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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BRACK CONRAD PRITCHARD, *Petitioner,*

v.

THE HONORABLE TINA R. AINLEY, Judge of the SUPERIOR COURT
OF THE STATE OF ARIZONA, in and for the County of YAVAPAI,
Respondent Judge,

STATE OF ARIZONA, *Real Party in Interest.*

No. 1 CA-SA 17-0094
FILED 4-25-2017

Appeal from the Superior Court in Yavapai County
No. P1300CR201501499
The Honorable Tina R. Ainley, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Yavapai County Public Defender's Office, Prescott
By Damon A. Rossi
Counsel for Petitioner

Yavapai County Attorney's Office, Prescott
By Robert J. Johnson
Counsel for Real Party in Interest

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MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Paul J. McMurdie joined.

NORRIS, Judge:

¶1 This special action arises out of an order entered by the superior court dismissing without prejudice two of three counts of an indictment against Petitioner, Brack Conrad Pritchard. Requesting special action relief, Pritchard argues the superior court abused its discretion in dismissing the two counts without prejudice at the request of the Real Party in Interest, the State of Arizona, because the State requested the dismissal solely to avoid “the looming speedy trial deadline.” In dismissing the two counts without prejudice at the State’s request, the superior court did not determine, as required by Arizona Rule of Criminal Procedure 16.6(a), whether the State was requesting the dismissal to avoid the speedy trial provisions of Arizona Rule of Criminal Procedure 8. Because Rule 16.6(a) required the court to make that determination and Pritchard has no remedy by appeal, we accept special action jurisdiction, *State v. Alvarez*, 210 Ariz. 24, 30, ¶ 23, 107 P.3d 350, 356 (App. 2005) (defendant may not appeal order of dismissal without prejudice; appropriate avenue of review is petition for special action), and grant relief, as discussed below.

FACTS AND PROCEDURAL BACKGROUND

¶2 On December 15, 2015, a grand jury indicted Pritchard on three counts: arson of an occupied structure, criminal damage, and possession or use of drug paraphernalia (methamphetamine) (the “2015 case”). Pritchard entered a not guilty plea and, thereafter, the parties exchanged disclosure and participated in other pretrial activities. For reasons not relevant here, the superior court excluded Rule 8 time. *See generally* Ariz. R. Crim. P. 8.4. At a September 12, 2016, pretrial conference, however, Pritchard requested a trial setting. Although the court determined that Pritchard’s Rule 8 time would expire on February 9, 2017, Pritchard agreed to extend his “last day” under Rule 8 to February 23, 2017, the date the court set the 2015 case for trial.

¶3 On December 12, 2016, at a pretrial conference hearing, the court confirmed the February 23, 2017 trial setting. The court also scheduled

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an evidentiary hearing/oral argument for January 31, 2017, to address the parties' pretrial motions.

¶4 On Thursday, January 26, 2017, the prosecutor provided defense counsel with a proposed plea agreement, and explained he would "update the restitution paragraph as soon as I receive more information." Pritchard accepted the proposed plea agreement. That same day, the State, with the concurrence of defense counsel, informed the court the parties had agreed "on a non-trial resolution," moved to vacate the January 31, 2017 evidentiary hearing, and asked the court to set a change of plea/sentencing hearing for January 30, 2017. The court granted the State's request on Friday, January 27, 2017, and scheduled a change of plea/sentencing hearing for January 30, 2017.

¶5 At the January 30, 2017 hearing, the prosecutor informed the court the State was withdrawing the plea agreement because, on Friday, January 27, 2017, he had learned

that there was another investigation completed, not by law enforcement but an independent party, and I need additional time to get a full report from this person and get that disclosed.

In making this statement, the prosecutor was referring to an investigation conducted by a forensic fire examiner retained by the victim's insurance carrier. As represented by the State in subsequent proceedings, the examiner had determined the fire in the victim's home had originated from an intentional act. The State asked the court to continue the trial and then stated that if the court was not willing to continue the trial it would move to dismiss the arson and criminal damage counts without prejudice. Pritchard objected to the continuance and asked that the court confirm the February 23, 2017 trial setting. The superior court rejected Pritchard's objection, vacated the February 23, 2017 trial setting, and rescheduled trial for March 29, 2017. Further, because of court calendar constraints and because Pritchard had filed a motion to suppress which the court had not yet ruled on and which Pritchard was unwilling to withdraw, the court excluded time under Rule 8. The court set an evidentiary hearing on the motion to suppress and on all other pretrial motions for March 7, 2017.

¶6 On February 1, 2017, Pritchard filed a motion asking the court to reconsider the trial continuance. The court scheduled a hearing on Pritchard's motion for February 8, 2017.

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¶7 After discussing the situation with the parties at the February 8, 2017 hearing, and over Pritchard's objections, the court informed the parties that, because of calendar constraints, it would begin trial in the case on February 23, 2017 but only with jury selection with the balance of the trial to be continued to March 29, 2017. Of significance to this special action, the court then informed the parties the State would have to decide which counts it intended to try to the jury:

If they think they can be ready for the arson on the 29th, then we'll pick a jury for the whole thing; if they are not ready, then they can't dismiss without there being prejudice attached.

¶8 In response, the State explained the fire examiner had informed the State he would not be able to provide his report (the "fire evidence") to the State until February 22, 2017 and "obviously that's not going to give anybody enough time." The State then suggested to the court that because of this anticipated late discovery, the court could extend the trial date under Arizona Rule of Criminal Procedure 15.6 which would also allow it to exclude time under Rule 8. *See generally* Ariz. R. Crim. P. 8.4(c) (allowing time to be excluded for delays resulting from extension of time for disclosure under Rule 15.6); Ariz. R. Crim. P. 15.6(e) (authorizing court to grant extension of time to complete scientific evidence/reports unless request for extension results from "dilatatory conduct, neglect, or other improper reason" of the moving party). Pritchard, through counsel, objected to the State's suggestion, asserting the State was not entitled to an extension of time to produce the fire evidence because it had not been diligent in obtaining the information. The court essentially agreed with defense counsel, stating that "because restitution is always going to be an issue," the State was not diligent in waiting until January 2017 to contact the victim about restitution, which led it to discover the fire investigation made by the victim's insurance carrier. The court told the State it was not "comfortable, based on 15.6, [in] excluding time."

¶9 Given the court's comments about the State's diligence and because the State recognized it would not be ready for trial on February 23, 2017, without the fire evidence, the State moved to dismiss the arson and criminal damage counts without prejudice. Pritchard objected to dismissing the two counts without prejudice. The court rejected Pritchard's objection and granted the State's motion to dismiss the arson and criminal damage counts without prejudice. In response to defense counsel's question as to whether the court was "satisfied that the State is moving to dismiss this for some purpose other than to avoid Rule 8," the court responded:

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I believe, based on what the State has already told me . . . that this investigation may be beneficial to the State, it may be beneficial to Mr. Pritchard. I think it's something, whether there's Rule 8 or not, that's important for the State to determine before they move forward with the trial, and I don't think that that necessarily encompasses Rule 8 only. And while I may not be comfortable using that as a basis to continue the overall trial, I think the standards are different enough in these circumstances that this is without prejudice, and I feel comfortable making that dismissal without prejudice.

¶10 After the court dismissed the arson and criminal damage counts, a grand jury re-indicted Pritchard on those counts ("the 2017 case"). Trial in the 2015 case went forward, but only on the possession or use of drug paraphernalia count. A jury convicted Pritchard on that count. Pending this special action, the superior court temporarily stayed trial in the 2017 case.

DISCUSSION

¶11 Rule 16.6 generally concerns the dismissal of a prosecution. Under Rule 16.6(a), the court may dismiss a prosecution on motion of the prosecutor but only under certain circumstances. That rule states:

The court, on motion of the prosecutor showing good cause therefore, may order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8.

¶12 In granting the State's motion to dismiss the arson and criminal damage counts without prejudice, the superior court did not directly address the good cause requirement of Rule 16.6(a). And, given its doubts regarding the lack of diligence shown by the State in learning about the fire evidence, it is not clear the court would have found good cause. Further, and more importantly, the court did not make a finding as to whether the State was seeking dismissal to avoid the provisions of Rule 8, as Rule 16.6(a) requires (court may order dismissal of prosecution on prosecutor's motion "upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8"). Although at the February 8, 2017 hearing defense counsel asked the court whether it was "satisfied" as to

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whether the State was moving to dismiss for some purpose other than to avoid Rule 8, the court's response was, at best, ambiguous. Accordingly, under these circumstances, the court should not have granted the State's motion to dismiss without explicitly making the finding required by Rule 16.6(a).

¶13 Therefore, we vacate the superior court's order granting the dismissal of the arson and criminal damage counts without prejudice in the 2015 case, and direct the court to reconsider dismissal of those two counts in light of the express language of Rule 16.6(a). On reconsideration, if the court finds the State's motion was made to avoid the provisions of Rule 8, the motion must be denied. *State v. Paris-Sheldon*, 214 Ariz. 500, 508, ¶ 23, 154 P.3d 1046, 1054 (App. 2007) (pursuant to Rule 16.6 (a), court "must deny the motion to dismiss altogether" if it concludes the State is attempting to avoid Rule 8).

¶14 When there is a Rule 8 violation, a defendant is not automatically entitled to a dismissal with prejudice, however. Rule 16.6(a) does not require a superior court to dismiss charges with prejudice if it finds the purpose of the prosecutor's motion to dismiss is to avoid the provisions of Rule 8. *Id.* Rule 16.6(d) provides that a dismissal of a prosecution shall be without prejudice "to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be with prejudice." Rule 8.6 is similar. Under that rule, if a court determines that a speedy trial time limit has been violated, "it shall on motion of the defendant, or on its own initiative, dismiss the prosecution with or without prejudice." *See also State v. Huffman*, 222 Ariz. 416, 420, ¶ 10, 215 P.3d 390, 394 (App. 2009) (Rule 16.6(d) applies broadly to all dismissals).

¶15 Under these rules, a superior court should not dismiss a prosecution with prejudice absent a finding that "the interests of justice" require it. *Id.* In the context of a speedy trial violation, Arizona courts have "concluded that the interests of justice require dismissal with prejudice only when the prosecutor has delayed in order to obtain a tactical advantage or harass the defendant *and* the defendant has demonstrated resulting prejudice." *Id.* at 420, ¶ 11, 215 P.3d at 394 (emphasis added).

¶16 In his special action briefing to this court, Pritchard has argued the State's motion to dismiss the arson and criminal damage counts in the 2015 case was to avoid the provisions of Rule 8. He has also argued that the State's "lack of diligence has severely impaired" his defense. The

superior court has not determined either issue and the superior court, not this court, should address these issues in the first instance.¹

CONCLUSION

¶17 For the foregoing reasons, we accept special action jurisdiction and grant relief, vacating the superior court's order dismissing the arson and criminal damage counts in the 2015 case. We direct the court to reconsider dismissal of those two counts in light of the express language of Rule 16.6(a) and to take further action consistent with this decision.



AMY M. WOOD • Clerk of the Court
FILED: AA

¹In their special action briefing, the parties have presented information that appears not to have been presented to the superior court when it granted the State's motion to dismiss the arson and criminal damage counts in the 2015 case. The submission of this material to this court further supports our conclusion that the superior court, not this court, should decide whether the State sought dismissal to avoid the provisions of Rule 8 and whether the "interests of justice" require any dismissal to be with prejudice.