

2014 IL App (1st) 133434-U
No. 1-13-3434
October 7, 2014

SECOND DIVISION

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Plaintiff-Appellant,)	Of Cook County.
v.)	No. 12 MC 4006785
RAY COFFEY,)	The Honorable
Defendant-Appellee.)	Ann Finley Collins,
	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion when it denied the State's first request for a continuance when the complaining witness was present in court on all required court dates and on the day of trial the first two times the case was called, but was not in court in the afternoon the third time the case was called.

¶ 2 On November 20, 2012, Forest Park Police filed a complaint against Ray Coffey, the defendant, charging him with battery. When the trial court called the case for trial, the State could not present its complaining witness. The State then orally made its first motion to continue the trial to a later date. The trial court denied the State's motion, proceeded with the

trial, and found the defendant not guilty. We find that the trial court abused its discretion when it denied the State's first motion for a continuance, granted Coffey's motion for a directed verdict, and found the defendant not guilty. Therefore, we reverse and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4

On November 20, 2012, Forest Park police filed a complaint against Coffey charging him with the battery of Lori McDaniel. From the first court date in December 2012 until the trial on October 22, 2013, the trial court granted a total of eight continuances. Coffey was granted seven continuances and the parties agreed upon the eighth. McDaniel, the complaining witness, appeared in court on all of the required court dates.

¶ 5

The court scheduled the trial for October 22, 2013, and McDaniel was present in court on that date. The court called and briefly passed the case, waiting for Coffey's lawyer to arrive. The court called the case again at 10:00 am and both parties answered ready for trial, but the case was passed for trial a second time. The court called the case a third time at 12:04 pm, but the State could not find McDaniel. The State moved to continue, but its oral motion for a continuance was denied on the grounds that McDaniel disregarded a court order to attend trial by leaving before the trial began.

¶ 6

Coffey signed a jury waiver, plead not guilty, and the trial court proceeded with the trial in McDaniel's absence. When the court requested pretrial motions, the State informed the court that it was not answering ready for trial and that it was not participating in the trial. The court proceeded with the trial and asked the State to call its first witness. The State responded that it would not call any witnesses. The court then asked defense counsel if he had a motion,

and counsel moved for a directed verdict. The court granted the motion and entered an order finding the defendant not guilty. The State now appeals.

¶ 7

ANALYSIS

¶ 8

The State contends that the trial court erred when it denied the State's motion for a continuance, conducted a "sham" trial, granted the defendant's motion for a directed verdict, and entered an order finding the defendant not guilty. This case presents two questions for this court to review: (1) whether the appellate court has jurisdiction to consider the State's appeal from the trial court's order granting the defendant's motion for a directed verdict of not guilty, and 2) whether the trial court erred when it denied the State's motion for a continuance. Although Coffey, the appellee, has not filed a brief in this court, we may proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Constr. Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 9

Appellate Court Jurisdiction

¶ 10

The threshold question we must address is whether the Appellate Court has jurisdiction to hear the State's appeal. *In re Estate of Gagliardo*, 391 Ill. App. 3d 343, 349 (2009). Appellate courts have an independent duty to determine if they have jurisdiction to hear an appeal after a trial on the merits in a criminal case. *See* Ill. Const. 1970, Art. VI §16. Generally, the state may not appeal from a judgment of acquittal. *See also People v. VanCleve*, 89 Ill. 2d 298, 307 (1982) (the Supreme Court held that the Illinois Constitution made judgments of acquittal nonappealable). A court order granting a motion to direct a verdict is an acquittal. *People v. Poe*, 121 Ill. App. 3d 457, 462 (1984). However, Rule 604(a) prescribes when the state can appeal and it provides "in criminal cases the State may appeal only from an order or

judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963," (Criminal Code). Ill. S. Ct. R 604(a)(1) (eff. Feb. 6, 2013).

¶ 11 Here, the trial court granted the defendant's motion for a directed verdict and found the defendant not guilty. While a finding of not guilty is not one of the grounds delineated for appeal in Section 114-1 of the Code, Illinois courts have allowed the state to appeal from a judgment which has the substantive effect of a dismissal, even if the ground for the dismissal is not enumerated in Section 114-1 of the Criminal Code. See *People v. Lawson*, 67 Ill. 2d 449, 455 (1977); see also *People v. Verstat*, 112 Ill. App. 3d 90, 96 (1983).

¶ 12 The *Lawson* court reasoned that:

"*People v. Love* (1968), [citation], has made clear that section 114-1 is not the only basis on which the People must rely when it appeals from a dismissal of an indictment by the trial court. The intent of Rule 604(a) [citation] 'was not to reduce the State's Attorney's right of appeal (from a dismissal) to only the ten grounds set forth in the statute [citation], but to include within that right those instances whereby the substantive effect of the judgment would be the dismissal of the indictment, information or complaint.' [Citation.] In other words, the grounds for dismissing an indictment under section 114-1 *are not exclusive*." (Emphasis added.) *Lawson*, 67 Ill. 2d at 455-56.

¶ 13 Case law teaches us that the appellate court has jurisdiction to consider the State's appeal from any dismissal, provided that a remand to trial would not violate double jeopardy protections. See *Martinez v. Illinois*, 134 S. Ct. 2070, 2077 (2014) (where the United State's

Supreme Court held that the State's appeal of an acquittal cannot be heard when jeopardy has already attached); *Lawson*, 67 Ill. 2d at 455-56.

¶ 14 The fact that a trial court labels a judgment an acquittal will not control in determining whether the judgment is, in fact, a nonappealable acquittal or an appealable dismissal. *People v. Deems*, 81 Ill. 2d 384, 388-90 (1980); *People v. Harris*, 222 Ill. App. 3d 1089, 1093 (1991). A judgment becomes a nonappealable acquittal only when there is a risk of a determination of guilt. *Deems*, 81 Ill. 2d at 388-90.

¶ 15 Therefore, the appellate court has jurisdiction to review the State's appeal if Coffey's remand for a second trial will not violate the double jeopardy protections of the United States and the Illinois Constitutions. See U.S. Const., amend. V; Ill. Const. 1970, art. I, §10; *Martinez*, 134 S. Ct. at 2077; *Lawson*, 67 Ill. 2d at 455-56. The first step in a determination of whether a second trial would violate a defendant's right to avoid double jeopardy is to determine whether jeopardy attached in the first proceeding. *People v. Bellmyer*, 199 Ill. 2d 529, 537-38 (2002). Jeopardy attaches in a bench trial "when the first witness is sworn and the court begins to hear evidence." *Deems*, 81 Ill. 2d at 389 (citing *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977)).

¶ 16 In *Deems*, the Illinois Supreme Court held that the state's appeal from the trial court's acquittal of the defendant did not violate double jeopardy protections as jeopardy had not attached because only the defendant, who did not testify, had been sworn in, no evidence was introduced and the defendant was in no danger of a guilty verdict. *Deems*, 81 Ill. 2d at 390.

¶ 17 In the present case, because no witnesses were sworn in and the court heard no evidence, Coffey was never in danger of receiving a guilty verdict. Therefore, we find that jeopardy

never attached. *See Martinez*, 134 S. Ct. at 2077; *Lawson*, 67 Ill. 2d at 455-56; *Deems*, 81 Ill. 2d at 390. Moreover, because Coffey was never placed in jeopardy in the first proceeding, a remand for a second trial would not subject him to double jeopardy. *See Martinez*, 134 S. Ct. at 2077; *Lawson*, 67 Ill. 2d at 455-56. Accordingly, following *Martinez* and *Lawson*, we find that this court has jurisdiction to consider the State's appeal. *See Martinez*, 134 S. Ct. at 2077; *Lawson*, 67 Ill. 2d at 455-56.

¶ 18 The State's Motion to Continue

¶ 19 Next, we address whether the trial court abused its discretion when it denied the State's motion to continue. The decision whether to grant or deny a request for a continuance is a matter within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Ward*, 154 Ill. 2d 272, 307 (1992). Whether a court has abused its discretion depends upon the facts and circumstances of each case. *People v. Walker*, 232 Ill. 2d 113, 125 (2009).

¶ 20 The Illinois Supreme Court established that the following as factors to consider in determining whether the trial court abused its discretion: (1) the moving party's diligence, (2) the defendant's right to a speedy, fair and impartial trial, and (3) the interests of justice. *Walker*, 232 Ill. 2d at 125; *People v. Segoviano*, 189 Ill. 2d 228, 245 (2000).

¶ 21 Diligence

¶ 22 We find that *People v. Peruscini* provides useful guidance in assessing the State's diligence in the instant case. *Peruscini*, 188 Ill. App. 3d 803 (1989). In *Peruscini*, the trial court rescheduled a trial from August 9, 1988 to August 16, 1988. *Peruscini*, 188 Ill. App. 3d at 805. The state answered ready for trial on August 16, 1988, and the court set the case for

trial that afternoon. *Peruscini*, 188 Ill. App. 3d at 805. When the court called the case at 1:30 pm on August 16, 1988, the state requested a continuance because the officer who witnessed the offense was unavailable. *Peruscini*, 188 Ill. App. 3d at 805. The trial court denied the motion for a continuance and dismissed the charge. *Peruscini*, 188 Ill. App. 3d at 805-06.

¶ 23 The *Peruscini* court explained that the defendant had requested the first continuance and that the state appeared with its witness and was ready for trial on the original trial date of August 8, 1988. *Peruscini*, 188 Ill. App. 3d at 807. The *Peruscini* court found that the state had diligently prosecuted the cause, and held that the trial court had abused its discretion by denying the state's second motion for a continuance. *Peruscini*, 188 Ill. App. 3d at 807.

¶ 24 We believe that the facts in *Peruscini* are similar to the facts in the present case. The trial court granted all seven of Coffey's requests for continuances. The State made only one request for a continuance, prior to its request on the day of trial, and the other continuance was by agreement of the parties. In addition, the State's witness was ready to testify on all the prior court dates. Therefore, following *Peruscini*, where there was an oral motion for a continuance, we find that the State was diligent in prosecuting its case against Coffey.

¶ 25 Speedy, Fair and Impartial Trial

¶ 26 Under Section 103–5(b) of the Illinois Code of Criminal Procedure, if a person is released on bail or recognizance, he shall be tried within 160 days of his demand for trial unless, among other exceptions, delay is occasioned by the defendant. 725 ILCS 5/103-5(b) (West 2014). Further, "not even a speedy trial demand prevents a trial judge from granting the State a continuance if the judge believes that good cause exists for it." *People v. Norris*, 214 Ill. 2d 92, 105 (2005).

¶ 27 In the present case, for ten months after Coffey's release on an I-bond, he made seven requests for continuances, which extended the term for a speedy trial. *See People v. Lewis*, 52 Ill. App. 3d 477, 481 (1977) (where the appellate court held that the defendant's own delay caused the 160-day statutory period to run anew). The State did not request a continuance during the ten month period, but its oral, emergency motion to continue to secure an unavailable witness on the day of trial substantially complied with the rules of criminal procedure. 725 ILCS 5/114-4(c)(2) (West 2013); see also *Peruscini*, 188 Ill. App. 3d at 807. When the State requested its continuance, a substantial amount of time remained on the 160-day term in order to timely prosecute the defendant. Therefore, with time remaining on Coffey's term, the trial court would not have denied Coffey a speedy trial if the court had granted the State's request for a continuance.

¶ 28 Interests of Justice

¶ 29 Finally, we consider whether denying the request for a continuance served the interests of justice. *Walker*, 232 Ill. 2d at 125. In *Walker*, the trial court denied the defendant's request for a continuance when there was no previous request for a continuance, except agreed continuances, and when there was no pattern of delay by the defendant. *Walker*, 232 Ill. 2d at 126. The defense in *Walker* requested a continuance for lack of preparation for trial due to miscalendaring the trial date and other trials. *Walker*, 232 Ill. 2d at 126. The trial court denied the request and proceeded with the trial. *Walker*, 232 Ill. 2d at 126-27. The *Walker* court considered the following, among other things, as evidence that denying the continuance did not serve the interests of justice: 1) the trial court had not afforded the movant the opportunity to inform the court of how long a continuance was sought; 2) the trial court had

not considered the fact that a bench trial is more easily rescheduled than a jury trial; and 3) the trial court had not considered the fact that the state did not make an objection to defense counsel's request for a continuance. *Walker*, 232 Ill. 2d at 127-28.

¶ 30 Although the *Walker* court analyzed a request for a continuance made by the defendant, the facts are similar; therefore, we apply the same rules to the facts in the present case. The State in the instant case, like the defendant in *Walker*, was not given the opportunity to indicate the length of its continuance, which the Illinois Supreme Court has noted is important to a court's consideration of a continuance request. *Walker*, 232 Ill. 2d at 127 (citing *People v. Childress*, 276 Ill. App. 3d 402, 413 (1995) (where the appellate court found reversible error when the trial court, among other things, failed to ask counsel how long a continuance would be needed). In addition, Coffey requested a bench trial, which would have been relevant to the court's ruling, as it is more easily rescheduled than a jury trial, thus minimizing the inconvenience of the parties. *Walker*, 232 Ill. 2d at 127. Finally, Coffey did not object to the State's request for a continuance. Under these circumstances, we cannot see how the State's motion to continue the case would, in any way, thwart the interests of justice. Accordingly, we find that the trial court's denial of the State's motion to continue did not serve the interests of justice and was an abuse of its discretion.

¶ 31 CONCLUSION

¶ 32 We find that the trial court abused its discretion when it denied the State's first request for a continuance when the complaining witness was present in court on all required court dates and on the day of trial the first two times the case was called, but was not in court in the afternoon the third time the case was called.

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¶ 33 Accordingly, the judgment of the circuit court of Cook County is reversed and the cause is remanded for further proceedings.

¶ 34 Reversed and remanded.