

IN THE SUPREME COURT OF THE STATE OF NEVADA

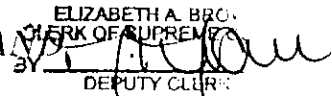
THE STATE OF NEVADA.
Appellant.
vs.
DUY DUOC TRINH.
Respondent.

No. 88669

FILED

MAY 29 2025

ORDER OF REVERSAL AND REMAND

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

This is an appeal from a district court order granting a motion to dismiss a criminal indictment for prohibited prosecution. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

The State filed a criminal complaint charging respondent Duy Duoc Trinh with first-degree kidnapping of a minor, luring children or mentally ill persons with the intent to engage in sexual conduct, and child abuse, neglect, or endangerment. Trinh's preliminary hearing was originally scheduled for September 20, 2023, however, after two continuance requests from Trinh, the hearing was rescheduled to January 3, 2024. Due to the assigned prosecutor's request for an unrelated criminal trial to be rescheduled for the same day, the State requested to continue the January 3 hearing, which the justice court granted. Subsequently, the district court granted Trinh's pretrial petition for a writ of habeas corpus and dismissed the case due to the "unnecessary delay," finding that the State, without good cause, was unprepared to present its case at the preliminary hearing.

Thereafter, the State brought the case before a grand jury which returned a true bill on all three counts. The State filed an indictment

that mirrored the three counts in the dismissed complaint. Trinh filed a motion to dismiss the case for prohibited prosecution, which the district court granted. It found that the prosecutor showed conscious indifference to Trinh's procedural rights by not identifying the preliminary hearing as a conflict before rescheduling the other trial in the unrelated case. It concluded that the State failed to comply with the procedural requirements of *Hill* and *Bustos*, as it neither filed a sworn affidavit nor provided sworn testimony in support of the continuance in justice court. *Hill v. Sheriff*, 85 Nev. 234, 452 P.2d 918 (1969) (holding that the State must support a motion to continue a preliminary hearing on the basis of witness unavailability with a sworn affidavit demonstrating good cause); *Bustos v. Sheriff*, 87 Nev. 622, 491 P.2d 1279 (1971) (recognizing that the State can meet its *Hill* burden with sworn testimony when the witness's unavailability is a surprise). The State appeals.

The State was permitted to seek an indictment after the complaint was dismissed

"A new proceeding for the same offense (whether by complaint, indictment or information) is not allowable when the original proceeding has been dismissed due to the willful failure of the prosecutor to comply with important procedural rules." *Maes v. Sheriff*, 86 Nev. 317, 319, 468 P.2d 332, 333 (1970). We review a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008). We agree with the Court of Appeals that an abuse of discretion standard of review likewise applies to a justice court's determination of good cause to extend the date of a preliminary hearing beyond the 15-day timeframe in NRS 171.196(2). *Chittenden v. Just. Ct. of Pahrump Twp.*, 140 Nev., Adv. Op. 5, 544 P.3d 919, 927 (Ct. App. 2024).

The State argues that the district court's conscious indifference finding lacks substantial supporting evidence because (1) it requested this continuance after Trinh had already requested two continuances, (2) it promptly informed defense counsel of the conflict a week before the scheduled preliminary hearing, and (3) it was unable to arrange for substitute counsel to cover the hearing because Trinh did not object until the day before the hearing and the nature of the case is sensitive. Thus, this case boils down to whether the State acted with conscious indifference to Trinh's procedural rights when it rescheduled the unrelated trial on the same day as Trinh's January preliminary hearing and failed to provide an affidavit or sworn testimony to show good cause for its request to continue Trinh's preliminary hearing. *State v. Austin*, 87 Nev. 81, 83, 482 P.2d 284, 285 (1971) (observing that *Maes* applies in cases where the State has demonstrated a "conscious indifference to rules of procedure affecting a defendant's rights"); see *McNair v. Sheriff*, 89 Nev. 434, 438, 514 P.2d 1175, 1177 (1973) (applying the *Hill* and *Bustos* requirements where a prosecutor orally requested a continuance without providing any reason for their request); *Reason v. Sheriff*, 94 Nev. 300, 301, 579 P.2d 781, 782 (1978) (applying the *Hill* and *Bustos* requirements where the prosecutor argued a continuance was needed because the defendant did not arrange to have the physical evidence of their alleged crime available at the hearing). "Conscious indifference is a factual determination." *State v. Lamb*, 97 Nev. 609, 611, 637 P.3d 1201, 1202 (1981), which will not be disturbed if supported by substantial evidence. *State v. Croft*, No. 87193, 2024 WL 3841753, at *1 (Nev. Aug. 14, 2024) (Order of Reversal and Remand) (citing *Sheriff v. Roylance*, 110 Nev. 334, 337, 871 P.2d 359, 361 (1994)).

We conclude that substantial evidence does not support the district court's finding of conscious indifference to Trinh's procedural rights. While the prosecutor may have been negligent in rescheduling the trial in the other case in conflict with Trinh's preliminary hearing, no evidence supports the proposition that the State acted with conscious indifference, which requires conduct that is not merely dilatory, but a dereliction of duties or a complete failure to comply with a procedural rule. *See e.g., Austin*, 87 Nev. at 82-83, 482 P.2d at 284-85 (affirming lower court dismissal of proceedings where the evidence showed the State was derelict in its duties, including that the magistrate had granted three prior continuances due to the State being "unprepared to proceed (by reason of such wanton omissions as failure to subpoena witnesses)," but denied the State's fourth continuance request based on its vague suggestion that it needed more time because it was inexplicably "unable to locate" certain physical evidence that should have been in its possession"); *McNair*, 89 Nev. at 440-41, 514 P.2d at 1178-79 (concluding the State was consciously indifferent to the defendant's rights because it was unprepared for the preliminary hearing and moved for a continuance without stating the grounds for the continuance, submitting an affidavit, or offering sworn testimony); *see also Watson v. Sheriff*, 93 Nev. 236, 237-38, 562 P.2d 1133, 1133 (1977) (concluding that the prosecutor demonstrated indifference to the defendant's rights where he engaged in outrageous behavior resulting in delay of the case, including allowing the case to languish for over nine months due to animosity between the prosecutor and the magistrate); *cf. Roylance*, 110 Nev. at 337, 871 P.2d at 361 (concluding substantial evidence did not support the district court's finding of willfulness or conscious indifference to the defendant's rights where the State subpoenaed a witness

who failed to appear and the State complied with *Bustos* by offering testimony that the witness was sick); *Lamb*, 97 Nev. at 611, 637 P.2d at 1202-03 (concluding the prosecution's failure to subpoena percipient witnesses in a murder case and failure to seek a continuance in accordance with *Hill* were not significant enough to support the determination that the State was consciously indifferent to procedural rules affecting the defendant's rights).

Here, on the same day that the assigned prosecutor learned of the rescheduled trial date in the other matter, over a week before the scheduled preliminary hearing, he communicated with Trinh's counsel about the conflict, asking that Trinh stipulate to continue the matter. Trinh's attorney failed to communicate to the State that Trinh would be opposing the continuance until the day before the preliminary hearing, after the prosecutor informed the justice court that the State was seeking to continue the hearing. At that point, the State no longer had sufficient time to prepare another attorney for the preliminary hearing, which the State explained in opposing Trinh's motion to dismiss. While the district court was correct in concluding that the State failed to meet the procedural requirements of *Hill* and *Bustos*, the prosecutor stated on the record the State's nondilatory reason for the request and its effort to seek agreement from Trinh's attorney in advance, and the record supports the proposition that the justice court did not see the use in swearing in the prosecutor. Indeed, there was no dispute that the trial in the other matter was set to begin within the hour and it would be impossible to do the preliminary hearing and the trial at the same time.

Because the justice court accepted as good faith reasons the representations of the prosecutor, an officer of the court, including the

undisputed fact that the prosecutor had another trial, it would not be a practical application of *Hill* and *Bustos* to prevent the State from proceeding on the indictment against Trinh after the dismissal of the original complaint based on the State's failure to provide sworn testimony regarding an undisputed and firm conflict. *Sheriff v. Terpstra*, 111 Nev. 860, 862, 899 P.2d 548, 550 (1995) (noting *Hill* and *Bustos* apply firmly and consistently, but also realistically). Moreover, while Trinh argues there was prejudice from his continued incarceration resulting from the delayed preliminary hearing, the facts presented here nevertheless do not demonstrate that the State acted with conscious indifference to rules of procedure affecting his rights as required to warrant dismissal of the indictment. *Bustos*, 87 Nev. at 624, 491 P.2d at 1280 ("A prosecutor should be prepared to present his case to the magistrate at the time scheduled or show good cause for his inability to do so."). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Pickering J.
Pickering

Cadish J.
Cadish

Lee J.
Lee

cc: Hon. Erika D. Ballou, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk