IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA

**STATE OF FLORIDA,**

Appellant,

vs.

**EMILY HELEN SMYTH,**

Appellee.

_____/

APPELLATE CASE NO.: CJAP 06-32
LOWER CT. CASE NO.: 48-2006-CT-011501-O

Appeal from the County Court
for Orange County, Florida
Jerry L. Brewer, County Court Judge

Abigail F. Jorandby
Assistant State Attorney
for Appellant.

Stuart I. Hyman, Esquire
Stuart I. Hyman, P.A.
for Appellee.

Before MACKINNON, J. KEST, and EVANS, J.J.

**MACKINNON** AND **J. KEST**, J.J

## FINAL ORDER REVERSING TRIAL COURT

The State (herein "Appellant") appeals the trial court's September 20, 2006 order dismissing the Uniform Traffic Citation issued in this case. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). After consideration of the record on appeal and the parties' briefs, this Court reverses the ruling of the trial court, and remands this matter for proceedings consistent with this opinion.

On July 16, 2006, Emily Helen Smyth (herein "Appellee") was arrested for the offense of false display of a driver's license or identification in violation of section 322.32(3), Florida Statutes. On September 20, 2006, the day of trial, the Appellee and her counsel, Whitney Boan, appeared before the trial court at 10:14 a.m., along with two other defendants, Gregory Antwan Alexander and Gino K. Cadet, who were represented by the Public Defender's Office. The following proceedings took place:

Prosecutor: The first one would probably be Alexander.

Court: Why would Alexander be first?

Prosecutor: Because he hasn't waived speedy.

Court: Okay.

Boan: We haven't waived speedy either in Smyth.

Court: So – well, you would all agree that I probably can only try one at a time, right; everybody agree with that?

APD: Yes, sir.

Prosecutor: Yes, Your Honor.

Court: Okay, so with two cases having speedy not waived in both cases, State, you kind of get to make the call because potentially, you'll lose the other one on speedy. So which one are you most anxious to pursue?

Prosecutor: The Alexander case, Your Honor.

Court: Okay. Have you confirmed your witnesses for that case?

(Pause)

Madam State Attorney, have you confirmed your witnesses?

Prosecutor: They are being confirmed; yes, Your Honor.

Court: Well, how can you tell me you're ready for trial if you haven't confirmed your witnesses? Now, what if I brought a jury panel up here and I send all these other folks away and you couldn't try this case? Nobody would be very happy about that, would they, least of all Judge Arnold?

So, have you confirmed them on the other case?

Prosecutor: I'm – I'm waiting back for confirmation for all of them.

Court: So you don't know if you're ready for trial yet or not, do you?

Prosecutor: Not exactly.

Court: Well, not at all. You can't go forward without witnesses, right?

Prosecutor: Yes.

Court: You don't know if you've got witnesses, right?

Prosecutor: Yes

Court: So how long do you expect it will be before we'll know if you have witnesses?

Prosecutor: I really don't know. I – I – I. . .

Court: How long are you willing – how long do you think this Court or any other Court should sit in a time-out posture waiting for your office to decide if it's capable of going forward to try a case; how long do you think I should wait?

Prosecutor: I wouldn't wait. I'm ready to go. So. . .

Court: Five minutes, ten minutes? No, you're not ready to go because you don't know if you have witnesses. And I'm not bringing the jury panel up here and starting the process only to have you nol-pros the case in the middle of it and have wasted all those citizens' time, not to mention the Court's time, those folks over there time and everybody else's time.

I need to know how long you want this Court to wait before the Court determines whether or not you are prepared to go to trial on any of the files that are lined before the Court right now?

Prosecutor: Ten minutes:

Court: All right. You have until 10:30 to determine if you have witnesses in any of these cases. And at 10:30, they either go south or we go to trial. So the court is in recess until 10:30.

The Court recessed at 10:17 a.m.

At 10:34 a.m. the following proceedings took place:

Boan: Emily Smyth.

Court: Okay. And Ms. Smyth, would you raise your right hand?

WHEREUPON: The defendant Emily Smyth, was duly sworn, after which the proceedings were as follows:

Court: Okay. Now My understanding is you've entered a plea of not guilty on the charge of failure to display a driver's license, or – let me make sure I've got it correct – no, failure to display a driver's license or an ID; is that correct?

Appellee: Yes, sir.

Court: Okay. Now, so the record is nice and clear, let me put this on the record. I note your presence. I note your attorney's presence. The State was present earlier and had indicated that they needed until 10:30 to determine if they were going to be able to produce witnesses for the case. It's now 10:36, according to the clock in the courtroom. The State has disappeared, so I'm going to take that as the State's indication that they are unable to proceed in your case and, at this time, I'll find good cause exists to dismiss the case. The case is dismissed.

Appellant argues that the trial court abused its discretion when it *sua sponte* dismissed the case against Appellee because the record does not indicate that the State abandoned its decision to prosecute the Appellee's case nor does the record indicate that the witnesses were not available for trial. Moreover, the Appellant asserts that the trial court failed to consider other available options besides dismissal of the instant charge.

Appellee argues that the trial court did not abuse its discretion in dismissing the charges as the trial court was "left in limbo" after the prosecutor or any other State representative failed to return to the courtroom as directed. The Appellee, therefore, asserts that the trial court was justified in its belief that the State abandoned its prosecution.

Clearly, the prosecutor, as well as any and all counsel, have the duty and responsibility to be in the courtroom when his or her case is called for trial.[1] This is especially true when the court has instructed counsel to be present at a set time. Courts are authorized to impose sanctions for non-compliance including, but not limited to, the striking of witnesses and/or continuing the case and charging such continuance to the State. The extreme sanction of dismissing the entire case is also available, if warranted, by the facts and circumstances of the case.

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[1] We are acutely aware of the difficulty and frustration in handling a large trial docket, especially when counsel that are needed for the trials are constantly stepping out of the courtroom. The concerns with trying the cases on the docket within the speedy trial requirements, effectively and efficiently handling juries, utilizing the jurors' time appropriately, and managing the limited number of jurors who do appear for jury service adds to the difficulties and complexity of the county court docket.

Dismissal of a criminal case has the effect of denying not only the prosecutor, but also the people of Orange County, from proceeding against this defendant for the particular offense or crime charged. *State v. Carpenter*, 899 So. 2d 1176 at 1182-1183 (Fla. 3d DCA 2005) (Dismissal should be restricted to "cases where no other sanction can remedy the prejudice to the defendant ... to insure that the public's interest in having persons accused of crimes brought to trial is not sacrificed in the name of punishing a prosecutor's misconduct"). As a result, the Fifth District Court of Appeal has also held that "[d]ismissal is an extreme sanction that should be employed only when lesser sanctions would not achieve the desired result...." *State v. L.J.T.*, 921 So. 2d 746, 747 (Fla. 5th DCA 2006); *State v. Carpenter*, 899 So. 2d 1176 (Fla. 3d DCA 2005).

A dismissal of criminal charges is inappropriate where the delay in proceeding is neither the result of **willful and deliberate actions of the state** nor **prejudicial to the defendant.** *State v. Wilson*, 498 So. 2d 1053 (Fla. 4th DCA 1986). "Willful" implies the act was done voluntarily and intentionally, but not necessarily maliciously. *See Black's Law Dictionary* 1630 (8th ed. 1999). "Deliberate" means the act was done intentionally. *See Black's Law Dictionary* 459 (8th ed. 1999). Thus, an act is willful and deliberate if it is voluntary and intentional. Charges that are dismissed without a showing of prejudice to the defendant awards the defendant a windfall and punishes the public rather than the prosecutor. *Carpenter* at 1183 (Cited in *L.J.T.* at 747-748) While a trial court's decision to grant a motion to dismiss will not be reversed absent an abuse of discretion, there must be some record evidence upon which this decision can be justified. *L.J.T.* at 747.

In this case, we know that when the judge called the case for trial, speedy had not been waived by this particular defendant.[2] We also know that the court announced it could only try one of these cases at that time. The State announced that it would go forward with "the Alexander case, Your Honor...," "[b]ecause he hasn't waived speedy." The transcript shows that the State could not assure the court that its witnesses were ready to proceed on the Alexander case.[3] While the colloquy between the State and the court was a little disjunctive,

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[2] The transcript shows that there were three cases before the court, Ms. Smyth, Mr. Gregory Antwan Alexander and Mr. Gino K. Cadet. Mr. Alexander and Mr. Cadet were represented by the Office of Public Defender and are not parties to this appeal, but are parties to a separate but similar appellate action before a different panel. Speedy was not waived in Mr. Alexander's or in Ms. Smyth's cases.

[3] A second concern also arises. The court signaled that it was adjourning to allow the State to determine if it could locate its witnesses in the called case – which was the Alexander case. The court did note, however, "[y]ou have until 10:30 to determine if you have witnesses in any of these cases." (Emphasis supplied) While not as significant as the primary issue, it does not appear that the State was advised that the Smyth case would be called if the Alexander case was not called. Certainly, the presence of the prosecutor was required in any event since the court noted that at 10:30 inquiry was made as to "any of these cases."

it appears that the State had not fully confirmed the certainty of the appearance of its witnesses. Be that as it may, the State did, in fact, indicate it was "ready to go."[4]

The court, on the other hand, was rightfully concerned about bringing a jury up to the courtroom and, thereafter, having the State *nolle prosequi* the case (for lack of witnesses) thereby wasting the jurors' time and resources. The court announced that it would adjourn until 10:30 to determine if the witnesses would be available in "...any of these cases."

It is undisputed that the prosecutor was not present, at least at 10:36, when the court re-called the case(s). The court announced that, "...the State has disappeared... ," and took that as an indication that the State was unable to proceed and, *sua sponte*,[5] dismissed the case. *State v. Pope*, 675 So. 2d 165 (Fla. 3d DCA 1996) (It is inappropriate for the court to "screen" the State's cases; the State could decide to go forward without its main witnesses or even *nolle prosequi* the case). Effectively, the court was sanctioning the State by dismissing the case, because it was uncertain whether the State's witnesses were ready to appear at trial. *Grande v. Ader*, 530 So. 2d 1050 (Fla. 3d DCA 1980).

The absence of the prosecutor is not in dispute. The reason for the absence of the prosecutor, however, may be. There is nothing in the record to demonstrate whether the prosecutor's absence was willful or deliberate. It is unknown whether the prosecutor's absence occurred, as suggested by the court, because the presence of the witnesses could not be procured, or conversely, by willful disregard of the judge's order. However, we also do not know if the absence was as a result of conditions or circumstances beyond this prosecutor's control. Sudden, unforeseen, onset of illness; an order of another judge that counsel remain in his/her courtroom and not leave; faulty operating elevators; as well as a multitude of other impediments and unpredictable events could have resulted in her absence from the courtroom – none of which would constitute a "deliberate or willful" absence.

The problem is we do not know, because the court dismissed the case without giving the State an opportunity to show cause why it should, or should not, be dismissed. Quite possibly the court could have found that the reason eventually given was not sufficient and the case should be dismissed. Unfortunately, since no opportunity was afforded the State, no record exists to demonstrate that the court even had an opportunity to consider the validity of any possible explanation.

If the dismissal was as a sanction for the State's failure to appear, then an opportunity should have been given the State to explain, if it could, why such a sanction should not be imposed. If, on the other hand, the court believed that the State was still having trouble securing its witnesses, the court could have continued the trial and charged the continuance

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[4] But the transcript also reflects: THE COURT "So you don't know if you're ready for trial yet or not, do you? " MS. HENRY "Not exactly."

[5] The record does not disclose that the Defendant, or her counsel, ever requested that the court dismiss the case and the dismissal was on the court's own motion.

to the State.[6] The end result may well have resulted in a dismissal, because of the running of the speedy trial time, but that would have been as a result of the State's record inactions.

Lastly, if the court construed the failure of the Assistant State Attorney to attend court when the court re-convened to be a representation that the State could not locate its witnesses, such an assumption should not have been made without further inquiry from the State. Once again, the State should have been afforded the opportunity to address this issue unless the court can find from other evidence before it that such failure to attend was willful and deliberate.

Therefore, we reverse the trial court's dismissal of this cause and remand for an evidentiary hearing as to the reasons that the Assistant State Attorney failed to return to the courtroom as previously directed and, if appropriate, the status of the witnesses. If no satisfactory reason is provided, the court could then address the appropriate sanction(s) or procedure(s) as the situation dictates.

REVERSED AND REMANDED.

**DONE AND ORDERED,** in Chambers, at Orlando, Orange County, Florida, this _11___ day of _____June_____, 2008.

____/S/_____ ___/S/_____
CYNTHIA Z. MACKINNON JOHN MARSHALL KEST
Circuit Court Judge Circuit Court Judge

EVANS, J., dissenting with opinion.

Respectfully, I must dissent from the majority's opinion.

Dismissal of criminal charges for lack of prosecution is inappropriate where the delay in the trial is neither the result of willful and deliberate actions of the State nor prejudicial to the defendant. *State v. Wilson*, 498 So.2d 1053 (Fla. 4th DCA 1986). Further, "[d]ismissal is an extreme sanction that should be employed only when lesser sanctions would not achieve the desired result…." *L.J.T.*, 921 So. 2d at 747 (citation omitted). However, a trial judge in a criminal prosecution has inherent power to declare the prosecution abandoned, if such a determination is supported by the record. *State v. Alvarez*, 258 So.2d 24 (Fla. 3d DCA 1972).

In *Alvarez*, the state attorneys were consistently tardy for, or absent from, court appearances and evinced little interest in the prosecution. As a result the court determined

[6] Granted, a continuance should not be permitted unless the State can advise the court that it believes it can reasonably obtain the presence of its witnesses at the continued trial. *Geralds v. State*, 674 So. 2d 96 (Fla. 1996)

that the prosecution of the cause had been abandoned by the state, thus warranting dismissal of the information. *Id.*

In *State v. Smith*, Appellate Case Number: CJAP00-36 (Cir. Ct. 9th Jud. Cir. 2002) the defendant filed a motion to suppress attacking the legality of the stop. On the day the motion was set for a hearing, neither the Assistant State Attorney nor a representative for the State appeared to explain any conflicts, if any, that prevented the Assistant State Attorney from attending the hearing. As a result the lower court granted the motion to suppress and the State appealed. The court found that it was not an abuse of discretion for the trial court to exercise its right to impose sanctions, such as granting the motion to suppress, where it finds "no excuse for the State's blatant disregard for the trial court and the judicial process".

This case is distinguishable from those cases that hold that a trial court abuses its discretion to *sua sponte* dismiss charges for lack of prosecution on the basis that a State's witness fails to appear at trial. *See State v. Pope*, 675 So. 2d 165 (Fla. 3d DCA 1996) (it is not appropriate to sanction the State by dismissing case when the State's witness fails to appear at trial or deposition); *Grande v. Ader*, 530 So. 2d 1050 (Fla. 3d DCA 1980) (a trial court cannot sanction the State for the actions of a State witness when it is the conduct of the witness that is at issue); *State v. Perez*, 543 So. 2d 386 (Fla. 3d DCA 1989) (State's failure to obey court order requiring police officers' presence in courtroom before jury had been selected did not indicate that the State was not prepared to present its evidence at trial at the appropriate time once trial had begun and could not form basis for dismissal of information for lack of prosecution). In this case, dismissal was not based upon the State's witnesses failing to appear, but the Assistant State Attorney failing to appear after a brief recess.

The record reflects this case and two other cases were set for trial. Speedy trial had not been waived in this case. The State appeared for trial announcing that it was ready to proceed on all three cases, but had not confirmed that any of its witnesses were available. The State did not request a continuance, but requested ten minutes to locate its witnesses. Seventeen minutes later, the case is recalled and the prosecutor had "disappeared". The record does not reflect that any State representative or any State witnesses were in the courtroom at the time the case was recalled. Thus, the record is sufficient to demonstrate that the State abandoned its prosecution, thereby warranting dismissal.

_____/S/_____
ROBERT M. EVANS
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Abigail F. Jorandby, Assistant State Attorney, 415 N. Orange Ave., Orlando, FL 32801 and Stuart I. Hyman, Esq., 1520 East Amelia St., Orlando, FL 32803, this __12_____ day of _____June_____, 2008.

__/S/_____
Judicial Assistant