

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT LEE THOMAS MCGRUDER,

Defendant-Appellee.

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UNPUBLISHED

March 3, 2009

No. 278130

Wayne Circuit Court

LC No. 07-005368-01

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

The prosecutor appeals as of right from an order of dismissal entered after the trial court denied the prosecution's motion for a continuance. We reverse and remand for further proceedings.

Defendant was charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. On the day scheduled for trial, May 10, 2007, the prosecutor requested a continuance. He informed the trial court that at 4:00 p.m. the day before trial, he learned that Officer Thomas Rogers, the sole witness at defendant's preliminary examination, had been shot in the knee while chasing a criminal suspect on April 29, 2007. According to the prosecutor, Rogers' kneecap was severely damaged and medical reports indicated that it could take six to eight weeks to recover. The prosecutor noted that a subpoena had been sent to the officer, and he had thought everyone would be present at trial.

The trial court stated that it believed the prosecutor's representation that he was unaware of the situation until 4:00 p.m. the prior day, but stated:

However, this really did happen 11 days or 12 days ago, whatever, and there was no reason why you couldn't have -- they couldn't have called you.

So, first of all, I don't think there is good cause because this should have been brought up earlier. And, second of all, I'm not allowed to adjourn any trial on the day of trial no matter what, according to our chief judge.

The trial court granted the prosecutor's request to ask the presiding judge for an adjournment.<sup>1</sup> The presiding judge stated that he lacked authority to grant the request, but that if he had been the trial judge, he would have granted the prosecutor's request.<sup>2</sup> The parties returned to the trial court and advised the court of the presiding judge's ruling. The trial court entered an order denying the motion for adjournment "for the reason that adjournments are not allowed [on] the day of trial." The presiding judge also entered an order denying the motion to adjourn. The trial court then granted the prosecutor's motion to dismiss the case without prejudice.

This Court reviews for an abuse of discretion a trial court's decision whether to grant a continuance. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). "A motion or stipulation for a continuance must be based on good cause." *Id.*, citing MCR 2.503(B)(1). MCR 2.503(C) governs where, as here, the adjournment is sought on the basis of unavailability of a witness. MCR 2.503(C)(2) states that "[a]n adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence."

The prosecution argues that the trial court disregarded the court rule standards by holding that an adjournment on the day of trial was prohibited, rather than discretionary. According to the prosecution, the court's failure to exercise its discretion was an abuse of discretion. The prosecution further contends that the requirements for granting a continuance were established because the officer's testimony was material and more diligent efforts to produce the officer would not have succeeded. The prosecution also asserts that the perceived tardiness of the request does not diminish the good cause that was shown.

Defendant agrees that the witness's testimony was material, but contends that the prosecution did not establish that diligent efforts were made to produce the officer for trial. According to defendant, although the prosecutor did not become aware of the situation until late in the afternoon of the day before trial, "efforts could and should have been made. . . immediately to have the officer, the only witness in the trial, appear."

We agree with the prosecution that the trial court's belief that it was prohibited from granting an adjournment on the day of trial requires reversal. The trial court was required to make its decision based on the standards in the court rules. The court's failure to exercise its

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<sup>1</sup> Although reference is made in the transcripts and defendant's brief to the chief judge, the matter was brought before Presiding Judge Edward Ewell, Jr.

<sup>2</sup> Third Circuit LCR 6.100(C) states, in part: "No trial of a criminal case shall be adjourned except by the presiding judge for good cause shown upon motion of the party seeking the adjournment or by the Presiding Judge for good cause." Local Administrative Order 2007-02, which was in effect at the time the trial court addressed this issue, states, in part: "The Presiding Judge shall consider a motion for an adjournment on the day of the trial only after the assigned judge has *approved* the adjournment." AO 2007-02, ¶ 21 (emphasis added). These rules appear to contradict each other, or at least leave some confusion, as to whether the assigned judge has the authority to initially approve an adjournment. We need not address this conflict, however, as we find a failure to exercise discretion by whichever judge was responsible for the adjournment decision.

discretion, when properly asked to do so, is itself an abuse of discretion. See *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990).

Upholding the denial of the continuance because the prosecutor did not make sufficient efforts to produce the officer in this circumstance would be contrary to *Jackson, supra*. In that case, a lay witness was served with a subpoena and appeared to be cooperative, but failed to appear at court on the day of trial. His mother informed the police that she had not had contact with him since he left the state two weeks before trial. The trial court reasoned that the prosecution had not exercised due diligence because it had not made any effort to produce the witness other than serving the subpoena. The Supreme Court disagreed:

The police here successfully served the subpoena. [The witness] had previously cooperated with the police and prosecution, and they had no reason to expect that his cooperation would not continue. We do not know what further efforts the court could have expected of the prosecution or police in these circumstances. We do not require the prosecutor to assume that every witness is a flight risk who must be monitored to ensure his attendance at trial. [*Id.*, at 279.]

In the present case, the officer had been subpoenaed, and the prosecutor reasonably expected his cooperation and attendance at trial, which was thwarted when the officer was shot and injured in the line of duty. Defendant does not state what efforts to produce the officer should have been made, but as stated in *Jackson, supra*, the prosecution is not required to monitor subpoenaed witnesses whose cooperation is not in question to ensure their attendance at trial.

For these reasons, we reverse the trial court's order denying the prosecutor's motion for an adjournment and dismissing the case, and remand for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ Kirsten Frank Kelly  
/s/ Jane M. Beckering