THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

APPELLATE DIVISION

ANDREW NAHINU Appellant, v. THE PEOPLE OF THE STATE OF CALIFORNIA Respondent.	Appellate No. APP-12-007317 Court No. 11015661

Appeal from the Judgment of the Superior Court, San Francisco County

Honorable Donna Alyson Little, Judge Presiding

APPELLANT'S OPENING BRIEF

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ISSUE PRESENTED

(1) Did the Court Abuse its Discretion in Finding Good Cause to Continue the Trial Past Appellant's Last Day?

(2) Should the Appellate Court, on *De Novo Review*, Find that Appellant's Right to a Speedy Trial was Violated When Appellant Was Not "Brought to Trial" on November 1, 2011.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of conviction after jury trial which finally disposes of all issues between the parties and is authorized by Penal Code section 1237, subdivision (a). (Cal. Rules of Court, Rule 8.204).

STATEMENT OF THE CASE

The District Attorney of the City and County of San Francisco charged by way of Complaint filed on June 20, 2011, Andrew Puni Nahinu ("Mr. Nahinu" and/or the "Appellant") with: a violation of Penal Code § 23152(A) (Driving under the Influence of Alcohol or Drugs) – Count I; a violation of Penal Code § 23152(B) (Driving while having a 0.08% higher blood alcohol)– Count II. The Complaint also alleged, as to Counts 1& 2, that Mr. Nahinu has one prior conviction on or about July 31, 2002, arising from an arrest on or about April 26, 2002. Mr. Nahinu entered not guilty pleas to all charges and proceeded on a general time waiver. (Clerk's Transcript or "CT" 3). Mr. Nahinu also filed a motion to suppress under California Penal Code section 1538.5 on September 20, 2011 (CT 9).

On September 28, 2011, Mr. Nahinu withdrew his general time waiver and the court set October 28, 2011 as the last day to begin jury trial on this matter (CT 14). On October 14, 2011, the date set for trial, the People declared ready for both the hearing on the motion to suppress and for trial (CT 12). The Defense also declared ready.

The People elected to wait until October 17, 2011, to make a subpoena request for CHP Officer Williams (*See* CT 13, People's Motion to Continue, Declaration). The same day, the People were informed that Officer Williams was scheduled for vacation (*Id.).*

On October 19, 2011, the People learned that Officer Williams was not available for service of the subpoena until November 7, 2011. (*Id.*,Exhibit 1). The same day, the prosecution filed a motion to continue the jury trial past the last day (CT 13). The officer was never served.

On October 21, 2011, the court put the matter over to October 27, 2011, for status of the prosecution's witness and hearing on the prosecution's Motion to Continue (CT 14).

On October 27, 2011, the court found good cause to continue over defense counsel's objection and demand for a speedy trial (*Id.*).

On October 28, 2011, the court continued the matter past the last day over defense counsel's objection and demand for a speedy trial. (*Id.*).

On November 1, 2011, on day after the last day, the Department 17 Judge, Judge Little, ordered the case to Judge Cheng, in Department 12. ***The case however could not be sent to a jury on November 1, 2011 because no jury panel was ordered for November 1, 2011***

(Reporter's Transcript, or "RT" 7:18) (emphasis added). The same day, Defendant moved to dismiss the case for violation of Mr. Nahinu's Speedy Trial Right (Pen. Code §1382). The Defendant again confirmed he was ready for trial (RT 5:16). The Court denied the motion (RT 16-22).

As a result, the case was continued again, ***a second time***, to November 2, 2011, in order to allow for a Jury to be impaneled. Mr. Nahinu renewed the motion to dismiss on November 2, 2011, for failure to impanel a jury by November 1, 2011 (RT 121:28-122:-3). The Court denied the motion but noted that the issue was preserved (RT 122-4:16). Subject to the preservation of the objection, the parties agreed to hear in limine motions and the motion to suppress on November 2, 2011 before the jury was finally impanelled on November 3, 2011.

In denying the renewed motion to dismiss, the Court never addressed in its ruling the issue of why a jury was not impaneled on November 1, 2012. The Court noted that it found good cause on November 2, 2011 not to impanel a jury until November 3, 2011, based on the pending limine motions, 402 hearing, and motion to suppress. (Id.). However, the rationale for continuing the case from November 1, 2012 to November 2, 2012 – and for not impaneling a jury on November 1, 2012 – was never explained.

The Court held the Motion to Suppress Hearing November 2, 2011. The Court found reasonable cause to justify the warrantless detention noting that the evidence was not particularly strong but the standard was only one of reasonable cause. (RT 145).

STATEMENT OF THE FACTS

On June 12, 2011, at about 2:32 a.m., Officer Williams (#19084) of the San Francisco Police Department was southbound on1-280 when he observed a Dodge Charger travelling 150 feet ahead in lane three. The officer observed the vehicle change lanes into lane two order to pass a yellow taxicab. After the lane change, the officer observed the vehicle move within lane two back towards lane three, travel on the lane delineators, and then move back into lane two.

In the officer's own words from the hearing on the Motion to Suppress:

> As I indicated, when I was driving southbound I could see him up ahead on the number three lane. He made a lane change to get around a yellow taxicab into the number two lane. After he made his lane change he began to — he drifted over into the three lane and actually nearly collided into the rear end of the taxi, and then actually corrected himself and then brought himself back into the two lane. And that's why I decided to make the stop.

(RT 129:4-11).

Based on the above observations, the officer chose to detain Mr. Nahinu (*Id.*).

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ARGUMENT

I. THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO A SPEEDY TRIAL

A. THE COURT ANALYZES "GOOD CAUSE" UNDER AN ABUSE OF DISCRETION STANDARD AND APPLIES A DE NOVO STANDARD TO QUESTIONS OF LAW OR MIXED QUESTIONS OF LAW AND FACT THAT IS PREDOMINANTLY LEGAL

The Court articulated the mixed standard of review well in *Brown v. Superior Court* (1987) 206 Cal.App.4th 817,824, as follows:

> If the defendant is not 'brought to trial' within the statutory period, dismissal is required unless the trial court, in the exercise of its discretion, determines that good cause has been demonstrated. [Citations.] In order to avoid dismissal, the prosecution must meet the burden of demonstrating good cause for delay. [Citation.]" (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1197, 117 Cal.Rptr.3d 327, 241 P.3d 828 (*Hajjaj*), first italics added, second italics in original.) Thus, we review a trial court's decision to grant a continuance for good cause for abuse of discretion. (*Hajjaj*, at pp. 1197–1198, 117 Cal.Rptr.3d 327, 241 P.3d 828; *see also Mendez v. Superior Court* (2008) 162 Cal.App.4th 827, 833, 76 Cal.Rptr.3d 538.) However, we apply the nondeferential de novo standard of review to a trial court's resolution of a pure question of law or a mixed question of law and fact that is predominantly legal. (*People v. Waidla* (2000) 22 Cal.4th 690, 730, 94 Cal.Rptr.2d 396, 996 P.2d 46.)

Brown, 206 Cal.App 4th at 824.

Within the first issue on appeal – the violation of Appellant's right to a speedy trial – there are two (2) issues to address: 1) whether or not the trial court had good cause to order the first continuance (from October 28, 2011 to November 1, 2011); and 2) whether or not trial was "in progress" as of the second continuance (from November 1, 2011 to November 2, 2011). The first issue is clearly factual in nature and falls

under the abuse of discretion standard. The second issue is a mixed question of law in fact – predominantly legal in nature – and requires a nondeferential *de novo* standard of review.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING GOOD CAUSE FOR THE FIRST CONTINUANCE PAST THE LAST DAY

Penal Code Section 1382(a)(3)(A) provides:

> The defendant enters a general waiver of the 60-day trial requirement. A general waiver of the 60-day trial requirement entitles the superior court to set or continue a trial date without the sanction of dismissal should the case fail to proceed on the date set for trial. If the defendant, after proper notice to all parties, later withdraws, in open court, his or her waiver in the superior court, the defendant shall be brought to trial within 60 days of the date of that withdrawal. Upon the withdrawal of a general time waiver in open court, a trial date shall be set and all parties shall be properly notified of that date. If a general time waiver is not expressly entered, subparagraph (B) shall apply.

Cal. Pen. § 1382(a)(3)(A).

The right to a speedy trial is a fundamental right secured by the Sixth Amendment to the United States Constitution and is made applicable to the states by the Fourteenth Amendment thereto (*Klopfer v. North Carolina* (1966)386 U.S. 312,323). Article I, section 13 of the California Constitution independently guarantees the right to a speedy trial. In addition, our Legislature has made the provision for "a speedy and public trial" as one of the fundamental rights preserved to a defendant in a criminal action (Pen. Code § 686, subd. 1; *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 88). The function of

this vital constitutional right is "to protect those accused of crime against possible delay, caused either by willful oppression or the neglect of the state or its officers." (*In re Begerow* (1901) 133 Cal. 349,354-355; *Jones v. Superior Court* (1970) 3 Cal.3d 734,738.)

The California Legislature has enacted Penal Code section 1382 in order to implement the constitutional right to a speedy trial (*Rhinehart v. Superior Court* (1984) 35 Cal.3d 772,776). The Legislature has therein prescribed certain time periods beyond which the right to speedy trial is presumed to have been violated. Accordingly, in the absence of a showing of good cause to the contrary, a misdemeanor complaint must be dismissed if the accused is not brought to trial within 30 or 45 days of his arraignment (depending upon his custodial status at the time of arraignment) (Pen. Code § 1382, subd. (a)(3)), or, if he consents to the matter being set for trial beyond that initial period, within 1.0 days of the last date to which he has consented his trial be delayed. (Pen. Code § 1382, subd. (a)(3)(A)).

Violation of the deadlines of Penal Code section 1382 entitles the defendant to a dismissal if good cause for the delay is not shown. (*Sykes v. Superior Court* (1973) 9 Cal.3d 83, 88). Continuance for counsel's convenience due to calendar conflict is not good cause to vitiate 1382; The consent of counsel to a postponement of trial beyond the statutory period, if given solely to resolve a calendar conflict and not to promote the best interests of his client, cannot stand unless supported by the express or implied consent of the client himself (*People v. Johnson* (1980) 26 Cal.3d 557,567).

It was held in *Brown v. Superior Court* (1987) 189 Cal. App. 3d 260, that if the People have waited until the last minute to determine the availability of their witness, then no due diligence may be found if the People discover that

the witness cannot be located or is unavailable. The reason is that if the prosecution had determined the availability of their witness when the trial date was set, an earlier date could have been set which would have protected both the witness' interest and the defendant's right to speedy trial. Brown was followed in *People v. Avila* (2005) 131 Cal. App. 4th 163,170.

As has been recognized in the courts of California for decades, police officer vacations are set well in advance, and that information is readily available to prosecutors who thus can, and should, coordinate trial dates and vacation schedules. (*See Cunningham v. Municipal Court* (1976)62 Cal. App. 3d 153). Such matters must be brought to the court's attention sufficiently in advance of trial to permit reasonable adjustment of the court's calendar. (*See Gaines v. Municipal Court* (1980) 101 Cal. App. 3d 556,560-561).

The defendant's only duties are to object when the date is set beyond the time period, to move to dismiss when the period expires, and, if applicable, to object to the denial of the motion to dismiss to preserve the issue for appeal. The Defendant has taken all of the above steps and not waived the right to a speedy trial and to appeal the denial thereform. (*See People v. Wilson* (1963) 60 Cal.2d 139, 144-145, 146).

Here, the People's scant showing of "due diligence" constituted an affidavit demonstrating that they first attempted to subpoena Officer Williams on October 17, 2011, four (4) days ***after*** they had declared ready for both the hearing on the motion to suppress and trial. Doing so makes a mockery of the Defendant's constitutional right to possible delay caused by willful oppression or neglect of the state of the officers.

Moreover, the only "facts" submitted in the declaration was were hearsay, or at best, facts submitted under "information and belief" that the

declarant had spoken with the CHP Liason who had communicated that Officer Williams both on vacation and had scheduled Drug Recognition Expert (DRE) training during his vacation time. These facts were not submitted upon personal knowledge. The declaration, therefore, on its face, was not competent evidence to support the facts contained therein (*Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204).

At a substance level as well, an officer's scheduled vacation or training is not good cause to continue a hearing (*Cunningham*, 62 Cal. App. 3d at 155-156; *Baustert v.Superior Court* (2005) 129 Cal. App. 4th 1269). In *Cunningham* – just as in the instant case – the appellate court issued a peremptory writ of mandate commanding the trial court to grant the motion to dismiss on account of the fact that "the postponement of the trial of an alleged misdemeanant beyond the period specified in the subdivision over that individual's objection for the sole purpose of serving the convenience of the People's witnesses may not defeat that individual's constitutional right (see Cal. Const., art. I, § 15) to a speedy trial" (*Cunningham*, 62 Cal.App. 3d 153 at 156).

C. THE DEFENDANT WAS NOT "BROUGHT TO TRIAL" AS OF THE SECOND CONTINUANCE BECAUSE NO JURY PANEL HAD BEEN SWORN

The second issue involving the appeal of the denial of the section 1382 motion concerns the trial court's failure to have the matter "brought to trial".

"[T]he swearing of a panel of prospective jurors constitutes bringing a case to trial ... so long as the panel is sworn in as a good

faith start to the jury selection process and not as a mere device to avoid the impact of the statute." (*People v. Amati* (1976) 63 Cal.App.3d Supp. 10, (Amati)); *see also Rhinehart* 35 Cal.3d 772 at 778). Where "the record objectively shows that a case is assigned for trial to a judge who is available to try the case and the court has committed its resources to the trial, the parties answer ready and a panel of prospective jurors is summoned and sworn, the trial process has commenced and [the] defendant has been 'brought to trial' as that term is used in ... section 1382" (*Sanchez v. Municipal Court* (1979) 97 Cal.App.3d 806, 813).

Rhinehart concluded that, on the facts before it, the defendant had not been brought to trial on the date the jury was impaneled because the jury was impaneled in order to avoid dismissal under section 1382 and the trial court was not "available or ready to try the case to conclusion" (*Rhinehart,* 35 Cal.3d at 780).

Here, as of the second continuance, there was not even a pretense of impaneling a jury to avoid dismissal under section 1382. Rather, when agreeing to continue the matter a second time from November 1, 2011 to November 2, 2011, the trial court noted that it had a courtroom, but that no jury was available to be impanelled on November 1, 2011. Rather, on November 1, 2011, the transcript reads in material part:

> THE COURT: . . . We have a judge for you. It's going to Judge Cheng, who is in Department 12. He would like to see you down there, and he will take your case back to the other courthouse tomorrow and have a panel for you. There's a room at the other courthouse.
>
> MR. MITCHELL: So we won't have a jury today.

THE COURT: No panel has been ordered for today.

(RT 7:12-8).

All the jurisprudence as to when a Defendant is "brought to trial" is consistent on the point that a Defendant is "brought to trial" – at the earliest – as soon as jury is impanelled.

Here, even if assuming without conceding that the Court found no abuse of discretion on behalf of the trial court in granting the first continuance, the Court can find only that a speedy trial right violation occurred as of the second continuance, because a jury was not impanelled until the third day after the last day. In short, the improper sequence can be demonstrated in bullet points as follows:

- Defendant's last day was October 28, 2011.
- The trial court found good cause to continue the matter one business day, or until November 1, 2011.
- However, no jury was available for impanelling on November 1, 2011.
- Rather, a jury was first available for impanelling on November 2, 2011.

Judge Cheng ultimately impanelled a jury November 3, 2011 because the Court needed November 2, 2011 to hold hearing on evidence code section 402, motions in limine, and motion to suppress. However, Judge Cheng's good faith basis to impanel a jury on November 3, 2011 instead of November 2, 2011 does not vindicate the section 1382 error that occurred on November 1, 2011, when the trial court was unable to impanel a jury.

D. THE VIOLATION OF APPELLANT'S SPEEDY TRIAL RIGHT TRIAL REQUIRES REVERSAL UNDER *CHAPMAN*

A constitutional error is harmless only when it appears "beyond a reasonable doubt that the error ... did not contribute to the verdict obtained." (*Chapman v. California*, (1967) 386 U.S. 18, 24). As restated in *Neder v. U.S.* (1999) 527 U.S. 1, 18, the reviewing court must answer this central question: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"

There can be no doubt that Appellant suffered irreparable damage. Appellant was denied the right to a speedy trial and was tried in violation of that right.

CONCLUSION

Appellant therefore, respectfully requests that his appeal in this matter be granted.

Respectfully submitted this 24th day of October, 2012.

BELVEDERE LEGAL, APC

Matthew D. Metzger, Attorney for Appellant Andrew Nahinu

CERTIFICATE OF WORD COUNT
(CRC Rule 8.883(b)(1))

I certify that this brief was prepared using 14-point type, Times New Roman typeface, and that the word-count of this brief, excluding the preliminary tables, is 3,231 words and thus below the 6,800 word limit for misdemeanor appeals. Cal Rules of Ct. 8.883(b)(1).

BELVEDERE LEGAL, APC

Matthew D. Metzger, Attorney
for Appellant Andrew Nahinu

PROOF OF SERVICE
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

Action: ANDREW NAHINU V. PEOPLE OF STATE OF CALIFORNIA

Case #: Appellate No. APP-12-007317
Court No. 11015661

I, MATTHEW D. METZGER declare:

I am a citizen of the United States, a resident of Santa Clara County, and am over 18 years of age. I am not a party to the above entitled action. My business address is Belvedere Legal, APC, 605 Market Street, Suite 505, San Francisco, CA 94105

On October 24, 2012, I served the following documents: **Appellant's Opening Brief** upon the interested parties in this action by the methods indicated below:

[X] **BY FIRST CLASS MAIL**: by placing a true copy thereof, enclosed in a sealed envelope, for postage and deposit with the United States Postal Service on the same date it is submitted for mailing, and addressed as follows:

[] **BY PERSONAL DELIVERY**: by causing a true copy thereof to be hand-carried to the recipient at the address indicated:

San Francisco District Attorney's Office Attn: Louise Ogden 850 Bryant St San Francisco, CA 94103	

[ ] **BY FACSIMILE TRANSMISSION**: by faxing a true copy thereof to the recipient at the facsimile number indicated:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 24, 2012 in San Francisco, California.

By: _____
Matthew D. Metzger