

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: April 28, 2017 4:49 PM FILING ID: 8290123F7EEC1 CASE NUMBER: 2016CA1963</p>
<p>THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellant,</p> <p>v.</p> <p>FLOYD JOSEPH SENETTE, Defendant-Appellee.</p>	
<p>Appeal from the District Court, El Paso County, Colorado Case No. 16CR1229, Division 17 Honorable Jann Patrice DuBois, District Court Judge</p>	<p>▲ COURT USE ONLY ▲ Case No.: 16CA1963</p>
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<p align="center">PEOPLE'S OPENING BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R.32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 4,177 words.

The brief complies with C.A.R. 28(b).

For each issue raised by the appellant, it contains, under a separate heading placed before the discussion of the issue, a statement of whether the appellee agrees with the appellant's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Tanya A. Karimi

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STATEMENT OF THE ISSUE

The People presented multiple reasons to the district court for granting a continuance of the trial date, including unavailability of a material witness, due diligence in making that witness available for trial, reasonable grounds the witness could be made available, and an alternative to dismissal. Did the district court abuse its discretion when it ignored these reasons and dismissed Defendant's case?

STATEMENT OF THE CASE

On April 27, 2016 Defendant entered not guilty pleas to felony charges of aggravated robbery and menacing, and the district court set the matter for jury trial on October 11, 2016. See R. CF, p. 13. On October 7, 2016, during a pre-trial hearing on the matter, the prosecutor announced she was conditionally ready for trial and explained that the lead witness in the case, the victim, was under personal service, but had been nonresponsive. See R. Tr. (10/07/16), p. 2, ll. 15–16 and p. 6, ll. 14–21. The prosecutor stated she could not proceed to trial without the victim as a witness, and informed the district court that if the witness did not appear the following Tuesday for trial, the prosecutor intended to ask for both a bench warrant and a continuance of the trial. See R. Tr. (10/07/16), p. 2, ll. 18–20 and p. 7, ll. 14–16.

On the morning of the scheduled jury trial, October 11, 2017 at 8:30am, the prosecutor informed the court that the lead witness was not present. See R. Tr. (10/11/17), p. 1, ll. 8–15. The prosecutor again stated that the witness was personally served. See R. Tr. (10/11/17), p. 1, l. 11. The prosecutor explained that a District Attorney Investigator had spoken to the witness, and the investigator’s opinion was that the witness was waffling on whether to come to court. See R. Tr. (10/11/17), p. 2, ll. 16–20. The prosecutor further related that representatives of the District Attorney’s Office had been to the witness’s house, left messages for the witness, and tried to get the witness to come to the District Attorney’s Office and meet. See R. Tr. (10/11/17), p. 2–3, ll. 21–4.

Counsel for Defendant moved to dismiss the case, arguing the witness was not cooperative with both prosecution and defense investigative efforts, and that there was no indication the witness would show up that morning for trial because she was waffling and didn’t want to come. See R. Tr. (10/11/16), p. 3, ll. 6–17. Defense counsel further represented that the case was 168 days into speedy trial, and there was only the following week left on speedy. See R. Tr. (10/11/16), p. 3, ll. 14–15. The prosecution argued there was an available trial date within speedy on October 17. See R. Tr. (10/11/16), p. 3, ll. 18–19. The prosecution noted there was a strong likelihood that the five trials set that date would not be proceeding,

and asked the Court to continue the trial to the October 17 date. See R. Tr. (10/11/16), p. 3–4, ll. 19–2. The prosecution, after giving the Court the return of service on the witness’s subpoena, asked for a bench warrant, and asked the Court to continue the trial to October 17 to see if the witness could be picked up on the warrant. See R. Tr. (10/11/16), p. 4, ll. 2–7; R. CF, p. 36. The prosecutor stated that the District Attorney’s Office knew where the witness worked and where the witness lived. See R. Tr. (10/11/16), p. 4, ll. 16–17.

The court noted that the witness was subpoenaed for 8:30 a.m., and the current time was 8:50 p.m. See R. Tr. (10/11/16), p. 4, ll. 18–20. The court stated it had no indication from the prosecution that the witness intended to cooperate, and that the defendant had been in custody for a substantial period of time. See R. Tr. (10/11/16), p. 5, ll. 1–3. The court concluded that unless the witness was present in the next ten minutes, it would dismiss the case. See R. Tr. (10/11/16), p. 5, ll. 3–4.

The court re-called the case 10 minutes later. See R. Tr. (10/11/16), p. 5, l. 7. The prosecution stated the witness was not responding to attempts to contact the witness, and that ten minutes was not enough time for an investigator to go to the witness’s home. See R. Tr. (10/11/16), p. 5, ll. 12–23. The court then dismissed

the case with prejudice. See R. Tr. (10/11/16), p. 5, ll. 24–25 and p. 6, ll. 16–17; R. CF, p. 37.

SUMMARY OF ARGUMENT

The district court abused its discretion in granting Defendant’s motion to dismiss and thereby denied both the People’s motion to continue due to an unavailable, material witness and the People’s request for a bench warrant for that witness. Colorado case law addressing motions to continue due to an unavailable witness identifies several factors, including due diligence, reasonable grounds to believe a witness can be made available, and alternatives short of dismissal, as factors a court should consider in evaluating a motion to continue. The district court failed to address any of these well-established factors. Instead, it focused on the cooperativeness of the witness rather than the due diligence the People had exercised to make the witness available. The People, by evidencing personal service on the witness and further efforts to contact and communicate with the witness, demonstrated due diligence warranting a continuance. The People, by requesting a bench warrant for the witness and representing that they knew where the witness could be found, demonstrated reasonable grounds that the witness could be made available, which warranted a continuance. And the People, by requesting a new trial date that did not affect Defendant’s speedy trial right,

proposed an alternative short of dismissal, which warranted a continuance. The People provided the district court with ample reasons demonstrating good cause for a continuance. The district court abused its discretion by ignoring those reasons and granting Defendant's motion to dismiss.

ARGUMENT

I. The People presented multiple reasons to the district court for granting a continuance of the trial date, including unavailability of a material witness, due diligence in making that witness available for trial, reasonable grounds the witness could be made available, and an alternative to dismissal. The district court abused its discretion when it ignored these reasons and dismissed Defendant's case.

A. Preservation and Standard of Review.

A court reviews a decision to dismiss a case for abuse of discretion. See People v. Storlie, 327 P.3d 243, 246 (Colo. 2014) (applying abuse of discretion standard to district court's denial of prosecution's motion to dismiss). Further, the district court, by granting Defendant's motion to dismiss, implicitly denied the prosecution's motion for continuance, and a court reviews a ruling on a motion for continuance for abuse of discretion. See People v. Crow, 789 P.2d

1104, 1106 (Colo. 1990); see also People v. Scialabba, 55 P.3d 207, 209 (Colo. App. 2002).

This issue was preserved by the People’s arguments during a pre-trial hearing on October 7, 2016 and the morning of the scheduled trial on October 11, 2016. The People asked to continue the trial, and requested a bench warrant for a duly subpoenaed trial witness, while Defendant moved to dismiss the case. See R. Tr. (10/11/16), p. 2–3, ll. 8–17 and p. 4, ll. 1–7. The district court’s order granting Defendant’s motion to dismiss is found in the transcript of the October 11, 2016 hearing at p. 5, ll. 24–25 and p. 6, ll. 16–17.

B. The Court abused its discretion by not considering as factors the People’s due diligence in making a witness available, reasonable grounds to believe a witness could be made available, and alternatives short of dismissal.

A court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. See Crow, 789 P.2d at 1106. The determination of whether a court has abused its discretion in denying a motion for continuance requires evaluation of the circumstances confronting the court at the time the motion is made, “particularly the reasons ‘presented to the trial judge at the time the request is denied.’” Id. (quoting People v. Hampton, 758 P.2d 1344, 1354 (Colo. 1988)). The reasons the People gave to the district court at the time they

requested continuance of Defendant's trial were multiple: that a material witness was unavailable for trial; that the People made diligent efforts—via personal service of a subpoena and repeated attempts to contact the witness— to make the witness available; that the court should issue a bench warrant; that the People knew where the witness lived and worked; and that the court could reschedule the trial within Defendant's six month speedy trial limit. These reasons, as Colorado case law demonstrates, provided the district court with ample good cause to continue the trial.

In this case, the People's trial witness was unavailable, as the witness did not appear in court the morning of trial. Further, the witness was material. The People informed the district court that the witness was the victim, and the People could not proceed to trial without the witness's testimony. See People v. Roberts, 146 P.3d 589, 593 (Colo. 2006) (finding material evidence means consequential and not merely relevant evidence).

Colorado case law addresses continuances due to the unavailability of a witness in two contexts: motions to continue an evidentiary hearing and motions to continue a trial beyond a speedy trial deadline pursuant to § 18-1-405(6)(g)(I), C.R.S. See Crow, 789 P.2d at 1105–06 (analyzing a continuance of a motions hearing); People v. Bakari, 780 P.2d 1089, 1092–93 (Colo. 1989) (analyzing

continuance of a suppression hearing). And see Roberts, 146 P.3d at 591–96 (analyzing application of § 18-1-405(6)(g)(I), C.R.S.); Sweet v. Myers, 200 Colo. 50, 612 P.2d 75, 77–78 (1980) (analyzing application of § 18-1-405(6)(g)(I), C.R.S.); see also § 18-1-405(6)(g)(I), C.R.S. 2016.

In general, and as applied to evidentiary hearings, “when the asserted reason for [a] continuance is the absence of a witness, a trial court properly may consider whether the party requesting the continuance has exercised due diligence in attempting to secure the presence of the witness.” Crow, 789 P.2d at 1106. When a prosecutor, due to an unavailable witness, moves to continue a trial beyond a defendant’s six-month speedy trial deadline, a statutory exclusion, § 18-1-405(6)(g)(I), C.R.S applies, and a prosecutor must demonstrate not only that the witness is unavailable, but also that the witness is material, that they exercised due diligence in making the witness available, and that that there are reasonable grounds to believe the witness will be available. See § 18-1-405(6)(g)(I), C.R.S. 2016; Crow, 612 P.2d at 77–78. Here, the People did not request a continuance of the trial date beyond Defendant’s speedy trial deadline. Nonetheless, § 18-1-405(6)(g)(I), C.R.S. and related case law is instructive as to the factors relevant in concluding whether there is good cause to continue a trial date when a witness is unavailable.

Both contexts—evidentiary hearing and trial continuances—evaluate the due diligence of a party’s efforts in making a witness available. See Crow, 789 P.2d at 1105–06; Sweet, 612 P.2d at 77–78 (Colo. 1980). A trial continuance that impacts a defendant’s right to a speedy trial must also consider whether there are reasonable grounds to believe the witness will be available. See People v. Valles, 2013 COA 84, ¶¶ 37–39. Additionally, where any continuance is at issue, a court should consider the harsh consequences of dismissal, the public interest in prompt disposition of a case, and available alternatives. See Bakari, 780 P.2d at 1092–93.

These three factors, due diligence, reasonable grounds, and available alternatives, were not considered by the district court in ruling on Defendant’s motion to dismiss. The district court, instead, found that the unavailable witness was uncooperative and that Defendant had been in custody for a substantial period of time. These findings failed to address well recognized factors for determining good cause for a continuance. Failure to even consider or properly evaluate these factors was an abuse of discretion. And if the district court had considered and evaluated these factors, the People presented ample reasons to warrant a continuance of the trial date.

1. The People exercised due diligence in securing the material witness's availability at trial, and the district court's failure to consider the People's due diligence was an abuse of discretion.

When the prosecution moves to continue a court date due to an unavailable witness, a court should examine whether the prosecution has exercised due diligence in attempting to make that witness available. See Crow, 789 P.2d at 1106; see also People v. Stanchieff, 862 P.2d 988, 990 (Colo. App. 1993); Gallagher v. County Court, 759 P.2d 859, 860 (Colo. App. 1988).

Here, the People exercised due diligence because they personally served the witness with a subpoena. The achievement of personal service alone sufficiently demonstrates due diligence. Case law heavily implies this by examining first, if there was a duly served subpoena, and then, if not, what other efforts by the prosecution satisfy due diligence. See Crow, 789 P.2d at 1105–07; Bakari, 780 P.2d at 1089–93; Valles, 2013 COA 84 ¶¶ 37–39; Scialabba, 55 P.3d at 209.

Case law addressing due diligence concerns instances where the prosecution, either negligently failed to subpoena a witness or where, because the witness was cooperative or the witness's location was unknown, the prosecution chose not to initially subpoena a witness. See Bakarai, 780 P.2d at 1090 (prosecutor failed to subpoena an officer for a hearing); Scialabba, 55 P.3d at 209 (prosecutor chose not

to subpoena a cooperative witness); People v. Wolfe, 9 P.3d 1137, 1142–43 (Colo. App. 1999) (prosecutor chose not to personally serve a subpoena on cooperative witnesses who lived out of state); Mosley v. People, 2017 CO 20 ¶¶ 35–39 (prosecutor was unable to personally serve a subpoena on an out of state witness who was not located until one week before a pre trial conference).

The factual circumstances addressed by case law concern instances where there is no personal service of a subpoena, and analysis, therefore, focuses on what efforts by the prosecution can satisfy due diligence where there is no duly served subpoena. See Crow, 789 P.2d at 1105–07 (analyzing the difference between a prosecutor’s failure to make any efforts to contact a non-subpoenaed officer and another prosecutor’s satisfactory due diligence in contacting non-subpoenaed officers at home). Efforts that demonstrate due diligence may include keeping in contact with a witness. See Roberts, 146 P.3d at 589 (demonstrating regular contact with a pregnant witness and knowing when the witness will be available showed due diligence); Scialabba, 55 P.3d at 209 (same); see also Valles, 2013 COA 84 ¶¶ 37–39 (demonstrating regular contact with a deployed witness, his family and his chain of command showed due diligence). They may also include efforts to locate a witness. See Mosley, 2017 CO 20, ¶¶ 35–39 (locating witness one week prior to pre trial hearing showed due diligence); Marquez v. District

Court In and For Tenth Judicial District, 200 Colo. 55, 613 P.2d 1302, 1304 (1980) (implying investigator's affidavit about attempts to locate the witness sufficient to demonstrate the factor of due diligence).

The prosecution fails to show due diligence where it only offers the bare allegation that a witness is unavailable. See Sweet, 612 P.2d at 77–78; see also Stanchieff, 862 P.2d at 989–90 (mailing a subpoena and doing nothing more was insufficient to show due diligence); Gallagher, 759 P.2d at 860–61 (informing the court the witness was on vacation without further explaining the failure to secure the witness's presence was insufficient to show due diligence).

The People in this matter exceeded standards for demonstrating due diligence. Not only did they personally serve the trial witness with a subpoena, but they also made repeated efforts to contact, communicate with, and provide transportation for the witness, similar to efforts highlighted in case law. See Bakari, 780 P. 2d at 1092–93 (attempts to contact witnesses who were inadvertently not subpoenaed); Wolfe, 9 P.3d at 1141–42 (efforts to make flight arrangements with uncooperative witnesses). In addition to knowing her home address, the People also knew the witness's work address. Cf. Valles, 2013 COA 84, ¶¶ 37–39 (finding contacts with witness's chain of command showed due diligence).

The district court made no finding as to the People's due diligence in making the witness available for trial. The district court did make a finding as to the witness's cooperativeness. But the cooperativeness is relevant to the types of efforts that demonstrate due diligence when a witness is not subpoenaed. If an unavailable witness is cooperative and not subpoenaed, the People should remain in contact with the witness and communicate with the witness to make them available for an upcoming court date. See Valles, 2013 COA 84, ¶¶ 37–39; Scialabba, 55 P.3d at 209. If a witness is non-cooperative and not subpoenaed, the People should make efforts to duly subpoena the witness. See Mosley, 2017 CO 20, ¶¶ 35–39; Wolfe, 9 P.3d at 1141–42. If a witness is personally served a subpoena, the witness's cooperativeness does not affect her availability because a court now has authority to compel her to appear. See Crim. P. 17(h) and discussion infra. The district court's finding regarding the cooperativeness of the witness is irrelevant to the People's due diligence, because they served the witness with a subpoena.

Case law regarding motions to continue based on the unavailability of a witness examines a party's due diligence in making a witness available. The district court failed in this matter to make any findings on or evaluation of due diligence. And the People's evidence of personal service and representations of

continual efforts to contact the witness demonstrated a more than sufficient showing of due diligence. In light of these reasons given by the People in support of a continuance, the district court abused its discretion in failing to grant the continuance and in dismissing Defendant's case.

2. The People provided reasonable grounds to believe the material witness would be made available, and the district court's failure to grant the People's request for a bench warrant and to consider those grounds was an abuse of discretion.

When the prosecution seeks continuance of a trial due to an unavailable witness, a court may examine not only whether the prosecution has exercised due diligence in attempting to make that witness available, but also whether there are reasonable grounds to believe that this evidence will be available at the later date. See Marquez, 613 P.2d at 1304; People v. Trujillo, 2014 COA 72, ¶¶ 23–24. This examination of reasonable grounds applies in the context of motions to continue a trial beyond a six-month speedy deadline pursuant to § 18-1-405(6)(g)(I), C.R.S. The People did not seek to apply that statutory exclusion in this case. Nonetheless, the statute does provide guidance as to an additional factor available to a court in its determination of good cause for a continuance.

Here, the People presented to the district court reasonable grounds that the witness could be made available by showing proof of a personally served subpoena, requesting a bench warrant, and knowing locations where the warrant could be executed—the witness’s home and work addresses. Yet the district court never ruled on the People’s request for a bench warrant, and implicitly denied the request by granting Defendant’s motion to dismiss. The district court’s refusal to issue a bench warrant was an arbitrary refusal to enforce the Rules of Criminal Procedure. A court must issue a bench warrant for a witness who, without adequate excuse, fails to appear on a duly served trial subpoena. See Crim. P. 17(h). The district court had no evidence of an adequate excuse for the witness’s absence, and pursuant to 17(h) was required to issue the warrant. Id. The district court’s failure to issue the bench warrant was an arbitrary decision and an abuse of discretion.

The district court’s finding that the witness was uncooperative is not an adequate excuse for the witness’s absence, and that finding does not negate the People’s offered grounds to believe that the witness would be available for trial. As discussed supra, the cooperativeness of a witness is not determinative of due diligence and it is also not determinative of whether a witness will be available for trial, because the focus of the relevant inquiry is on the availability of the witness

and whether tools exist to make that witness available. The cooperation of a witness is a tool that can be used to make a witness available. See Valles, 2013 COA 84, ¶¶ 40–43. When a witness is uncooperative, other tools—such as personal service or interstate subpoenas—must be used to make the witness available. See Mosley, 2017 CO 20, ¶¶ 35–39; Wolfe, 9 P.3d at 1141– 42. Here, the People used the tools of personal service and a request for a warrant.

The district court failed to consider the reasonable grounds presented by the People that the witness could be made available, and the district court thwarted the People’s ability to make the witness available by not granting the request for a bench warrant. Both failures were an abuse of discretion by the district court.

3. The People provided an alternative to dismissal, and dismissal by the district court was a drastic remedy and abuse of discretion.

When ruling on a motion for a continuance by the prosecution, a court must consider the harsh consequences of dismissal, the public interest in prompt disposition of the case, and the available alternatives. See Bakari, 780 P.2d at 1092–93. In Bakari, the prosecution asked to continue a motions hearing due to an unavailable witness. Id. After finding the prosecution had exercised due diligence, the Colorado Supreme Court went on to find that the court’s failure to grant the

continuance effectively dismissed the case and that this was a harsh sanction in light of the fact that the prosecution had offered an alternative motions hearing date that would not affect the trial date and consequently, defendant's right to a speedy trial. Id.

In weighing the interests of the prosecution, the defendant, and the public, the Colorado Supreme Court took into account not only the requests of the parties, but also the public interest in prompt disposition of the case and the paramount importance of whether granting a continuance will affect a defendant's right to a speedy trial. Id. (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: SPEEDY TRIAL Standard 12–1.3 (2d ed.) (currently at Standard 12–4.5 (4th ed. 2006))); see also Roberts, 146 P.3d at 593 (citing the ABA Standard). The continuance requested by the prosecution in Bakari did not extend the scheduled trial date and did not affect the defendant's speedy trial right. See Bakari 780 P.2d at 1092–93. This fact was a key distinction in the Colorado Supreme Court's decision that dismissal was a harsh and unwarranted consequence. Id.

Here, the district court weighed the effect of the People's requested continuance on Defendant. The other reason the district court gave for granting Defendant's motion to dismiss was that Defendant had been in custody a substantial amount of time. Defendant entered his not guilty plea on April 27,

2016. Consequently, his speedy trial deadline was October 27, 2016. See § 18-1-405(1), C.R.S. 2016. On October 11, 2016, the date the People requested the continuance, Defendant had 16 more days left on speedy trial. And the People requested a new trial date, October 17, which would have only extended Defendant's wait by 6 days, leaving 10 days still on speedy trial. The People's requested continuance, although it lengthened Defendant's wait for a trial, and consequently his time in custody, was a request for a short continuance of mere days, and the request did not affect Defendant's speedy trial right. The district court failed to consider the alternative the People proposed and failed to weigh the People's request and the harshness of the outcome along with Defendant's interests.

“Dismissal of charges is recognized as ‘a drastic remedy to be reserved for situations where no other sanction will attain the proper result.’” Bakari, 780 P.2d at 1091 (quoting People v. Holloway, 649 P.2d 318, 320 (Colo. 1982)). The district court had other options short of dismissal: resetting the trial within speedy; applying the § 18-1-405(6)(g)(I) exclusion in the speedy trial statute; reducing Defendant's bond. Although, not argued by the People, that these last two options existed, illustrates the harshness of the district court's decision to dismiss. Because dismissal is a drastic remedy, and because the People proposed an alternative to

dismissal that did not affect Defendant's right to a speedy trial, the district court's dismissal of the case was an abuse of discretion.

CONCLUSION

For the reasons stated above, the People pray the Court reverse the order of the district court and reinstate all charges against Defendant.

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CERTIFICATE OF SERVICE

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