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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE**

THE PEOPLE,

Plaintiff and Appellant,

v.

TRAVIS DAVID LYMAN,

Defendant and Respondent.

A127755

**(Sonoma County
Super. Ct. No. SCR569736)**

On the date scheduled for the preliminary hearing in this case, the trial court denied the prosecution's oral motion to continue the hearing under Penal Code section 1050¹ because proper notice of the motion had not been provided. The prosecution was unable to proceed, and the court dismissed the case against defendant, Travis David Lyman. The People appeal, and we conclude the trial court erred in refusing to continue the hearing. We reverse and remand for further proceedings.

BACKGROUND

In September 2009, defendant was charged in Sonoma County by felony complaint with grand theft (§ 487, subd. (a)). Defendant pled not guilty, waived his right under section 859b to a preliminary hearing within 10 court days (in custody) or 60 calendar days, and was released on bail. The preliminary hearing was set for December 4, 2009.

¹ All further undesignated section references are to the Penal Code.

On December 2, 2009, over defendant's objection, the trial court granted the People's motion to continue the preliminary hearing to January 8, 2010. On January 6, 2010, the parties confirmed their readiness for the January 8 preliminary hearing.

On January 8, 2010, the People orally moved to continue the preliminary hearing based on the unavailability of the investigating officer. The prosecutor said she had been surprised to discover earlier that day that the officer was on administrative leave. She requested "a short continuance [so] that we can ascertain why he's not available or secure the witnesses necessary to go forward with the case." Defendant objected and the trial court denied the motion, stating "I've already continued this once over the defendant's objection" and "it was on for readiness on the 6th, and the People said they were ready at that point. [¶] There's no written [section] 1050 [motion] before the court. This is an oral [section] 1050 [motion]. [¶] Charges are dismissed."

DISCUSSION

Relying primarily on *People v. Henderson* (2004) 115 Cal.App.4th 922 (*Henderson*) and this court's decision in *People v. Ferrer* (2010) 184 Cal.App.4th 873 (*Ferrer*), the People contend the trial court lacked authority to deny the request for continuance of the preliminary hearing.

The parties agree that section 1050 applied to the People's request to continue the preliminary hearing. Section 1050, subdivision (b) provides that a party seeking to continue a hearing in a criminal proceeding must file and serve notice of the request at least two court days before the scheduled hearing. (See also *Ferrer, supra*, 184 Cal.App.4th at pp. 878-879; *Henderson, supra*, 115 Cal.App.4th at p. 933.) Section 1050, subdivision (d) provides: "When a party makes a motion for a continuance without complying with the requirements of subdivision (b), the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements. At the conclusion of the hearing, the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding. . . . If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted."

In the present case, the prosecutor failed to provide notice of the request for a continuance; instead, she verbally requested a continuance before the commencement of the scheduled preliminary hearing. As explanation for the need for a continuance and her failure to provide notice, the prosecutor told the trial court that she found out earlier that day that the investigating officer was on administrative leave and unavailable to testify. “To show good cause for a continuance, a party must make a showing of diligence. ‘Particularly, when the party seeks a continuance to secure a witness’s testimony, the party must show that he exercised due diligence to secure the witness’s attendance, that the witness would be available to testify within a reasonable time, that the testimony was material and not cumulative.’ [Citation.]” (*Ferrer, supra*, 184 Cal.App.4th at p. 879.) In the present case, the People do not contend the trial court abused its discretion in making an implied finding there was no showing of good cause, either for the failure to provide notice or for the continuance itself.

As this court explained in *Ferrer*, “Normally, the prosecutor’s failure to show good cause would require the trial court to deny the motion for a continuance under section 1050, subdivisions (d) and (e). [Citations.] However, . . . other statutory provisions effectively limit the trial court’s authority to deny a request for a continuance. In particular, in 2003 the Legislature passed Assembly Bill No. 1273 (2003-2004 Reg. Sess.) . . . which added subdivision (*l*) to section 1050. (Stats. 2003, ch. 133, § 1.) The provision states: ‘This section is directory only and does not mandate dismissal of an action by its terms.’ (§ 1050, subd. (*l*)). Moreover, while a court may impose sanctions under section 1050.5 if a party fails to show good cause for failure to provide notice (§ 1050, subd. (c)), including the imposition of fines or the filing of a report with a disciplinary committee (§ 1050.5, subd. (a)), Assembly Bill No. 1273 also amended section 1050.5, subdivision (b), to read: ‘The authority to impose sanctions provided for by this section shall be in addition to any other authority or power available to the court, *except that the court or magistrate shall not dismiss the case.*’ (Italics added.) (Stats. 2003, ch. 133, § 2; see also *Henderson, supra*, 115 Cal.App.4th at p. 935.)”

(*Ferrer, supra*, 184 Cal.App.4th at pp. 879-880; see also *People v. Graves* (2010) 189 Cal.App.4th 619, 639-641.)

We conclude that sections 1050, subdivision (l), and 1050.5, subdivision (b), prohibited the trial court from refusing to continue the preliminary hearing in the circumstances of this case, where defendant waived the time limits in section 859b. As we explained in *Ferrer*, although section 1050, subdivisions (d) and (e), normally prohibits the granting of a continuance in the absence of good cause, the Legislature, in prohibiting dismissals in sections 1050, subdivision (l), and 1050.5, subdivision (b), intended to prohibit a court from refusing to continue a hearing where denial of the continuance would result in dismissal of the case. (*Ferrer, supra*, 184 Cal.App.4th at pp. 879-882; see also *Henderson, supra*, 115 Cal.App.4th at pp. 934-935.)

Defendant contends this case is distinguishable from *Henderson*, which also involved continuance of a preliminary hearing, because the defendant in that case was responsible for much of the delay between the arraignment and the preliminary hearing. (*Henderson, supra*, 115 Cal.App.4th at p. 940.) However, the statutory analysis in that case and *Ferrer* did not turn on whether the defendant was responsible for any of the delay in the criminal proceedings.

Defendant also contends that granting the continuance would have “amounted to a denial of [defendant’s] constitutional rights to a fair trial, as it unduly delayed his ability to counter witnesses and evidence produced against him, or to secure witnesses and evidence in his own behalf.” Defendant did not present that argument below, presumably because the court quickly dismissed the case due to the prosecution’s failure to comply with section 1050. On remand, defendant may argue that the continuance requested by the People on January 8, 2010, would have violated his fair trial rights. (See *People v. Martinez* (2000) 22 Cal.4th 750, 765-766; *People v. Roybal* (1998) 19 Cal.4th 481, 511-514; *Henderson, supra*, 115 Cal.App.4th at p. 940.) The trial court should also consider on remand whether any of the other sanctions available under section 1050.5, subdivision (a), are an appropriate sanction for the prosecutor’s failure to comply with the notice

requirements of section 1050, subdivision (b). (*Ferrer, supra*, 184 Cal.App.4th at p. 885.)

DISPOSITION

The trial court's order of dismissal is reversed, and the case is remanded for further proceedings consistent with this decision.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.