

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION

STATE OF NORTH CAROLINA,  
Plaintiff,

v.

Defendant,

**BRIEF IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS –  
DUE PROCESS CLAUSE VIOLATION**

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FACTS

The Defendant was originally charged with DWI on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. On that day the State took the Defendant into custody. He was released subject to certain terms and conditions by the Magistrate, however he was compelled to appear in Court or be subject to further criminal and civil penalties.

After several court dates, the State moved to continue the case again and was denied by the Court. The State then dismissed the case.

After the Courts ruling, and the State's dismissal, the Defendant was re-charged with the DWI, and was again compelled to appear under penalty of law, and again had to miss work and expend resources in defending a case which the Court had denied the State additional time to gain a tactical advantage.

POINT I

**THE CASE MUST BE DISMISSED BECAUSE  
THE DEFENDANT'S DUE PROCESS RIGHTS  
WERE VIOLATED BY BEING RECHARGED  
FOR AN INCIDENT PREVIOUSLY DISMISSED  
DUE TO THE STATE'S FAILURE TO PROSECUTE**

The State has violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by circumventing the Court's prior ruling that the case could not be continued by using a "loose" reading of a statutory provision which was designed to prevent this very type of occurrence.

The United States Supreme Court has been clear and unequivocal concerning the prohibition of delaying prosecution for tactical advantage. *U.S. v. Lovasco*, 431 U.S. 783 (1977); *U.S. v. Marion*, 404 U.S. 307 (1971). In both cases, the Supreme Court stated that any intentional delay by the prosecution to gain a tactical advantage or to harass a defendant is impermissible and violative of the defendant's due process rights. *Id*, *Lovasco*, 431 U.S. at 796; *Marion*, 404 U.S. at 324. In addition, several Federal District Courts have prohibited the dismissal and re-charging of a case for tactical advantage. See, *U.S. v. Fields*, 475 F.Supp. 903 (D.D.C. 1979) (holding that the government is not free to indict, dismiss and re-indict solely to achieve a more favorable prosecutorial picture); *U.S. v. Radmall*, 591 F.2d 548 (10th

Cir. 1978) (holding that a tactical delay was to be taken as a minimum standard for a due process violation in that it represents a flagrant example of due process abuse).

In *Marion*, the Court noted that the major evils that the due process clause protected against in cases of inappropriate **tactical delays**, apart from actual or possible prejudice to an effective defense, is the violation of an individual's liberty rights, whether he is free on bail or not. *U.S. v. Marion*, 404 U.S. 307, 320 (1971). Those liberty rights include the right to be free of disruption in his employment, to avoid the draining of his financial resources, curtail his associations, subject him to public humiliation, and create anxiety in him, his family and his friends. *Id.*, at 320; *see also, Klopfer v. North Carolina*, 386 U.S. 213, 221-226 (1967).

The facts of this case show that the prosecutor's only possible motivation for taking a voluntary dismissal in this case was to delay the prosecution of the Defendant long enough to obtain the presence of an unavailable witness and therefore circumvent Judge Davis's ruling denying the State's Motion to Continue. This tactical move is impermissible under the holdings in *Marion* and *Lovasco* as a tactical delay for prosecutorial advantage. Given Judge Davis's ruling on the State's Motion to Continue, the prosecutor was either required to try the case on March 1st, 2007 or dismiss it without leave to recharge. Failure to do so was a clear violation of the Court's order and a flagrant disregard for the Defendant's due process rights. It is important to note that "[t]here need not be a showing of bad faith or malicious intent on the part of the State." *Blackledge v. Perry*, 417 U.S. 21 (1974). The mere fact that the State used the voluntary dismissal as a tactical move to obtain additional time to secure necessary witnesses is sufficient.

Additionally, the Defendant's individual liberty rights were violated by the State's tactical delay in prosecution. He has had to endure continued disruptions from work to deal with this matter. The defense of the subsequent charge has become a drain of his resources, both financial and emotional.

Due Process demands that this matter be dismissed. The defendant is entitled to a speedy and final resolution of the charge, which cannot happen if the State is allowed unlimited continuances by way of a recharge after a voluntary dismissal.

POINT II  
G.S.15A-954 DEMANDS THAT THE MATTER  
BE DISMISSED WITH PREJUDICE

G.S. 15A-954 provides, in pertinent part, that

(a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:

.....

- (3) The defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina.
- (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.....

In the case at bar, the Defendant submits that both of the above are bases upon which the court should grant the Motion to Dismiss in addition to the 14th Amendment to the Constitution.

As previously discussed, the Defendant has been denied a speedy trial. The Court ruled that the State was not entitled to additional time to prepare the case against the defendant.

Additionally, the Defendant's Due Process Rights have been flagrantly violated by the State's action in this matter. To allow the prosecutor to gain an advantage over the defendant, wear down his resources, run up his legal bill, and cause him to miss repeated days from work; to drag a case out in complete disregard of Judge Davis's ruling "is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end?" *State v. Ball*, 163 U.S. 662 (1896). Dismissal of the charge pursuant to G.S. 15A-954 is the only appropriate remedy.

Respectfully submitted this the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

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