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20-P-303

Appeals Court

COMMONWEALTH vs. JAVIER PIMENTEL.

No. 20-P-303.

Essex. January 13, 2021. - May 21, 2021.

Present: Lemire, Ditkoff, & Grant, JJ.

Practice, Criminal, Continuance, Motion to suppress, Dismissal.  
Evidence, Absence of witness.

Complaint received and sworn to in the Lynn Division of the District Court Department on August 20, 2018.

A pretrial motion to suppress evidence was considered by Cesar A. Archilla, J., and a motion for reconsideration was considered by him.

An application for leave to prosecute an interlocutory appeal was allowed by David A. Lowy, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court.

Kathryn L. Janssen, Assistant District Attorney, for the Commonwealth.

Michael P. Osborne for the defendant.

DITKOFF, J. The Commonwealth appeals from an order of a District Court judge allowing a motion to suppress filed by the defendant, Javier Pimentel, because the necessary witness, a

retired police officer, failed to appear for a third time. Although the judge would have been justified in denying the Commonwealth's motion for a continuance and dismissing the complaint without prejudice for want of prosecution, the judge abused his discretion by allowing the defendant's motion to suppress and effectively dismissing the complaint with prejudice where it was uncontested that the delays were unintentional and there was no showing that the Commonwealth acted in bad faith. Accordingly, we reverse.

1. Background.<sup>1</sup> In August 2018, the defendant was driving a motorcycle in Lynn when a police officer driving directly behind the defendant noticed that the license plate was missing. The officer continued to follow the defendant. At one point, the officer estimated that the defendant was traveling at least fifty miles per hour on a thickly settled street. Eventually, the defendant parked the motorcycle at a restaurant.

The officer called for backup and then approached the defendant in the restaurant. In response to the officer's questions, the defendant asserted that the motorcycle was his and that the license plate was missing because it was recently stolen. The officer asked him whether he had reported the

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<sup>1</sup> These allegations are those stated in the application for the criminal complaint. See Commonwealth v. Geordi G., 94 Mass. App. Ct. 82, 83 n.1 (2018). They remain unproven.

theft, and the defendant stated that he had not done so, because the theft was recent.

Unsatisfied with the defendant's responses, one officer stayed with the defendant while another officer went and located the motorcycle's vehicle identification number. Officers called in the number and soon discovered that, approximately one month earlier, the motorcycle was "reported stolen out of Boston."

After this discovery, the defendant was arrested and the motorcycle was towed.<sup>2</sup> Upon further investigation at the police station, police discovered that the defendant was not licensed to operate a motorcycle.

Two days later, a criminal complaint was issued charging the defendant with receiving a stolen motor vehicle, G. L. c. 266, § 28 (a); operation of a motor vehicle without a license, G. L. c. 90, § 10; and speeding, G. L. c. 90, § 17. That same day the defendant was released on personal recognizance.

Approximately five months later, a month after the pretrial conference report was submitted, the court set a date for hearing any motion to suppress. The first three dates were continued because the defendant had not filed a motion.

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<sup>2</sup> The police also searched two backpacks apparently belonging to the defendant and seized one of the backpacks, which contained marijuana. It is not evident that this evidence is relevant to the charges in the complaint.

Finally, nearly three months after the original hearing date, the defendant filed a motion to suppress all evidence gathered after the officer approached the defendant in the restaurant, and the motion was scheduled for a hearing.

The Commonwealth summonsed its witness, the officer who initiated the encounter. Before the scheduled hearing, the Commonwealth provided notice that the officer would be unable to attend the hearing because of a prescheduled doctor's appointment. Both parties agreed to continue the hearing to the following month.

A month later, at the scheduled suppression hearing, all parties were prepared, and the officer, who had by then retired from service, was present, but the judge (motion judge) continued the hearing because of court congestion. The motion judge set the hearing date for approximately two months later. When the hearing date arrived, the officer forgot to appear, and the Commonwealth requested a continuance. A different judge (second judge) set a new date for the hearing to be held approximately two months later but marked the case "no further continuances."

At the new date, November 4, 2019, the officer was in Virginia attending to a family matter, so the Commonwealth requested a continuance. The motion judge, over the

Commonwealth's objection, denied the Commonwealth's request for a continuance and allowed the defendant's motion to suppress.

Later that month, the Commonwealth filed a motion requesting that the motion judge reconsider. The judge denied the motion to reconsider, stating that "there were no justifiable, concrete reasons for the officer's absence on the motion to suppress date after the matter had been continued a number of times. The Commonwealth was not prepared to go forward on prior dates and [the second judge] had addressed and marked the matter no further continuances." In addition, the motion judge found that "the defendant has been prejudiced in light of the fact that the matter commenced on August 20, 2018, when the defendant was arraigned." This appeal followed.

2. Suppression order. Typically, "[t]he decision whether to grant a motion to continue lies within the sound discretion of the trial judge." Commonwealth v. Super, 431 Mass. 492, 496 (2000), quoting Commonwealth v. Painten, 429 Mass. 536, 543 (1999). The judge's discretionary powers, however, are not unlimited "but bounded by important considerations." Commonwealth v. Clegg, 61 Mass. App. Ct. 197, 200 (2004). When a party requests a continuance, the "trial judge should balance the movant's need for additional time against the possible inconvenience, increased costs, and prejudice which may be incurred by the opposing party if the motion is granted."

Super, supra at 496-497, quoting Commonwealth v. Gilchrest, 364 Mass. 272, 276 (1973). Among the factors a judge may consider "in determining whether to grant a continuance [is] . . . [w]hether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice." Mass. R. Crim. P. 10 (a) (2), 378 Mass. 861 (1979). The "judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." Commonwealth v. Butler, 87 Mass. App. Ct. 183, 187 (2015), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Generally, when a judge denies a motion to continue and the Commonwealth is unable to proceed, the judge dismisses the case without prejudice for want of prosecution. See Commonwealth v. Lucero, 450 Mass. 1032, 1033 (2008) ("where a prosecutor is unprepared to present her case due to the unexpected absence of a witness, a judge has discretion to dismiss the case without prejudice"); Commonwealth v. Melucci, 88 Mass. App. Ct. 160, 161 (2015), quoting Commonwealth v. Corbett, 26 Mass. App. Ct. 773, 779 (1989) (in absence of showing of egregious prosecutorial misconduct, substantial threat of prejudice, or irreparable harm to defendant's opportunity to obtain fair trial, "dismissal of a

complaint on a basis such as want of prosecution should not be with prejudice"); Butler, 87 Mass. App. Ct. at 186-187. If the Commonwealth subsequently decides that the prosecution is important enough to revive and is able to address the problems that made it unable to proceed, the Commonwealth can bring a new prosecution. See Commonwealth v. Heiser, 56 Mass. App. Ct. 917, 919 (2002) ("in the absence of any indication that the original complaints were dismissed with prejudice, no reason appears why the Commonwealth could not seek new complaints against the defendants"); standard 4:02 of the District Court Standards of Judicial Practice: The Complaint Procedure (2008) (following "a dismissal without prejudice, the prosecution may either file a motion to reconsider, file a new application for complaint in the same court, appeal from the dismissal of the original complaint, or seek an indictment from the grand jury").<sup>3</sup>

Given the motion judge's "legitimate 'concern over the court calendar and the need to move cases along,'" dismissing the complaint without prejudice would have addressed the problem with witness absence without unnecessarily hindering the Commonwealth's ability to prosecute its case if the Commonwealth chose to file for a new complaint. See Butler, 87 Mass. App.

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<sup>3</sup> The speedy trial clock under Mass. R. Crim. P. 36 (b), 378 Mass. 909 (1979), however, continues to run during the time the complaint is dismissed. See Commonwealth v. Denehy, 466 Mass. 723, 735 (2014).

Ct. at 187, quoting Commonwealth v. Fossa, 40 Mass. App. Ct. 563, 567-568 (1996). Accord Commonwealth v. Graham, 480 Mass. 516, 537 (2018) ("dismissals without prejudice would not preclude the Commonwealth from seeking new indictments and prosecuting the cases anew"). Had the judge chosen this course of action, we would not have discerned an abuse of discretion. As a result of several continuances spanning across approximately five months, the hearing on the motion to suppress was delayed on numerous occasions. The first hearing date was continued because the retired officer was unavailable because of a prescheduled doctor's appointment. After a continuance because of court congestion, the hearing was continued again when the officer forgot the scheduled court date and was out of State. On this day, the second judge marked the case "no further continuances." At the fourth hearing date, the officer did not appear because he was attending to a family matter out of State. Under these circumstances, the motion judge would have been justified in doubting the vigor of the Commonwealth's prosecutorial efforts and dismissing the complaint without prejudice. See Lucero, 450 Mass. at 1033.

Because, instead, the motion judge denied the Commonwealth's motion to continue and allowed the defendant's motion to suppress, the judge's decision was "tantamount to



dismissal with prejudice." Clegg, 61 Mass. App. Ct. at 201.

There was an inadequate basis to take this drastic step.

Dismissing a complaint with prejudice should be restricted to cases involving "hard core transgressions," not those where the Commonwealth acts in good faith or where the delay is unintentional. Clegg, 61 Mass. App. Ct. at 202. See Commonwealth v. Borders, 73 Mass. App. Ct. 911, 912 (2009) ("Dismissal of a criminal complaint with prejudice is a draconian sanction that must be reserved for cases manifesting egregious prosecutorial misconduct or a serious threat of prejudice to the defendant"). Here, the retired officer was unavailable because of personal reasons, and not because the Commonwealth acted in bad faith or intentionally acted to dissuade the officer from testifying at the suppression hearing. See Clegg, supra at 202 (where Commonwealth's key witness for suppression hearing was absent because of personal reasons, "there is no basis for concluding that the Commonwealth was not acting in good faith or that the delay was other than unintentional"). The Commonwealth repeatedly sought to continue the suppression hearing not for the sake of delay or advantage but instead because the officer first had a prescheduled doctor's appointment, then forgot the hearing date and was out of State, and then was attending to an out-of-State family matter. When these delays arose, the Commonwealth notified the

court and the defendant's counsel, and diligently made an effort to contact the officer. Cf. Commonwealth v. Burston, 77 Mass. App. Ct. 411, 414 (2010) (dismissal with prejudice warranted where Commonwealth did not summons key witness and Commonwealth's reason for continuance was "a pretext designed to postpone the hearing on the motions to suppress").

By allowing the motion to suppress, the motion judge forever foreclosed the Commonwealth from proceeding on its two criminal charges against the defendant.<sup>4</sup> Although the judge could have denied the Commonwealth's continuance request and dismissed the complaint for want of prosecution, the judge was not justified in allowing the motion to suppress because doing so had the effect of dismissal with prejudice.

3. Conclusion. The order allowing the defendant's motion to suppress is reversed.

So ordered.

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<sup>4</sup> The parties agree that the Commonwealth would have been able to proceed on the speeding count.