

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,**

UCN: 512019AP000060APAXWS

Appeal No.: 19-AP-60

v.

Lower No.: 18-MM-2269

**NICKEY LEE LAMB,
Appellee.**

_____/

On appeal from Pasco County Court,
Honorable Debra Roberts

Tyler Fleming,
Assistant State Attorney,
for Appellant.

Daviana M. Braniff, Esq.,
The Law Offices of Carlson & Meissner,
for Appellee.

ORDER AND OPINION

Because Appellee was not provided with Appellant's traverse/demurrer until after the hearing on his motion to dismiss had started, the trial court did not err when it denied Appellant's motion to continue and granted Appellee's motion to strike the traverse/demurrer. Without the traverse/demurrer, the trial court properly dismissed the Driving Under the Influence charge based upon Appellant's written motion. Accordingly, the trial court's order granting Appellee's motion to dismiss is affirmed.

STATEMENT OF THE CASE AND FACTS

Appellee was charged by Information with Obstructing or Resisting an Officer without Violence, Driving While License Suspended or Revoked, and Driving Under the Influence (DUI). He moved to dismiss the DUI charge only and the motion was set for hearing. While Appellant had drafted a traverse/demurrer (traverse) well before the hearing date, it was not filed until late on the day before the hearing. The traverse did not

appear on the Clerk's docket in Clericus and was not electronically served on Appellee by the start of the hearing the next morning. Appellant had to file the traverse in open court and serve it on Appellee after the hearing started.

During the hearing, Appellee moved to strike the traverse as untimely under Florida Rule of Criminal Procedure 3.190(d). Appellant conceded that the traverse was not timely within the meaning of rule 3.190(d). However, Appellant argued that the correct remedy was a continuance of the hearing rather than striking the traverse. Appellant then moved for a continuance.

Appellee argued that as a matter of law, an untimely-filed traverse was the same as a traverse not being filed at all and therefore the trial court should only consider the merits of Appellee's motion and not the traverse. However, Appellee did not cite to any case law where a traverse had been filed late. Instead, Appellee cited to case law where a traverse had never been filed at all. Thus, those cases did not support Appellee's legal argument. Appellee further argued that rule 3.190(c)(4) does not permit continuances and therefore Appellant's motion to continue should be denied. Appellee based that argument on the text of the rule.

The trial court found that the traverse was not timely-filed and granted Appellee's motion to strike. Appellant again moved to continue which was denied by the trial court. The trial court then considered the merits of Appellee's motion to dismiss.

Appellee recited the facts from his written motion: that deputies had received information that he had taken his girlfriend's vehicle and was possibly intoxicated, that when deputies caught up to the vehicle near Moon Lake Road and State Road 52, the deputy observed the vehicle weaving within its own lane and almost hit a median, that he was arrested for a violation of probation and driving while license suspended or revoked, and that the deputy told Appellee that a DUI investigation would be conducted at the jail. However, due to Appellee being pepper sprayed, smashing his own head against the deputy's car, and having to stop and have Appellee checked out by EMT's, no field sobriety tests, BAC testing, or DUI investigation whatsoever was ever conducted.

In response, Appellant attempted to orally demur the motion by proffering the following additional facts: the deputy conducting the traffic stop observed an open Miller Lite can in the vehicle, Appellee admitted multiple times to consuming alcohol, Appellee

had slow, slurred speech, and that there is a body camera video of Appellee's rambling and incoherent speech.

The trial court found that because the traverse had been stricken, it was not considering the additional facts proffered by Appellant during the hearing. The trial court found that under the facts alleged in Appellee's motion to dismiss, Appellant could not establish a prima facie case of guilt for DUI.

The trial court found that in the alternative, even if the trial court considered the facts in the traverse or demurrer, there were still no disputed issues of material fact and because no DUI investigation was conducted, Appellant could still not establish a prima facie case of guilt for DUI. The trial court granted the motion to dismiss. Appellant timely-appealed.

STANDARD OF REVIEW

A trial court's order denying a motion to dismiss involves a pure question of law and is therefore reviewed pursuant to a de novo standard. See *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

"Granting a continuance is within the trial court's discretion, and the court's ruling on a motion for continuance will be reversed only when an abuse of discretion is shown." *Randolph v. State*, 853 So. 2d 1051, 1063 (Fla. 2003) (citing *Gorby v. State*, 630 So. 2d 544, 546 (Fla. 1993)); *Lundy v. State*, 531 So. 2d 1020 (Fla. 2d DCA 1988).

Where, as here, a judge's decision to grant or deny a motion to strike a filing is discretionary, an appellate court reviews the decision for abuse of discretion. Cf. *Bryant v. State*, 901 So. 2d 810, 817 (Fla. 2005).

LAW AND ANALYSIS

1. Appellee's Motion to Strike Appellant's Traverse

"The state may traverse or demur a motion to dismiss that alleges factual matters. Factual matters alleged in a motion to dismiss under subdivision (c)(4) of this rule shall be considered admitted unless specifically denied by the state in the traverse. . . The demurrer or traverse shall be filed a reasonable time *before the hearing* on the motion to dismiss." Fla. R. Crim. P. 3.190(d) (emphasis added).

Despite Appellee's lack of citations before either the trial court or this Court, there is appellate case law holding that a trial court has the discretion¹ to strike a late-filed traverse and consider only the merits of the defendant's motion to dismiss. See *State v. Rodriguez*, 505 So. 2d 628 (Fla. 3d DCA 1987), *reversed on other grounds*, 523 So. 2d 1141 (Fla. 1988); *State v. Purvis*, 560 So. 2d 1296 (Fla. 5th DCA 1993); *State v. Covington*, 973 So. 2d 481 (Fla. 3d DCA 2007).

As in *Rodriguez*, *Purvis*, and *Covington*, Appellee was not provided the traverse until after the start of the motion to dismiss hearing. This occurred despite the fact that Appellant had prepared the traverse in sufficient time to make sure Appellee received it in a reasonable time prior to the hearing. Additionally, Appellant conceded during the hearing that the traverse was not timely-filed. Accordingly, the trial court did not abuse its discretion in granting Appellee's motion to strike the traverse and ruling on the merits of Appellee's motion to dismiss standing alone.

The case to which Appellant cites in support of the argument that the trial court abused its discretion is distinguishable. See *State v. Burnison*, 438 So. 2d 538, 540 (Fla. 2d DCA 1983). In *Burnison*, the traverse was provided to the defendant just *before* the hearing. *Id.* at 538. See Fla. R. Crim. P. 3.190(d) ("The demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss"). The question in *Burnison* then became what the appropriate sanction should be for a traverse filed before the hearing but not in a reasonable time. *Id.* at 539-40 (holding that the trial court abused its discretion by granting the motion to dismiss because a continuance would have cured any prejudice to the defendant).

Because Appellee was not provided the traverse until after the hearing started, *Burnison* is inapplicable and the trial court had the discretion to strike the traverse and consider only Appellee's written motion. See *Purvis*, 523 So. 2d at 1297-98 (considering both *Burnison* and *Rodriguez* and holding that *Rodriguez* applied and the trial court did not abuse its discretion in ruling on the motion to dismiss without considering the traverse because the traverse was not provided to the defendant until after the start of the hearing).

¹ Contrary to Appellee's assertion before the trial court, there is not a per se requirement that a trial court must strike an untimely traverse. Instead, the trial court has the discretion to do so.

2. Appellant's Motion to Continue

This Court also holds that the trial court did not abuse its discretion when it denied Appellant's ore tenus motions to continue. Contrary to Appellee's assertion before the trial court, continuances of Rule 3.190(c)(4) hearings are permitted. If they were not, the *Burnison* court would not have provided a continuance as a possible remedy for a traverse that was not filed within a reasonable time before the hearing. *Burnison*, 438 So. 2d at 540. See also Fla. R. Crim. P. 3.190(f)(1) ("A continuance within the meaning of this rule is the postponement of a cause for any period of time"). However, in this case, a continuance would not change the fact that the traverse was not provided to the defendant until after the start of the hearing. See *State v. Randolph*, 287 So. 3d 686 (Fla. 5th DCA 2019) (affirming the denial of a continuance because granting a continuance so that the State could file a traverse would result in the traverse being filed after the start of the hearing in violation of *Purvis*).

3. Appellee's Motion to Dismiss

Because the trial court did not abuse its discretion by granting Appellee's motion to strike, it properly considered the merits of Appellee's motion to dismiss standing alone. However, contrary to Appellee's assertion, the State is not required to prove the offense beyond a reasonable doubt at the pretrial motion to dismiss stage.

While the State must make a prima facie case in both a pretrial motion to dismiss and during a jury trial, the State's underlying burden of proof in establishing the prima facie case changes between the different proceedings. During a trial, there must be sufficient facts to prove every element of the offense beyond a reasonable doubt. *Id.* Doing so means convincing a reasonable jury that the weight of evidence and credibility of the witnesses is in the State's favor to the exclusion of every reasonable doubt. However, during a pretrial motion to dismiss, only undisputed material facts can be addressed. Additionally, those facts must be viewed in the light most favorable to the State and all factual inferences must be drawn in the State's favor. Evidence is not weighed and credibility is not determined. See *State v. Hudson*, 397 So. 2d 426, 428 (Fla. 2d DCA 1981). Thus, in a pretrial motion to dismiss, "the State need not adduce the evidence necessary to prove its case beyond a reasonable doubt . . . instead, it must

bring forward facts sufficient to show only the barest prima facie case.” *State v. Yarn*, 63 So. 3d 82, 85 (Fla. 2d DCA 2011) (citations and quotations marks omitted).

Appellee is also incorrect regarding what evidence the State must adduce to establish a prima facie case for DUI during a motion to dismiss hearing. The State can offer facts or evidence that a defendant’s normal faculties are impaired regardless of whether blood or breath alcohol testing was available. The availability of the latter does not control the State’s use of the former. And in proving that a defendant’s normal faculties are impaired during a motion to dismiss hearing, the State is not required to show that a DUI investigation complete with gaze nystagmus tests, field sobriety tests, and in-field observations was conducted.

To establish a prima facie case for DUI sufficient to survive a motion to dismiss, the State need only put forth prima facie facts showing that the defendant’s normal faculties were impaired by alcohol, a chemical substance, or a controlled substance, while the defendant was either driving or in actual physical control of his vehicle. See *State v. Lukas*, 652 So. 2d 1177, 1178 (Fla. 2d DCA 1995) (holding that “evidence that Lukas had been drinking and speeding, the smell of alcohol on Lukas’s breath, and admissions by Lukas to paramedics at the scene that he had been drinking” was sufficient to prove a prima facie case of impairment).

The above being said, the trial court did not err when it granted the motion to dismiss based solely Appellee’s written motion. The facts alleged in the motion, which were undisputed as a result of the traverse being stricken, did not establish a prima facie case for DUI. While there were sufficient prima facie facts that Appellee was driving or in actual physical control of the vehicle when the vehicle was weaving within its own lane and nearly hit a median, there were no facts in the written motion establishing that alcohol, a chemical substance, or a controlled substance had impaired his normal faculties.

CONCLUSION

Because Appellant’s traverse was not provided to Appellee until after the start of the hearing on his motion to dismiss, the trial court did not abuse its discretion when it granted Appellee’s motion to strike the traverse and denied Appellant’s motions to continue the hearing. Because the undisputed facts in the written motion failed to establish a prima facie case that alcohol had impaired Appellee’s normal faculties, the

trial court did not err by granting Appellee's motion to dismiss. Accordingly, the trial court's order granting the motion is affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ____ day of _____, 2020.

Original Order entered on August 31, 2020, by Circuit Judges Shawn Crane, Susan G. Barthle, and Kimberly Sharpe Byrd.

Copies to:

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