

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
Resident Judge

SUSSEX COUNTY COURTHOUSE
THE CIRCLE
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May 4, 2004

Carole E.L. Davis, Esquire
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RE: State v. Wynne, Def. ID# 0305017503

DATE SUBMITTED: March 23, 2004

Dear Counsel:

Pending before the Court is an appeal which the State of Delaware (“the State”) has brought, pursuant to 10 Del. C. § 9902(b),¹ asserting the Court of Common Pleas (“CCP”)

¹ 10 Del. C. §9902(b), it is provided as follows:

When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of

abused its discretion in denying a continuance request. The parties have briefed the issue on appeal, and this is my decision affirming the decision below.

FACTS

On May 20, 2003, defendant Benjamin Wynne (“defendant”) was arrested on a charge of driving under the influence in violation of 21 Del. C. § 4177(a)(5).² Defendant requested a jury trial, thereby requiring a transfer of the matter to CCP. Defendant was arraigned in CCP on August 28, 2003. On that date, he was given a jury trial date of October 27, 2003. Because his attorney had filed a motion to suppress, CCP, on or about September 5, 2003, scheduled a suppression hearing for October 21, 2003.

On October 1, 2003, the State, for the first time, requested a continuance of the October 21, 2003, suppression hearing. It gave the following as its reason for its request: “Tpr. Oldham on scheduled vacation from 10/19/03 to 11/4/03 out of state”. The State also explained that Mr. Gill, defendant’s attorney, did not oppose the continuance request. The State’s request was made in accordance with CCP’s unwritten policy to grant first-time continuance requests when the

which the evidence suppressed or excluded is essential. Upon ordering the complaint, indictment or information or any count thereof dismissed pursuant to the Attorney General’s certification, the reasons of the dismissal shall be set forth in the order entered upon the record.

² In 21 Del. C. § 4177, it is provided in pertinent part:

(a) No person shall drive a vehicle:

(5) When the person’s alcohol concentration is, within 4 hours after the time of driving, .10 or more. ***

testifying officer was on vacation.³

The Court denied the request. It did not provide a reason for the denial.

By letter dated October 3, 2003, the State asked that the Court reconsider its request for a continuance of the suppression hearing on October 21, 2003, because the case had not been continued previously and Mr. Gill did not oppose the continuance. Apparently, CCP denied the request for reconsideration and no reason for the denial appears to have been given.

By motion dated October 17, 2003, the State moved for a continuance of the suppression hearing and the trial date. In that motion, the State explains as follows:

2. *** The defense seeks to suppress all of the State's evidence against the defendant from the traffic stop on. Trooper Oldham's testimony is essential if the State is to establish that the stop and arrest of the defendant was constitutional, and that the defense is not entitled to suppression. Thus, denial of the State's request will result in dismissal of the State's case either because the State's only witness, Trp. Oldham does not appear or because all evidence in the State's case will be suppressed.

3. While the Court in this matter has denied a State requested continuance, such issues are usually framed as being under Rule 48(b), failure for the state to prosecute. As Trp. Oldham is the only witness the State would call at a suppression hearing, given the court's denial of the State's request, the State will surely not be prepared to go forward on October 21, 2003.

The State, noting no speedy trial issues and no prejudice to the defendant existed, requested that the Court reconsider its previous denials and grant its requests for continuances of the suppression hearing and trial dates.

The Court addressed the October 17, 2003, request for reconsideration of its previous

³According to CCP:

And, you know, we go way out of our way consistently. We have an unwritten policy, it's informal, it's not the policy that has to be adhered to all the time, but by and large, we grant every request the State makes for officer vacation continuance, the first time. You get one vacation continuance on each case.

decisions on October 21, 2003, the time set for the suppression hearing. Defendant was present in the courtroom. The arresting officer was not present because she was on vacation out of state.

During the hearing, the Court finally stated the reason for its denial. The State's delay in making the continuance request was inexcusable, a continuance would result in the trial not taking place for two months from its originally scheduled date, and the Court's interest in moving its cases was paramount. The Court expressed its opinion that the State should have a system whereby it checks vacations of officers at the time of arraignment, and if the Attorney General's Office does not seek a continuance at that time, then it should not be allowed a continuance based on the reason that the officer was on vacation. The Court explained that it was not examining the prejudice aspect to the defendant; instead, what it considered was "the providence of the Court to control the pace of its work and its calendar."

The Deputy Attorney General explained that he understood the Court's position, but there was nothing his office could do about the situation; i.e., there existed no procedure whereby it could have determined any earlier that the vacation conflict existed and have sought a continuance.

Despite the State's entreaties, the Court denied the request for a continuance because it planned to keep its calendar moving and "it's becoming a real burden and a real difficult task to try to reschedule these matters for jury trials."

The State then could not proceed on the motion to suppress because it lacked the necessary witness to present its case. Importantly, the State offered no evidence to show that it had made any attempts to secure the officer's presence at the suppression hearing. The Court granted the motion to suppress; the State certified that it could not proceed to trial without the

suppressed evidence. The Court then dismissed the driving under the influence case pursuant to 10 Del. C. § 9902(b).

DISCUSSION

“[A]pplications for continuances are left to the discretion of a trial judge whose ruling will not be disturbed on appeal unless that ruling is clearly unreasonable or capricious.” Bailey v. State, 521 A.2d 1069, 1088 (Del. 1987). The standards to be applied when reviewing the decision below are set forth in Secrest v. State, 679 A.2d 58, 66 (Del. 1996):

First, the party seeking the continuance has the burden of establishing a clear record of the relevant facts relating to the criteria for a continuance, including the length of the requested continuance. Second, the party seeking the continuance must show:

- (a) that it was diligent in preparing for the presentation of the testimony;
- (b) that the continuance will be likely to satisfy the need to present the testimony; and
- (c) that the inconvenience to the Court, opposing parties, witnesses and jurors is insubstantial in relation to the likely prejudice which would result from the denial of the continuance.

In this case, the State was well aware for a couple of weeks before the hearing that CCP was denying its request, it just did not know why. The Court below certainly has the inherent authority to control its calendar. State v. Augustine, Del. Super., Cr. A. Nos. I N-91-09-1557, et al., Herlihy, J. (October 29, 1992). Unfortunately for the State, it was caught in a change by CCP of its continuance policy. It would have been more judicious for CCP to have notified the State of its change in policy before implementing it and, in any case, to have provided a reason for its denial at the time of the first request.

What matters here, however, is that despite knowing CCP was denying its continuance request, the State appeared at the hearing on the suppression motion without making any efforts

to secure the officer's presence. Thus, the State failed to establish it diligently prepared for the presentation of the testimony, the first requisite of Secrest v. State, supra. Once CCP denied the continuance request, then the State should have subpoenaed the police officer to insure her presence at the hearing. The State's failure to secure the presence of the witness for the suppression hearing is what caused the continuance. See State v. Richards, Del. Super., Def. ID# 9609004774, Toliver, J. (May 28, 1998). When the trial court denied the continuance request on the day of the suppression hearing, it acted reasonably and within its discretion. See In the Matter of the Petition of the State of Delaware for a Writ of Mandamus, 720 A.2d 559 (Del. 1998).

For the foregoing reasons, I affirm the decision of the Court below.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary's Office
CCP Clerk's Office
The Honorable Kenneth S. Clark, Jr.