

police officer did not have reasonable suspicion to pull over the Defendant for a suspected DUI and also that there was no probable cause to arrest the Defendant.

On December 3, 2012, the Court was prepared to begin the suppression hearing and the non-jury trial. At the time of the hearing, the Commonwealth informed the Court that a witness for the Suppression Hearing was not present and that additional time would be needed to wait for the witness. After approximately thirty (30) minutes, the Commonwealth orally informed the Court, off the record, that the witness had mixed up dates for the hearing and non-jury trial and they would be requesting a continuance. The Court denied the continuance request and after the Commonwealth did not provide any evidence, granted the Defendant's Suppression Motion.

On December 17, 2012, the Commonwealth filed a Motion to Reconsider Denial of Continuance and Granting of Suppression Motion. The Court initially scheduled the Motion for a hearing, but after scheduling issues with the parties, summarily denied the Motion on January 4, 2013. On the same day the Commonwealth filed a Notice of Appeal with the Superior Court of Pennsylvania. On January 8, 2013, this Court requested a Concise Statement of Matters Complained of on Appeal. The Commonwealth raises one issue, which was whether the Court erred when it denied the Commonwealth's Motion for Continuance of a suppression hearing and granted the suppression motion.

Whether the Commonwealth has waived the issue on appeal of whether this Court abused its discretion in the denial of the Continuance request

The Commonwealth alleges that this Court had erred when it denied the Motion for Continuance. The single issue raised by the Commonwealth, even if found to be true, would not warrant any type of relief. The Commonwealth's entire concise statement states:

Did the Court err when it denied the Commonwealth's Motion for Continuance of a suppression hearing, and granted the suppression motion, when the sole witness, a police officer, failed to appear when he inadvertently entered the incorrect date, December 4, 2012, rather than December 3, 2012, on his schedule and at the time of the hearing was in Philadelphia attending a scheduled medical appointment for a surgical consultation?

As discussed below, the standard for an appellate court to overturn a grant or refusal of a continuance is an "abuse of discretion." An allegation that this Court merely erred would not warrant any appellate court from overturning a decision on a continuance. As such, the Commonwealth may have waived the issue of whether there was an abuse of discretion as they did not raise it in their concise statement. See Pa.R.A.P. 1925(b)(4)(vii). This Court, however, will still address whether there was an abuse of discretion.

Whether the Court abused its discretion when it denied the Commonwealth's Motion for Continuance of a suppression hearing and granted the suppression motion

This Court did not abuse its discretion by denying the Commonwealth's oral motion for a continuance after the time for the suppression hearing and trial were to take place. The Pennsylvania Rules of Criminal Procedures states the following in regards to continuances:

Rule 106. Continuances in Summary and Court Cases

- (A) The court or issuing authority may, in the interests of justice, grant a continuance, on its own motion, or on the motion of either party.
- (B) When the matter is before an issuing authority, the issuing authority shall record on the transcript the identity of the moving party and the reasons for granting or denying the continuance. When the matter is in the court of common plea, the judge shall on the record identify the moving party and state of record the reasons for granting or denying the continuance.
- (C) A motion for continuance on behalf of the defendant shall be made not later than 48 hours before the time set for the trial. A later motion shall be entertained only when the opportunity therefore did not previously exist, or the defendant was not aware of the grounds of the motion, or the interests of justice require it.

Pa.R.Crim.P. 106; Commonwealth v. Micelli, 573 A.2d 606, 607 (Pa. Super. 1990) (stating that factors stated in the statute are in relation to a defense motion but are equally applicable to a prosecution request). “The grant or refusal of a request for a continuance is a matter vested in the sound discretion of the trial court and its decision, to grant or deny the request, will not be reversed by an appellate court in the absence of an abuse of that authority.”⁵ Commonwealth v. Remp, 507 A.2d 345, 347 (Pa. 1986). In evaluating whether there is an abuse of discretion, an appellate court is to consider the nature of the crime and its surrounding circumstances in deciding whether there was an abuse of discretion. Commonwealth v. Scott, 365 A.2d 140 (Pa. 1976). A non-exclusive list of factors created to assist in determining abuse of discretion include: 1) the necessity of the missing witness to strengthen the case; 2) the essentiality of the witness; 3) the diligence exercised to procure his presence at trial; 4) the facts to which he could testify; and 5) the likelihood that he could be produced at the next term of court. See id.

In Micelli, the Commonwealth requested a continuance nine (9) days prior to a DUI trial. Micelli, 573 A.2d at 607 (Pa. Super. 1990). The Commonwealth intended to call an officer at trial, who was unavailable due to reserve duty and who only notified the Commonwealth thirteen (13) days prior to the trial. The trial court denied the continuance finding that the Commonwealth failed to act diligently and wasted valuable court time by not notifying the Court earlier. The Superior Court applied Pa.R.Crim.P. 301,⁶ which states:

- (a) The court may, in the interest of justice, grant a continuance of its own motion, or on the motion of either party. The court shall on the record identify the moving party and state of record the court’s reasons justifying the granting or denial of the continuance.

⁵ “Even *mere error of judgment* does not rise to abuse of discretion by the trial court; it is only where the trial court, in reaching its conclusion, has overridden or misapplied the law, or where judgment is manifestly unreasonable, or the result of prejudice, partiality, bias, or ill will illustrated by the record, that [the trial court] will be found to have abused its discretion.” Kepple v. Fairman Drilling Co., 551 A.2d 226 (Pa. Super. 1988) (emphasis added).

⁶ Pa.R.Crim.P 106 is currently the rule for continuances in summary and court cases. Rule 301 is very similar to the current rule.

- (b) A motion for continuance on behalf of the defendant shall be made not later than forty-eight (48) hours before the time set for the trial. A later motion shall be entertained only when the opportunity therefor did not previously exist, or the defendant was not aware of the grounds for the motion, or the interests of justice require it.

The Superior Court found that subsection (b) was fulfilled as the Commonwealth filed the continuance nine (9) days prior to the trial. Thereafter, the Superior Court evaluated the factors set forth in Scott and found that the continuance should have been granted. Scott, 365 A.2d at 143. The Court specifically cited to the fact that the Commonwealth filed the motion a week earlier and that “the Commonwealth acted diligently and cannot be expected to continually verify the trial date with all of its witnesses.” Micelli, 573 A.2d at 608.

Here, the Court had accommodated the Commonwealth and had waited to begin the suppression hearing and trial while their witness was located. Only after reaching the witness well after the time of the court proceeding was to start did the Commonwealth make an oral motion for a continuance. Therefore, unlike Micelli, the Commonwealth did not comply with Pa.R.Crim.P. 106(C) and did not request the continuance forty-eight (48) hours before trial. Such a continuance should not be treated the same by appellate courts as continuances filed prior to forty-eight (48) hours, as the Pennsylvania Rules of Criminal Procedure distinguish them.

As dictated by the Pennsylvania Rules, a trial court should still entertain a continuance within forty-eight (48) hours “when the opportunity therefore did not previously exist, or the defendant was not aware of the grounds of the motion, or the interests of justice require it.” Pa.R.Crim.P. 106(C). At the case at hand, the Court denied the continuance request as the Commonwealth had wasted valuable court time and did not act diligently. The trial court’s justifications in Micelli are similar to this Court’s; however, they are stronger as the

Commonwealth filed the continuance nine (9) days prior in Micelli and complied with Pa.R.Crim.P. 106. While the Superior Court in Micelli stated that the Commonwealth did act diligently and did not have to verify that witnesses have the correct trial date, this Court still found that the Commonwealth was not diligent in determining that their sole witness was not going to be at the hearing and trial till after they were to start. At some point the Commonwealth needs to be diligent enough to know if their sole witness will be present prior to the start of a proceeding. If the Court abused their discretion in this instance, then it constructively means that the Commonwealth can continue a trial/hearing at any time if their witness/officer failed to appear.

Moreover, all cases that this Court found that do not comply with the forty-eight (48) hour notice were affirmed for denying the continuance. See Commonwealth v. Foreman, 375 A.2d 142 (Pa. Super. 1977) (affirming the denial of a continuance that was made a day before trial); Commonwealth v. Ritchie, 436 A.2d 239 (Pa. Super. 1981) (finding that the trial court did not err in denying a continuance request made the day of trial); Commonwealth v. Waters, 419 A.2d 612 (Pa. Super. 1980) (denial of a continuance on the day of trial); Commonwealth v. Glover, 401 A.2d 779 (Pa. Super. 1979) (determining that a trial court did not abuse its discretion when it denied a continuance right before trial). While all these cases are distinguishable from the facts here, some had defendants that filed a continuance so that they could have added time to obtain witnesses. As Pa.R.Crim.P. 106 is applied equally to defendants and the Commonwealth, this Court did not abuse its discretion in refusing to give favorable treatment to the Commonwealth than it would have a defendant.

The Commonwealth will argue that the Defendant had received continuances in the past. These motions, however, were done in a timely manner and due to the nature of those

proceedings were easily continued with minimal prejudice to either party. The Commonwealth was not timely in their continuance request and due to the length of the proceedings and the Court's schedule, would have resulted in a prejudicial three (3) to four (4) month delay for the Defendant. In addition, the Court continued the beginning of the proceeding as the Commonwealth searched for their witness. The Court accommodated the Commonwealth as much as possible for the circumstances and did not abuse its discretion when requested to continue the entire proceeding after it was scheduled to take place.

DATE: _____

By the Court,

Nancy L. Butts, President Judge

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