

STATE OF VERMONT
ORLEANS COUNTY, SS

STATE OF VERMONT	*	DISTRICT COURT OF VERMONT
	*	UNIT #3 ORLEANS CIRCUIT
v.	*	DOCKET NO. 816-12-11 Oscr
	*	
	*	
CHRISTOPHER BRAITHWAITE	*	
	*	

State's Response to Defendant's Motion to Dismiss with Prejudice

NOW COMES Sarah A. Baker, Orleans County Deputy State's Attorney, and responds to the Defendant's Motion to Dismiss with Prejudice as follows.

This matter was scheduled for a pretrial conference on November 28, 2012 and a jury draw was conducted the following day. At that point the State was prepared to go forward and had witnesses to prove that the Defendant, Christopher Braithwaite, violated the 33 V.S.A. § 3705(a), unlawful trespass to land.

On November 29, 2012, the day of the jury draw, the Defendant suggested that it may have documentary evidence that Green Mountain Power had in fact given the Defendant permission to be in the property. This had not been a defense asserted by the Defendant prior to the jury draw. A jury was selected and the jury trial was scheduled for December 13, 2012.

Green Mountain Power, as the victim in this case, has communicated to the State's Attorney's office that it would support the State in its decision to prosecute or to dismiss the case against this Defendant. Green Mountain Power would provide any witness needed for the trial. The State also had law enforcement personnel prepared to testify.

After the jury draw, on the day of November 29, 2012, the State received confidential and non-confidential documents that had been subpoenaed by the Defendant from Green Mountain Power. The State did not have those documents in its possession, nor was it aware of them.

The Defendant filed a Motion to Dismiss on December 4, 2012. Documents referred to in Defendant's motion that had been received from Green Mountain Power would not have

made it impossible for the State to obtain a finding of guilty, but it would have made it more unlikely without the testimony of the unavailable State witness, David Coriell.

The State filed a Notice of Dismissal without prejudice on December 5, 2012 because the State, in order to rebut the Defendant's newly asserted defense, would need to call a witness that was not available.

The State has made the decision to dismiss the case before a jury trial because of the unavailability of a rebuttal witness. The State would have less than two weeks to locate a witness that it was not planning to call. This particular witness is out of state and bringing him back to Vermont on the day the jury trial was scheduled would have been more burdensome on that witness than the State's interest in a conviction on a misdemeanor trespass charge with a defendant with no prior record and a defendant that is unlikely to reoffend. A lot of State time and resources have been used already to prepare for the scheduled jury trial. There has been no bad faith by the State in pursuing this matter or making the determination to dismiss prior to the jury trial.

Pursuant to Vermont Rules of Criminal Procedure, Rule 48, the "attorney for the state may file a written dismissal of an . . . information and the prosecution shall thereupon terminate." V.R.Cr.P. 48(a). The court may dismiss a matter with prejudice, but that would not be appropriate in this case. See V.R.Cr.P. 48(b)(2). In *State v. Jones*, the Vermont Supreme Court has stated that "the sanction of dismissal with prejudice should be used only 'sparingly[.]'" *State v. Jones*, 157 Vt.553, 559 (1991)(quoting *State v. Wells*, 443 A.2d 60, 64 (Me. 1982)).

In *State v. Snide*, the Vermont Supreme Court took up the issue of "[w]hether or not [a] defendant is entitled to have his case dismissed with prejudice upon a failure of the prosecution to go forward with the trial once the jury had been selected . . . " *State v. Snide*, 144 Vt. 436, 439 (1984). The Court determined that the dismissal by the lower court without prejudice was proper and not an abuse of discretion when the prosecutor informed the court on the day of the trial that he was unprepared to go forward because a witness had not been located and he had not opened the file. *Id.* 438-440.

This matter had been pending for almost a year at the time of the State's Notice of Dismissal; the State has not requested a continuance at any point. A dismissal without prejudice by the State is appropriate in this matter because jeopardy had not yet attached – the jury had not yet been sworn. See *State v. Snide*, 144 Vt. 436, 440 (1984); reporters notes V.R.Cr.P. 48.

WHEREFORE, for the reasons as set forth above the State requests that this Court not dismiss the Unlawful Trespass matter with prejudice.

DATED at Newport, Vermont this 20th day of December, 2012.

Respectfully submitted,

A handwritten signature in cursive script, reading "Sarah A. Baker", is written over a horizontal line.

Sarah A. Baker
Deputy State's Attorney
Orleans County

cc. Philip H. White, Esq.