

No. 1-09-2482

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. TP 233 309
)	
MARSHALL LORENZO,)	Honorable
)	Ann O'Donnell,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion when it denied the State's motion for a continuance and then proceeded to trial without the State's participation.

¶ 2 After defendant Marshall Lorenzo was charged with several traffic violations, he filed a written jury demand and the matter proceeded to a jury trial. However, on the day of trial, the State indicated that it could not proceed due to the absence of a material witness and moved for a continuance. The trial court denied the State's motion, requested a written jury waiver, and instructed the State to call its first witness. The State instead moved for a continuance, indicated

that it was not ready to proceed, and stated that it would not participate in a "sham trial."

Ultimately, the court granted defendant's motion for a directed verdict. The State now appeals, contending that the trial court abused its discretion when it denied the motion for a continuance and proceeded to trial over the State's objection. We reverse and remand.

¶ 3 After a March 6, 2008 incident, defendant was charged by uniform citation and complaint with driving under the influence of alcohol, operating a motor vehicle without a seatbelt, speeding, and operating a motor vehicle without headlights. He appeared before the court represented by private counsel and indicated that he would be exercising his right to a jury trial. The matter was then continued several times.

¶ 4 On October 20, 2008, the State indicated that it was not ready for trial because a witness was unavailable. Defendant answered ready and filed a written demand for trial. The matter was continued on the State's motion. On the next court date, the matter was again continued on the State's motion.

¶ 5 On January 8, 2009, defendant answered ready and demanded trial. However, the State indicated that it was not ready. The case was then set for a jury trial on March 4, 2009. On that date, both parties answered ready. However, the trial was not held because no courtroom was available and the matter was continued, by order of court, to March 23, 2009.

¶ 6 On the next court date, defendant answered ready for trial. However, the State indicated that it was not ready to proceed. Defense counsel objected. The parties then calculated that the "term date" would be Sunday, March 29, 2009, and the State requested that the case be continued until Monday, March 30. See 725 ILCS 5/103-5(b) (West 2008) (a person on bail shall, absent certain exceptions, be tried within 160 days from the date the person demands trial). The defense again objected to any continuance.

¶ 7 The State then explained that it was not ready for trial because its material witness, the officer, was not in court and the State could not proceed without him. The court denied the motion for a continuance. A recess was then taken so that the Assistant State's Attorney (ASA) could speak to a supervisor. After the recess the following exchange took place:

"[ASA]: The State is answering not ready for trial today. The State is—the only motion that the State has is [a] Motion for a Continuance.

THE COURT: Denied. Call your first witness.

[ASA]: The State would not be sustaining [sic] trial. The State is not ready.

THE COURT: We are *** going to call it. Written executed Jury Waiver please. You are first on the trial call."

After another recess, the defense made a motion to dismiss the charges against defendant. The court denied the motion and requested defendant's written jury waiver. The court then instructed the State to proceed. The State indicated that it was not ready, was asking for a continuance, and was not "participating in any sham trial." The court denied the motion for a continuance and asked whether the State had any witnesses. The State again indicated that it would not be participating in the trial.

¶ 8 The trial court then stated that it had given the State the opportunity to proceed on its case and to call witnesses in order to prove up its case, but the State had chosen not to call any witnesses. The State clarified by stating that it was not ready for trial and had chosen not to participate. The court then requested any motions and the defense made an oral motion for a directed finding. The court granted the motion as to all charges. When the case was later recalled, defense counsel asked that the court withdraw the directed finding and enter a finding of not guilty instead. The court stated that all charges had been dismissed and the motion for a

directed finding had been granted. The State then filed a motion to reconsider, which the trial court denied. This appeal followed.

¶ 9 Defendant has not filed a brief on appeal. We therefore review the issues under the standards set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

¶ 10 Initially, this court must consider the question of jurisdiction, as, generally, the State may not appeal from a judgment of acquittal. However, pursuant Supreme Court Rule 604(a)(1) (eff. July 1, 2006), the State may appeal from a judgment which has the substantive effect of a dismissal; the fact that the trial court labeled the judgment as an "acquittal" is not controlling. See *People v. Harris*, 222 Ill. App. 3d 1089, 1093 (1991). It appears that the judgment in this case, although labeled as the grant of a motion for a directed finding, was instead "an artifice employed by the trial judge to achieve the result of a dismissal with prejudice for want of prosecution which * * * [the trial court] did not have the authority to order." *People v. Deems*, 81 Ill. 2d 384, 389 (1980); see 725 ILCS 5/114-1(a) (West 2008) (listing reasons that a trial court may grant a defendant's motion to dismiss). Accordingly, because the judgment in this case amounted to an improper dismissal of the charges, the State has the right to appeal pursuant to Supreme Court Rule 604(a)(1), and this court has jurisdiction over the appeal. See *Deems*, 81 Ill. 2d at 390-91; *Harris*, 222 Ill. App. 3d at 1093; see also *People v. Edwards*, 97 Ill. App. 3d 407, 412 (1981) (when the State presented no evidence, no "trial" took place).

¶ 11 The State contends on appeal that the trial court abused its discretion when it denied the State's motion for a continuance based upon the absence of a material witness.

¶ 12 Pursuant to section 114-4(c)(2) of the Code of Criminal Procedure of 1963 (the Code), the State may move for a continuance when "[a] material witness is unavailable and the prosecution will be prejudiced by the absence of his testimony." 725 ILCS 5/114-4(c)(2) (West

2008). The decision whether or not to grant a continuance is a matter within the sound discretion of the trial court; a reviewing court will not disturb that decision absent an abuse of that discretion. *People v. Walker*, 232 Ill. 2d 113, 125 (2009); see also 725 ILCS 5/114-4(e) (West 2008) ("[a]ll motions for continuance are addressed to the discretion of the trial court and shall be considered in the light of the diligence shown on the part of the movant"). Factors to consider when determining whether to grant a continuance include the moving party's diligence, the defendant's right to a speedy, fair, and impartial trial, and the interests of justice. *Walker*, 232 Ill. 2d at 125.

¶ 13 Here, the State moved for a continuance on the basis of the absence of a material witness. Despite the State's indication that it was not ready to proceed and would not participate at trial, the court denied the motion for a continuance without stating a reason, proceeded to a bench trial at which the State presented no evidence, and ultimately entered a directed finding in favor of defendant. Although the matter was near the end of the 160-day term commenced by defendant's trial demand, approximately a week remained, and both parties had answered ready on the previous date, it was only the lack of a courtroom that had prevented a trial. In this case the trial court abused its discretion when it denied the State's motion for a continuance without exercising its discretion to consider the diligence of the parties and whether the continuance best served the interests of justice, *i.e.* the court did not consider the circumstances of the case at the time of the State's request. See *People v. Norris*, 214 Ill. 2d 92, 105 (2005) (not even a speedy trial demand prevents the court from granting the State a continuance when it believes that good cause exists for the continuance).

¶ 14 *People v. Harris*, 222 Ill. App. 3d 1089 (1991), is instructive. In that case, which concerned three consolidated appeals, the State moved for a continuance on the day of trial on the basis of the unavailability of material witnesses. In each case, although the trial court denied

the motion and ordered that the matter proceed to trial, the State stood on its motion and presented no evidence. Ultimately, a judgment of acquittal was entered in each case.

¶ 15 On appeal, the court recognized that the decision to grant or deny a continuance was within the discretion of the trial court, and that the diligence shown by the moving party is considered when analyzing the exercise of the court's discretion. *Harris*, 222 Ill. App. 3d at 1094. However, the trial court's decision depends upon the facts and circumstance at the time of the request. *Harris*, 222 Ill. App. 3d at 1095. In other words, the provisions of section 114-4 of the Code are not to be applied mechanically; rather, they should be construed " 'to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the State to a speedy, fair and impartial trial.' " *Harris*, 222 Ill. App. 3d at 1095, quoting Ill. Rev. Stat. 1989, ch. 38, par. 114-4(h).

¶ 16 Turning to the cases at issue, the court noted that although the State filed written motions for a continuance supported by affidavits, in each case, the trial court found the motions insufficient due to a lack of information about the proposed testimony and the State's efforts to produce the absent witness. *Harris*, 222 Ill. App. 3d at 1095. However, as section 114-4 did not specify that this information must be contained in a motion for a continuance, it was an abuse of discretion for a trial court to deny the motions solely on that basis. *Harris*, 222 Ill. App. 3d at 1095. The court then indicated that even if it were to determine that there was no abuse of discretion in the denial of the motions for a continuance, the court would still reverse and remand those cases when, although each of the defendants was "acquitted" by the trial court after the State refused to participate at trial, those "acquittals" were in effect dismissals for want of prosecution, and section 114-1 of the Code does not list dismissal for a want of prosecution as a statutory ground for a dismissal of the charges against a defendant. *Harris*, 222 Ill. App. 3d at 1095-96, citing Ill. Rev. Stat. 1989, ch. 38, par. 114-1.

¶ 17 Similarly, here, the trial court denied the State's motion for a continuance and proceeded to a bench trial although the State indicated that it was not ready for trial due to the absence of a material witness and would not participate. The court's denial of the motion, without a consideration of the particular facts and circumstances of the case, including that the State had been ready to proceed at the last court date, the case had been continued on the court's motion, and the absence of a material witness, was a failure to exercise the court's discretion, and, therefore must be reversed. *Walker*, 232 Ill. 2d at 126.

¶ 18 Due to our disposition of this case, we must now address whether double jeopardy bars retrial of defendant. However, we find no double jeopardy concerns because jeopardy never attached. Although jeopardy attaches when the first witness is sworn in and the court begins to hear evidence (*Deems*, 81 Ill. 2d at 389), in this case no witnesses testified and no evidence was presented, therefore, the proceeding conducted by the trial court was not, in fact, a "trial." See *Edwards*, 97 Ill. App. 3d at 411-12 (when the State presented no evidence, no "trial" took place and the defendant was not exposed to jeopardy, "single or double"). As our supreme court has explained, jeopardy does not attach under these circumstances because the "defendant was at no time * * * in danger of being found guilty of any offense." See *Deems*, 81 Ill. 2d at 390.

¶ 19 For the reasons stated above, the judgment of the circuit court is reversed and this case remanded for further proceedings not inconsistent with this order.

¶ 20 Reversed and remanded.