

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 13-00006APANO  
UCN: 522013AP000006XXXXCR

SAMI ABRAHAM  
Appellee.

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Opinion filed June 10, 2013.

Appeal from an Orders  
Denying a Motion for Continuance  
and Granting a Motion to Dismiss  
Entered by the Pinellas County Court  
County Judge Patrick K. Caddell

Erin Isdell, Esquire  
Office of the State Attorney  
Attorney for Appellant

Andrew H. Shafii, Esquire  
Attorney for 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. We reverse.

### *Background*

On April 3, 2012, Appellee, Sami Abraham, was given a Notice to Appear for an ordinance violation, Possession of Simulated Drugs. The case was scheduled for a non-jury trial on January 10, 2013. It was the first trial date. Mr. Abraham was not in custody. On the morning of trial two law enforcement witnesses to be called to testify by the State Attorney were unavailable. Their law enforcement agency had refused to accept the service of the subpoenas. The State Attorney moved to continue the trial. There was little additional explanation and no legal argument presented. Defense counsel simply objected to the continuance offering no legal argument. The trial court denied the continuance and asked if the State Attorney was able to go forward. The State Attorney responded she was not. Defense counsel then moved to dismiss for lack of prosecution. That motion was granted; the case was 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 *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).

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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 So.2d 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).

*The Present Case*

In the present case the scant record of the involved motions reveals no lack of diligence or dilatory tactics on the part of the State Attorney and no discernible prejudice or injustice to Mr. Abraham if a continuance was granted. Mr. Abraham 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 granting the 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 granting Mr. Abraham's motion to dismiss should be reversed.

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

ORDERED at Clearwater, Florida this 19 day of June, 2013.

Original order entered on June 10, 2013, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Patrick K. Caddell  
Office of the State Attorney  
Andrew H. Shafii, Esquire