County Criminal Court: CRIMINAL PROCEDURE— Continuance. It was error to deny the motion for extension of time and to grant the motion to suppress based solely on the allegations in the motion. Reversed and Remanded. *State of Florida v. Nina Novak,* No. 14-CF-6962-WS (Fla. 6th Cir. App. Ct. December 15, 2015).

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 PASCO COUNTY
APPELLATE DIVISION

STATE OF FLORIDA,
Appellant,

v.

NINA NOVAK,
Appellee.
_____/

UCN: 512014CF006962A000WS
Appeal No: CRC14006962CFAWS
L.T. No: 13-8217-MM-WS

On appeal from County Court,

Honorable Robert Beach,

Office of the State Attorney,
for Appellant,

Ron Smith, Esq.,
for Appellee.

ORDER AND OPINION

It was error for the trial court to deny Appellant's motion for extension of time and to grant the motion to suppress based solely on the allegations in the motion. The order of the trial court is reversed and the cause is remanded for further proceedings.

STATEMENT OF THE CASE AND FACTS

Appellee was stopped by a highway patrol trooper based on observations that Appellee left the roadway multiple times and was weaving within the lane of travel. Appellee exhibited signs of impairment and performed poorly on field sobriety exercises. Appellee was arrested and while in the patrol car, asked the trooper to bring her purse with them. The trooper searched the bag and found marijuana and two pipes in the

purse. Appellee was read the implied consent provision and refused to provide a breath sample.

Appellee filed a motion to suppress alleging the traffic stop and subsequent arrest were illegal, and challenging the constitutionality of the search of the purse. A hearing was scheduled on August 8, 2014, which was continued by stipulation of the parties to August 29, 2014. Appellant moved to continue the August 29 hearing because the trooper did not receive the subpoena and was unavailable to testify that day. The hearing was continued to October 17, 2014, without objection from Appellee. On September 4, 2014, Appellant sent out subpoenas for the October 17 hearing. At the October 17 hearing Appellant moved to continue the hearing on the motion to suppress because the trooper again had not received the subpoena, and was in Tallahassee and not able to return in time to testify. Appellee objected to the continuance, and the trial court denied the motion to continue and granted Appellee's motion to suppress. Appellant filed a timely notice of appeal.

STANDARD OF REVIEW

"The denial of a motion for continuance should not be reversed unless there has been a palpable abuse of discretion," which "must clearly and affirmatively appear in the record." *Geralds v. State*, 674 So. 2d 96, 99 (Fla. 1996). A party filing a motion to suppress has the initial burden of making "a prima facie showing" that the evidence at issue was obtained by a warrantless search. *Andress v. State*, 351 So. 2d 350, 350 (Fla. 4th DCA 1977). Allegations contained in the motion which are unsupported by proof are insufficient to meet this burden. *Williams v. State*, 640 So. 2d 1206, 1209 (Fla. 2d DCA 1994).

LAW AND ANALYSIS

Appellant contends it was error to deny the motion to continue based on the factors set forth in *Geralds v. State*, 674 So. 2d 96 (Fla. 1996). In order to prevail on a motion for continuance, a party must demonstrate: "(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." *Id.* at 99.

Appellant contends this case is similar to *State v. Humphreys*, 867 So. 2d 596 (Fla. 2d DCA 2004). In *Humphreys*, the Court found the trial court abused its discretion by denying the motion to continue where the defendant would not have suffered prejudice had the continuance been granted. *See id.* at 599. In this case, as in *Humphreys*, the hearing on the defendant's motion had previously been continued without objection from defense counsel. *See id.* at 597. In *Humphreys*, the State sent the subpoenas to the necessary witnesses as soon as the hearing date was set, but the subpoenas were never served. *See id.* In this case, State sent the subpoenas September 4, 2014, for the hearing scheduled October 17, 2014. On the date of the hearing, when the State realized the subpoena had not been served and the witness was not present, State attempted to secure the presence of the witness by contacting the witness by telephone, but the officer was in Tallahassee and unable to return in time to testify at the hearing. In *Humphreys*, the Court found the State exercised due diligence to obtain the witnesses' presence by timely subpoenaing the officers and contacting the officers' district office on the date of the hearing. *See id.* at 598; *Geralds*, 674 So. 2d at 99. As in *Humphreys*, there was a lack of evidence as to why the witnesses did not receive the subpoenas, but the Court nevertheless held the State exercised due diligence in attempting to obtain the witnesses' presence. *See Humphreys*, 867 So. 2d at 597.

The second factor Appellant must prove is that the witness would have provided "substantially favorable testimony." *Geralds*, 674 So. 2d at 99. This may be satisfied by a proffer of the likely testimony of the witness. *See Humphreys*, 867 So. 2d at 598. Appellant made a sufficient proffer in this case, as the officer was the sole witness who could testify as to the basis for the traffic stop, and who could authenticate the video-recording of events challenged in the motion to suppress.

Appellant contends it sufficiently demonstrated the third factor necessary to obtain a continuance, that the witness was available and willing to testify. In *Humphreys*, the Court found this factor was met by the fact that the witnesses were still employed by the Sheriff's Office. *See* 867 So. 2d at 598. In this case, the record demonstrates the officer was still employed by the Florida Highway Patrol, and Appellant spoke to the officer on the day of the hearing, and the officer stated he was

willing and able to testify in the case but was out of town the day of the hearing and unable to testify on that date.

As to the fourth factor, Appellant contends it was materially prejudiced because the result of the denial of a continuance is Appellant's inability to adduce testimony regarding the basis for the traffic stop, and the granting of the motion to suppress as a direct result of the denial of the motion to continue results in suppression of nearly all evidence gathered in this case, and is "tantamount to a dismissal of the charges against" Appellee. *See Humphreys*, 867 So. 2d at 598 ("when denying a continuance due to witness unavailability amounts to a dismissal of the charges, such denial has been held an abuse of discretion when there was no showing of prejudice to the defendant"). "It is the function of the appellate court to determine whether the trial court's judgment is supported by competent evidence." *Zinovoy v. Zinovoy*, 50 So. 3d 763, 768 (Fla. 2d DCA 2010). The record demonstrates Appellant met the burden of proof set forth in *Geralds*, and that it was error to deny the continuance. *See* 674 So. 2d at 99.

Appellant further contends Appellee failed to meet the initial burden of proof at the hearing on the motion to suppress and it was therefore error to grant the motion. Appellee as the movant had the burden of demonstrating a search or seizure occurred which violated the movant's rights. *See Palmer v. State*, 753 So. 2d 679, 680 (Fla. 2d DCA 2000); *Williams*, 640 So. 2d at 1209. Appellant maintains this burden cannot be met by reliance on allegations contained in the motion, or by the absence of a search warrant in the record, but that sworn testimony at an evidentiary hearing is necessary to support the motion. *See Palmer*, 753 So. 2d at 680; *Williams*, 640 So. 2d at 1209. "Allegations in the motion to suppress are not evidence and will not shift the burden to the State." *State v. Mobley*, 98 So. 3d 124, 125 (Fla. 5th DCA 2012).

It was error to grant the motion on the basis of the record in this case. Although the trial court found there had been a warrantless arrest, detention and search, the court did not follow the necessary procedure to take judicial notice of the absence of a search warrant in the court file as a way of satisfying the defendant's initial burden without witness testimony. The court was required to "afford each party reasonable opportunity

to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed," and to "afford each party reasonable opportunity to challenge such information, and to offer additional information, before judicial notice of the matter is taken." *See* § 90.204(1)-(3). Further, neither party satisfied the requirement of providing written, timely notice of requesting the court take notice of any fact. *See* § 90.203(1), Fla. Stat; *Mobley*, 98 So. 3d at 125-26; *State v. Hinton*, 305 So. 2d 804, 807 (Fla. 4th DCA 1975).

CONCLUSION

It was error to deny the motion to continue based on the record in this case, and to grant the motion to suppress based solely on the allegations contained in the motion. The order of the trial court is therefore reversed and the cause is remanded for further proceedings.

It is ORDERED AND ADJUDGED that the cause is hereby REVERSED AND REMANDED for further proceedings.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 15th day of December, 2015.

Original order entered on December 15, 2015, by Circuit Judges Linda Babb, Shawn Crane and Daniel D. Diskey.