

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIAM WHITE,

Defendant-Appellee.

---

UNPUBLISHED

December 18, 1998

No. 209903

Oakland Circuit Court

LC No. 97-152990 FH

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with larceny in a building, MCL 750.360; MSA 28.592. The prosecution appeals as of right the trial court's order of dismissal. We reverse the trial court's order of dismissal and remand for further proceedings.

On the date set for trial in this case, before the seating of a jury, the prosecution informed the court that the complainant was unavailable to testify due to a mental or physical illness or infirmity, as defined in MRE 804(a)(4), and asked that it be allowed to introduce the complainant's preliminary examination testimony at trial under MRE 804(b)(1). The court found that the complainant's preliminary examination testimony was not admissible because the prosecution did not meet its burden of showing the unavailability of the complainant as required under MRE 804(b)(1) and because the prosecution did not exercise due diligence in attempting to obtain the complainant's presence at trial. On defendant's motion, the court dismissed the case without prejudice.

The prosecution first argues that the court erred in requiring due diligence by the prosecution in attempting to procure the complainant's presence at trial. We agree. Under MRE 804(a)(4), when a witness is unavailable due to mental or physical illness, a showing of due diligence in attempting to produce the witness is not required. *People v Gross*, 123 Mich App 467, 470; 332 NW2d 576 (1983).

The prosecution also argues that the court erred in concluding, without conducting an evidentiary hearing, that the prosecution had failed to meet its burden of proving the unavailability of the

complainant, and, therefore, finding that the complainant's preliminary examination testimony was inadmissible.

Pursuant to MRE 804(a)(4), a declarant is "unavailable" if he or she "is unable to be present or to testify at the hearing because of death or *then* existing physical or mental illness or infirmity." On the date set for trial, the prosecutor indicated that the complainant was unavailable to testify at that time because of illness. A detective testified that the manager of the nursing home where the complainant lived indicated that the complainant was unable to testify as a result of her mental condition. Contrary to the trial court's determination, the prosecution sufficiently called into question the complainant's availability to testify and, under these circumstances, the trial court erred by failing to hold an evidentiary hearing to determine whether, in fact, the complainant was unavailable to testify.

The prosecution argues next that the court erred in dismissing its case based on the absence of the complaining witness. The prosecution contends that it had sufficient evidence aside from the testimony of the complainant to prove its case, and that in dismissing its case without regard for whether the prosecution wished to proceed, the court infringed on the prosecutor's charging decision, thereby violating the separation of powers doctrine.

A trial court does not have authority over discharge of the prosecutor's duties except to the extent that the prosecutor's actions are unconstitutional, illegal, or ultra vires. *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995). The record in this case does not suggest that the trial court determined that the prosecution's actions were unconstitutional, illegal, or ultra vires. Moreover, the court did not entertain any arguments with regard to whether the absence of the complainant warranted dismissal, nor did it state that without the complainant's testimony there was no longer probable cause to prosecute defendant. Under these circumstances, the trial court improperly dismissed the case without ascertaining whether the prosecution wished to proceed without the testimony of the complainant.

Reversed and remanded.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald