

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87005

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

ANTHONY CARINGI

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-463037

BEFORE: Sweeney, J., Dyke, A.J., and Calabrese, J.

RELEASED: November 9, 2006

JOURNALIZED:

[Cite as *State v. Caring*, 2006-Ohio-5937.]

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[Cite as *State v. Caring*, 2006-Ohio-5937.]
JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from the trial court's order dismissing the indictment against defendant-appellee, Anthony Caringi, with prejudice and order sealing the record. For the reasons that follow, we reverse and remand.

{¶ 2} The state's sole assignment of error states:

{¶ 3} "I. The trial court erred in dismissing the indictment with prejudice and sealing the record."

{¶ 4} The scant record establishes that appellee was indicted for carrying a concealed weapon. The trial court granted a continuance of the trial date at the state's request due to the unavailability of the arresting officers. When the state sought a second continuance on the same basis, the trial court dismissed the indictment with prejudice and ordered the record sealed.

{¶ 5} "The court may not dismiss an indictment with prejudice unless it is apparent that the defendant has been denied either a constitutional or statutory right, the violation of which would, in itself, bar prosecution." *State v. Dixon* (1984), 14 Ohio App.3d 396, citing *State v. Sutton* (1979), 64 Ohio App.2d 105; accord *State v. Steel*, Cuyahoga App. No. 85076, 2005-Ohio-2623.

{¶ 6} As was the case in *Steel*, the trial court here did not make a finding that appellee was denied a constitutional or statutory right when it dismissed the charge

against him with prejudice. Accordingly, it was error for the trial court to dismiss the case with prejudice. The state may re-indict.

{¶ 7} The state's sole assignment of error is sustained.

{¶ 8} The trial court is ordered to correct its journal entry to read "dismissed without prejudice." This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

Judgment reversed and remanded.

It is ordered that appellant recover from appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

ANTHONY O. CALABRESE, JR., J., CONCURS
ANN DYKE, A.J., CONCURS IN JUDGMENT ONLY
(See concurring opinion attached.)

ANN DYKE, A.J., CONCURRING IN JUDGMENT ONLY:

{¶ 9} I concur in judgment only. I note that this is only one of several similar cases where the trial court dismissed the case with prejudice where the state's

witnesses failed to appear and the state was not ready to go to trial. See *State v. Johnson*, Cuyahoga App. No.87348, 2006-Ohio-4772 (On the day of trial, the State made an oral motion for a continuance because the alleged victim was not present); *State v. Watson*, Cuyahoga App. No. 87347 , 2006-Ohio-4771 (the police officers involved in the case were not present.)

{¶ 10} In this matter, trial was originally scheduled for June 15, 2005. The state moved for a continuance asserting that the arresting officer would be on vacation on this date. The trial court granted the state's motion and rescheduled the matter to August 15, 2005. On this date, the state again requested a continuance and again asserted that the arresting officer was on vacation. Defendant objected to the state's request. The trial court denied the request, dismissed the indictment with prejudice and ordered the records of the case sealed.

{¶ 11} The parties were given plenty of notice of the impending trial, and having been forewarned, were required to be prepared. Moreover, litigants must make every effort to ensure that they can meet scheduled trial dates. A trial court acts well within its discretion in refusing to grant a continuance in these instances. *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078, syllabus.

{¶ 12} A scheduled trial date is obviously applicable to both parties and invariably impacts both parties. The trial court, as the neutral arbiter of the proceedings, is not required to merely assent to a prosecuting attorney's claim that

the matter must be continued. The court is vested with control over its own docket and has responsibilities to safeguard fundamental rights of the accused.

{¶ 13} Moreover, as the party with the burden of proof the prosecuting attorney must be especially vigilant in meeting scheduled dates. We note that courts have proceeded to seat a jury and require the presentation of evidence even where the prosecuting attorney complains that his witness has not appeared. See *State v. Kubitz* (Feb. 18, 2000), Ottawa App. No. OT-99-061. In that case, defendant was arrested for driving under the influence of alcohol, disorderly conduct, and no operator's license. He pled not guilty, demanded a jury trial and was held in lieu of bond. On the day of trial, the state informed the court that it could not obtain service upon a critical witness. The state continued to locate the missing witness and the trial court seated a jury. The court then denied the state's motion for a continuance and the state moved to dismiss. The court granted the motion to dismiss, but, citing possible double jeopardy and speedy trial issues, would not grant the state leave to refile the case.

{¶ 14} The matter was affirmed on appeal, as the panel noted:

{¶ 15} "The trial date for this case was originally set on July 8, 1999. The state, therefore, had two and one-half weeks to procure attendance of its witness. In our view, it is not unreasonable for a court which has provided adequate notice for a trial to expect all parties to be prepared to go forward with the trial. Since the court's

decision denying a continuance was neither unreasonable, arbitrary nor unconscionable, it did not constitute an abuse of discretion.”

{¶ 16} Parties must remain mindful of the court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice.