

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

APPELLATE CASE NO: 2008-AP-000027
LOWER COURT CASE NO: 2008-CT-002881

STATE OF FLORIDA,

Appellant,
vs.

MATTHEW PURDY,

Appellee.
_____ /

Appeal from the County Court
for Orange County, Florida,
Steve Jewett, County Court Judge

Lawson Lamar, State Attorney and
Christina J. Patterson, Assistant State Attorney,
for Appellant

David H. Novak, Esq.,
for Appellee

Before MCDONALD, G. ADAMS and O’KANE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State appeals from an order denying its Motion to Continue and an order granting Appellee Purdy’s Motion to Suppress. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We conclude that the trial judge erred in denying the State’s Motion to Continue and granting Appellee’s Motion to Suppress, and reverse.

A trial court’s ruling on a motion to continue is subject to an abuse of discretion standard of review. *Jackson v. State*, 998 So. 2d 1175, 1176 (Fla. 5th DCA 2006).

On February 21, 2008, Orange County Sheriff's Deputy Mackenzie Doss arrested Appellee for driving under the influence. Subsequently, Appellee filed a Motion to Suppress, which was set for hearing on June 6, 2008. The State subpoenaed Deputy Doss to testify at the June 6, 2008, hearing. However, on the day of the hearing Deputy Doss was delayed at hearings in Osceola County. Accordingly, the State requested that the trial judge either postpone the hearing until the afternoon, or continue the hearing to a later date.

When requesting its continuance, the State explained that: (1) Deputy Doss was under subpoena; (2) she was the arresting officer, and thus her testimony was relevant; (3) the State was in constant contact with her regarding her estimated time of arrival; and (4) without her testimony, the trial court would likely grant the Motion to Suppress and the State would not be able to go forward with its case. The State also argued that Appellee would not suffer any prejudice because he waived speedy trial and was not in custody. Appellee's counsel argued he was prejudiced because he was unavailable that afternoon.

The trial judge stated that he would give Deputy Doss until 11:30 a.m. to arrive, and "[i]f she's not here at 11:30, we're done." At 11:30 a.m. and Deputy Doss still en route, the trial judge denied the State's Motion to Continue and granted Appellee's Motion to Suppress.

In *Geralds v. State*, 674 So. 2d 96, 99 (Fla. 1996), the Florida Supreme Court explained that a party seeking a continuance due to witness unavailability must establish four factors: "(1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance caused material prejudice." (citations omitted).

In a case similar to the one at hand, the Fourth District Court of Appeal reversed after the trial court refused to continue a hearing on a motion to suppress, which resulted in the trial court

granting the motion to suppress. *State v. Reed*, 421 So. 2d 754, 754 (Fla. 4th DCA 1982). The Court explained:

A motion for the suppression of a confession, however, is an extremely important matter having severe repercussions to the losing party, whether the state or accused. For that reason it is imperative that both sides be given fair opportunity to be heard. Only where prejudice will result to the accused should simple neglect or attorney error be sanctioned with the extreme remedy of granting a motion to suppress a confession.

Additionally, in *State v. Humphreys*, 867 So. 2d 596 (Fla. 2d DCA 2004), the Second District Court of Appeal reversed after the trial court refused to continue a hearing on a motion to suppress, which also resulted in the trial court granting the motion to suppress. In *Humphreys*, subpoenas for the arresting officers were never served and the officers failed to appear. *Id.* at 597. The State moved to continue, however counsel for Humphreys objected on the basis that he had driven from Tampa to Dade City for the hearing. *Id.* The lower court denied the State's motion for continuance. *Id.* The Second District Court of Appeal reversed, finding the trial court failed to take into consideration the four factors set forth in *Geralds* before denying the continuance. *Id.* The Court also explained that there was no indication that Humphreys would have been prejudiced by the continuance. *Id.*

The record in the instant case establishes that the State satisfied the requirements set forth by the Florida Supreme Court in *Geralds* to receive a continuance: (1) the State was diligent in its efforts to secure Deputy Doss' attendance at trial – she was under subpoena and the State was in constant contact with her on June 6, 2008, regarding her estimated time of arrival; (2) Deputy Doss was the arresting officer and the State's only witness – without her testimony the State could not proceed with the hearing on the Motion to Suppress; (3) Deputy Doss was en route to the Orange County Courthouse in anticipation of testifying at the hearing; and (4) the trial judge's denial of the State's Motion to Continue was tantamount to a dismissal of the case.

