

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

APPELLATE CASE NO: CJAP 06-34
LOWER COURT CASE NOS: 2006-MM-571
2006-MM-7608

STATE OF FLORIDA,
Appellant,

vs.

GREGORY ANTWONE ALEXANDER,
GINO KERLING CADET,
Appellees.

_____ /

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

Lawson Lamar, State Attorney,
LaMya Henry, Assistant State Attorney,
for Appellant

Gregory Antwone Alexander, Pro Se,
Gino Kerling Cadet, Pro Se,
Appellees

Before THORPE, O'KANE, and KOMANSKI, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State (herein "Appellant") appeals the court's dismissals of 2006-MM-571, *State v. Gino Kerling Cadet* and 2006-MM-7608, *State v. Gregory Antwone Alexander*. We reverse.

On May 4, 2006, Orange County Sheriff's Deputy Rodriguez arrested Gino Cadet ("Cadet") for Petit Theft after an Assistant Manager at Walgreens saw him ripping pages out of magazines. On July 12, 2006, Orange County Sheriff's Deputy James arrested Gregory Alexander ("Alexander") for Trespass After Warning when he returned to Universal Studios even though security had issued him a trespass warning on July 8, 2006. The State charged Alexander with Trespass on Property Other Than Structure or Conveyance.

On the day of trial, the court dismissed the cases because the prosecutor was not in the court room when the cases were called and it therefore deemed that Appellant was not ready to proceed. These timely appeals follow.

On February 19, 2007, the court consolidated 06-AP-33, *State v. Gino Cadet* into 06-AP-34, *State v. Gregory Alexander*. Both appeals stem from the same judge dismissing both cases on the same date for the same reason; both cases raise the same issue on appeal.

Appellant argues that the court abused its discretion when it *sua sponte* dismissed the cases against Appellees without first considering options other than dismissal. Appellant asserts that it had not abandoned its decision to prosecute either Appellee and the records do not show that the witnesses had not been subpoenaed and were therefore not available for trial. Neither Appellee filed an Answer Brief.

The trial court abused its discretion. As the Fifth District Court of Appeal has held,

Dismissal is an extreme sanction that should be employed only when lesser sanctions would not achieve the desired result. It is 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.’¹ Dismissing charges without a showing of prejudice to the defendant awards the defendant a windfall and punishes the public rather than the prosecutor.

State v. L.J.T., 921 So. 2d 746, 747 (Fla. 5th DCA 2006) (internal citations omitted). When a court summarily dismisses a case, it fails to consider other, less drastic alternatives available to it, including forbidding the witness(es) to testify, continuing the case until the witness(es) become available, ordering the witness(es)’ arrest for failure to comply with the subpoena, or issuing a rule to show cause or writ of bodily attachment. *State v. Pope*, 675 So. 2d 165, 167 (Fla. 3d DCA 1996). “...The trial court’s action in dismissing the case for lack of prosecution when the State [has] announced that it [is] ready for trial is clearly error because the court is, in

¹ The court notes that the record does not reflect any prosecutorial misconduct; it shows that the prosecutor’s only mistake was to step out of the court room for a few minutes too long.

effect, ‘screening’ the State’s case by making its own determination of whether or not the case should be prosecuted.” *Id.* (citing *State v. Earl*, 545 So. 2d 415 (Fla. 3d DCA 1989)).

The following exchange occurred on the morning of trial:

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 [Cadet]?

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 time over there 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 court is in recess until 10:30.

WHEREUPON: The Court was in recess from 10:17 a.m. until 10:24 a.m., handled unrelated matters until 10:35 a.m., after which the proceedings were as follows:

COURT: Okay. Call the case of Gino K. Cadet. Is Gino Cadet present?

PUBLIC DEFENDER: ...Mr. Cadet is in custody downstairs in trial posture. He---he is ready for trial, Your Honor.

COURT: All right. He has indicated a desire to proceed to trial today?

PUBLIC DEFENDER: That is correct.

COURT: I will note, for the record, that Counsel has indicated his client is in custody and is downstairs prepared to proceed to trial. Also that the State was present earlier and indicated she needed until 10:30 to determine if she had witnesses for the case. She has since disappeared, and---I’ll take that to mean that the State has not the ability to proceed

today and, at this time, the Court will dismiss the case. The next case is Gregory Antwan Alexander. (Pause) Tell me about Gregory Antwan Alexander.

PUBLIC DEFENDER: Yes, Your Honor....Mr. Alexander is downstairs in custody and in trial posture. He is ready for trial.

COURT: All right. I'll note for the record, that Counsel has indicated the defendant is present in the building, prepared for trial, Counsel is present. The State earlier requested until 10:30 to determine if she had witnesses. The State Attorney has since disappeared, is no longer present, and so the Court will take that to mean that the State is unable to proceed in the case or produce its witnesses. And---and let me just say on all of these cases now, no request to continue anything has been made by the State either earlier or now. And so, therefore, the Court will take all of that to mean that the State is unable to proceed and, at this time, will dismiss the case for failure to prosecute in the matter of Gregory Antwan Alexander....

WHEREUPON: These proceedings were concluded at 10:37 a.m.

The court did not hear argument or even wait for the prosecutor to return before dismissing the cases. The prosecutor had stated she was confirming the status of her witnesses, but that she was ready to proceed. By dismissing the cases solely because the prosecutor was five minutes late in returning to the court room, the court foreclosed any opportunity Appellant had to proceed with either case. The dismissals provided a windfall for both Appellees, especially considering that neither one had moved to dismiss his case. No prejudice to either Appellee existed to explain how the court could consider dismissal to be the most appropriate option. Appellant never stated it was not ready to proceed, and the court failed to consider alternatives other than dismissal. In doing so, it abused its discretion.

