

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
DWAYNE DONALD DIAZ,  
Respondent.

No. 34976

**FILED**

JUN 15 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court granting respondent's motion to dismiss.

Respondent was originally charged by criminal complaint with felony driving under the influence. The case was set for preliminary hearing in justice's court on January 20, 1998. On that date, the Highway Patrol trooper who arrested respondent did not appear. The prosecutor did not move to continue because he was unsure whether the trooper had been subpoenaed. The justice's court granted respondent's motion to dismiss. Twenty minutes after the complaint was dismissed, the trooper arrived and confirmed that he had been subpoenaed, but had been unexpectedly detained in a traffic accident investigation.

The State subsequently sought and obtained an indictment from the grand jury. Respondent moved to dismiss the indictment, arguing that a second prosecution was barred. See, e.g., Sheriff v. Blackmore, 99 Nev. 827, 829, 673 P.2d 137, 138 (1983) ("where the magistrate properly dismisses the criminal proceeding at the preliminary examination, and the prosecution has acted in a willful or consciously indifferent manner, further prosecution is barred"). After hearing argument on the motion, the district court granted the motion

to dismiss, without making any specific findings as to whether the prosecutor's behavior demonstrated willful failure to comply with procedural rules or conscious indifference to procedural rules.

We conclude that, based on the facts in this case, there is no evidence that the prosecutor willfully failed to comply with procedural rules or acted with conscious indifference. In particular, we note that the trooper was subpoenaed, and the prosecutor was surprised by the trooper's absence at the preliminary hearing. See *Bustos v. Sheriff*, 87 Nev. 622, 491 P.2d 1279 (1971) (there is no prosecutorial abuse where a subpoenaed witness is unexpectedly absent at the preliminary hearing). We therefore conclude that the motion to dismiss was improperly granted. Accordingly, we reverse the order of the district court granting respondent's motion to dismiss, and we remand this matter for further proceedings.

It is so ORDERED.

<u>Young</u> Young	J.
<u>Agosti</u> Agosti	J.
<u>Leavitt</u> Leavitt	J.

cc: Hon. Steven P. Elliott, District Judge  
Attorney General  
Washoe County District Attorney  
Marc P. Picker  
Washoe County Clerk