to dismissal, such as requiring state to proceed); *State v. Colon*, 909 So2d 536 (Fla. 2nd DCA 2005) (finding the trial court abused its discretion in dismissing charges in response to defendant's motion for continuance); *Robinson v. State*, 561 So.2d 419, 421 (Fla. 1st DCA 1990) (finding trial court abused its discretion by refusing to continue trial to allow time to secure appearance of a witness where counsel immediately moved for a continuance before trial when the witness failed to appear in response to a subpoena).

*State v. Lundy*, 531 So.2d 1020 (Fla. 2d DCA 1988).” *State v. Colon*, 909 So.2d 536, 537 (Fla. 2nd DCA 2005). Dismissal of an otherwise valid [criminal charge] is too extreme a sanction where there is no showing of prejudice or unfairness to the [defense]. *State v. Lundy*, 531 So.2d 1020, 1020 (Fla. 2nd DCA 1988). Dismissal of criminal charges is only an action of last resort where *no* viable alternative exists. *State v. Ottrock*, 573 So.2d 169, 169 (Fla. 4th DCA 1991); *See State v. Kalfani*, 968 So.2d 599, 601 (Fla. 2nd DCA 2007).

#### *The Present Case*

In the present case the record of the involved motion reveals no lack of diligence or dilatory tactics on the part of the State Attorney and no discernible prejudice or injustice to Ms. Keefer if a continuance was granted. Ms. Keefer was not incarcerated. The record reveals no conduct of the State Attorney to abandon prosecution; there is nothing to support a finding of any lack of prosecution. The trial court’s orders denying the motion for a continuance and then granting what amounted to a *sua sponte* motion to dismiss were an abuse of discretion.

#### *Conclusion*

This court concludes that the orders of the trial court denying the State Attorney’s motion for a continuance and summarily dismissing the case should be reversed.

IT IS THEREFORE ORDERED that the orders of the trial court denying the Appellant’s Motion for a Continuance and granting dismissing the case are reversed and the case is remanded to the trial court for further action.

ORDERED at Clearwater, Florida this 18 day of November, 2013.

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Michael F. Andrews  
Circuit Court Judge

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Raymond O. Gross  
Circuit Court Judge

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R. Timothy Peters  
Circuit Court Judge

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cc: Honorable Paul A. Levine  
Office of the State Attorney  
Samantha Keefer, Pro Se