IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v. Case No. 5D18-2979

RUOSHAWN RANDOLPH,

Appellee.

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Opinion filed December 20, 2019

Appeal from the Circuit Court
for Hernando County,
Stephen E. Toner, Jr., Judge.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellant.

James S. Purdy, Public Defender, and Kathryn Rollison Radtke, Assistant Public Defender, Daytona Beach, for Appellee.

SASSO, J.

The State of Florida challenges the trial court's order granting Ruoshawn Randolph's Florida Rule of Criminal Procedure 3.190(c)(4) motion to dismiss and the court's denial of its ore tenus request for leave to file a traverse. We hold the trial court

did not abuse its discretion in denying leave to file a traverse but nonetheless erred in granting Randolph's motion to dismiss because the inherently contradictory motion created a disputed issue of material fact.

The State filed a multi-count information and in count I, charged Randolph with driving while license canceled, suspended, or revoked (habitual offender) in violation of sections 322.34(5) and 322.264, Florida Statutes (2017). Randolph, citing rule 3.190(c)(4), filed a sworn motion to dismiss that count.

In his motion, Randolph claimed that he never obtained his driver's license, and therefore, under the authority of *State v. Miller*, 193 So. 3d 1001 (Fla. 3d DCA 2016), *approved*, 227 So. 3d 562 (Fla. 2017), could not be charged under section 322.34(5). In support, Randolph attached to his motion his six-page Florida driving record. Randolph argued his driving record demonstrated he was issued a driver's license on January 3, 2001, but he never attempted the driving portion of the exam. He asserted that without passing the driving test, he was ineligible to receive a valid driver's license and could only be charged pursuant to section 322.34(2)(c).

In response, the State filed a motion to strike, arguing Randolph's motion to dismiss should have been filed under rule 3.190(b) because it raised a defense and not a material fact issue. Having filed a motion to strike, the State did not file a traverse to Randolph's motion to dismiss.

At a hearing on Randolph's motion to dismiss, Randolph argued the court was obligated to grant his motion because the State's failure to file a traverse left the motion's assertions unrebutted. The State again raised the arguments made in its motion to strike

and alternatively argued Randolph's motion should be denied because the driving record attached to his motion indicated that, in fact, he was issued a "Class E" license.

After the court explained it would treat the motion as a rule 3.190(c)(4) motion, the State requested leave to file a traverse. The court denied the request. Regarding Randolph's motion to dismiss, the court explained that it would have denied the motion had the State filed a traverse. The court agreed with the State that the driving record indicated Randolph was issued a license. Nonetheless, the court explained: Randolph "says [his license] was never issued, and I've got nothing to rebut that at this point in time." In two separate orders, the court granted Randolph's motion to dismiss, dismissed count I, and appointed appellate counsel.

We review an order on a motion to dismiss de novo. *State v. Taylor*, 16 So. 3d 997, 999 (Fla. 5th DCA 2009). Like summary judgment motions in the civil context, a motion to dismiss must be viewed in the light most favorable to the State, the nonmoving party. *Id.* "Only where the most favorable construction to the State would still not establish a prima facie case of guilt should a motion to dismiss be granted." *Id.* The denial of a continuance to file a traverse is reviewed for an abuse of discretion. *See, e.g.*, *Darby v. State*, 748 So. 2d 1069, 1070 (Fla. 5th DCA 1999) ("A trial court's ruling denying a request for a continuance will not be disturbed on appeal unless a palpable abuse of discretion is demonstrated.").

Florida Rule of Criminal Procedure 3.190(c) provides that, at any time, the court may entertain a motion to dismiss in certain enumerated circumstances, including when "there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." Fla. R. Crim. P. 3.190(c)(4). Rule 3.190(d)

provides that factual matters alleged in a motion to dismiss under subdivision (c)(4) "shall be considered admitted unless specifically denied by the state in the traverse." Fla. R. Crim. P. 3.190(d). That subdivision further provides that a traverse "shall be filed a reasonable time before the hearing on the motion to dismiss."

Here, Randolph's motion cited to rule 3.190(c)(4), but the State nonetheless chose to file a motion to strike rather than a traverse. As such, we find no abuse in the trial court's decision to deny the request for a continuance. *See State v. Purvis*, 560 So. 2d 1296, 1297 (Fla. 5th DCA 1990) (noting that traverse filed after commencement of motion to dismiss hearing is untimely). Even so, the trial court erred in determining that without a traverse, there was no issue of material disputed facts.

"Whether or not the State responds to a motion to dismiss, the court must consider the motion and decide whether it is legally sufficient . . . ." *Id.* at 1298. If Randolph's allegation that he never received a driver's license was truly unrebutted, his motion would have been sufficient for the reasons stated in *Burgess v. State*, 198 So. 3d 1151 (Fla. 2d DCA 2016) (holding that defendant, who never had driver's license, could not be convicted of driving motor vehicle while his license was revoked for being habitual traffic offender). However, unlike the facts in *Burgess*, the attachments to Randolph's motion undermined his assertion.

Specifically, Randolph's driving record indicates that on January 3, 2001, Randolph passed the vision, signs, and rules portion of the licensing exam and was issued a "Class E" license that day. Additional entries in the driving record indicate that Randolph's license had been revoked and lists him as a "Career Offender." Further review of Randolph's driving record demonstrates that between March 19, 2003 and August 1,

2006, he was cited or charged with driving while license canceled, revoked, or suspended eleven times. Of those eleven, the court withheld adjudication four times and Randolph was adjudicated guilty seven times. By June 21, 2005, Randolph's driving record refers to him as a "Habitual Traffic Offender" and indicates that his license was revoked for five years. Finally, Randolph's driving record shows that his license was suspended indefinitely in August 2017 and October 2017 for his failure to pay a traffic fine and failure to appear in court.

Regardless of the circumstances under which Randolph's license was issued, the attachments evidence his license was, in fact, issued. Consequently, the trial court erred in accepting as unrebutted Randolph's allegations that he was never issued a license and should have denied his motion to dismiss. *See, e.g.*, *State v. Norwood*, 66 So. 3d 388, 389 (Fla. 5th DCA 2011) (holding that trial court erred in granting motion to dismiss where terms of contract attached to defendant's motion did not negate State's charges); *State v. Aylesworth*, 666 So. 2d 181, 182 (Fla. 2d DCA 1995) (noting that where dispute of material fact is created, rule 3.190(c)(4) motion must be automatically denied).

Accordingly, we reverse the dismissal of count I and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

ORFINGER and WALLIS, JJ., concur.