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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 12/03/09
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,) No. 1 CA-CR 08-0824
)
Appellant,) **DEPARTMENT B**
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RALPH MANFRED FLOREK,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-112373-001 DT

The Honorable John R. Hannah, Jr., Judge

REVERSED AND REMANDED

Andrew P. Thomas, Maricopa County Attorney Phoenix
By Diane Meloche, Deputy County Attorney
Attorneys for Appellant

James J. Haas, Maricopa County Public Defender Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellee

D O W N I E, Judge

¶1 The State appeals the superior court's denial of its motion to dismiss without prejudice and the ensuing order dismissing criminal charges against Ralph Manfred Florek with

prejudice. For the following reasons, we vacate the dismissal with prejudice and remand to the superior court with instructions to dismiss the charges without prejudice.

FACTS AND PROCEDURAL BACKGROUND

¶12 On November 3, 2007, Officer B. stopped a late-model Ford based on an invalid vehicle registration. The driver, a white male, could not provide identification. He told Officer B. his name was "Eric Scott Erckstrand" and his birth date was "3-10-59." That name did not match any licensed Arizona drivers. When confronted with this information, the man said his last name was actually "Eckstrand." Before Officer B. could check that spelling, the man sped away. Officers pursued the man, who abandoned the vehicle and fled on foot. The vehicle was impounded.

¶13 The owner of the Ford claimed the vehicle two days later. Officer B. ruled him out as the suspect. However, the owner identified the suspect as his father-in-law, Ralph Florek. Based on an arrest photograph of Florek taken in 2007, Officer B. was certain Florek was the driver he stopped on November 3. Florek was indicted for unlawful flight from a law enforcement vehicle; driving while license suspended, revoked, cancelled or refused or in violation of license restrictions; and false reporting to a law enforcement agency.

¶14 At the comprehensive pretrial conference on July 25, 2008, a trial date was set for September 8, 2008; the last day for trial was September 25, 2008. See Ariz. R. Crim. P. 8.2 (limiting time between arraignment and trial to 150 days for in-custody defendants). Florek filed a motion to suppress evidence of Officer B.'s out-of-court identification and to preclude any in-court identification. The State responded in opposition, and a *Dessureault* hearing was scheduled for September 5.

¶15 After Officer B. received a subpoena, he contacted the prosecutor on August 21 and advised that he would be out of town on vacation from September 1 to September 18. The next day, the State moved to continue the trial for thirty days because Officer B. was its main witness. Florek opposed the continuance. On August 28, a "continuance panel" of the superior court denied a continuance, finding no "extraordinary circumstances"; it affirmed the September 8 trial date and the September 5 *Dessureault* hearing.

¶16 On September 4, 2008, the State filed a motion to dismiss the criminal charges without prejudice, stating:

Officer [B.] is on vacation in Texas from September 1 to September 18 and will not be able to break his plans to come to court. Without Officer [B.'s] testimony, the State is unable to proceed with trial and has no choice but to request a dismissal without prejudice. While the State believes there is no reason to waste the Court's resources with a re-file, the Defendant has made it

quite clear that he opposes any continuances. There is nothing in the record that would prejudice the Defendant's case at this point and, in fact, may even benefit his case given defense counsel's difficulty in contacting potential defense witnesses.

¶17 On September 5, the State argued its motion. In opposition, Florek asserted his right to a speedy trial under Rule 8.6 and the Arizona Constitution and requested a dismissal with prejudice, or alternatively, that the trial proceed as scheduled. Over Florek's objection, the court continued the trial to September 12 and took the State's motion under advisement.

¶18 On September 12, the court ruled that the State was attempting to avoid Arizona Rules of Criminal Procedure ("Rule") 8 deadlines and dismissed the charges with prejudice, stating:

[It] doesn't make very much sense to require a jury to be called and a jury to be selected, when the State has avowed it's not prepared to proceed. That would obviously not be the right thing to do to force it that far, so in lieu of that with the State having forthrightly avowed that it will not be prepared to proceed, the Court finds that a dismissal with prejudice is a functional equivalent of denying the Motion to Dismiss and forcing the case to go to trial. It's therefore ordered dismissing CR 2008-112373 with prejudice.

¶19 The State timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003); 13-4031 (2001) and -4032 (Supp. 2008).

DISCUSSION

¶10 When reviewing a dismissal with prejudice, we will uphold the superior court's ruling unless there has been an abuse of discretion. *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997); *State v. Garcia*, 170 Ariz. 245, 247, 823 P.2d 693, 695 (App. 1991). Generally, a trial court abuses its discretion if it commits an error of law in reaching its decision or the record fails to provide substantial support for its decision. *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004).

¶11 Rule 16.6 discusses the dismissal of criminal charges and provides, in pertinent part:

- a. **On Prosecutor's Motion.** The court, on motion of the prosecutor showing good cause therefor, 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.

. . . .
- c. **Record.** The court shall state, on the record, its reasons for ordering dismissal of any prosecution.
- d. **Effect of Dismissal.** 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.

¶12 For purposes of appeal, we accept the trial court's finding that the State was trying to avoid Rule 8 time limits. Thus, it properly denied the State's motion under Rule 16.6(a). See *State v. Paris-Sheldon*, 214 Ariz. 500, 508, ¶ 23, 154 P.3d 1046, 1054 (App. 2007) (holding that "if the court concludes the state is attempting to avoid Rule 8, the court must deny the [prosecution] motion to dismiss altogether."). Rule 16.6(a), however, addresses only the prosecutor's ability to dismiss criminal charges. Trial courts have the inherent power (and, under Rule 8, the specific authority) to dismiss criminal charges, though there are limitations on when they may dismiss with prejudice. See *State v. Huffman*, 222 Ariz. 416, 420, ¶ 10, 215 P.3d 390, 394 (App. 2009) ("Rule 16.6(d) . . . applies broadly to all dismissals"); *State v. Hannah*, 118 Ariz. 610, 611, 578 P.2d 1039, 1040 (App. 1978) (holding that, although the trial court "has the inherent power to dismiss a prosecution," it may not dismiss an indictment with prejudice absent a finding that "the interests of justice" require it).

¶13 Rule 8.6 makes clear that, even when there has been an actual speedy trial violation (something that did not occur here because the last day was September 25--thirteen days *after* the case was dismissed), the court has the power to dismiss criminal

charges without prejudice.¹ It would be anomalous to hold that an *attempted* violation of Rule 8 must be dealt with more harshly and with less judicial authority than an actual violation of a defendant's speedy trial rights. In *State v. Garcia*, we discussed a defense claim that the State was attempting to avoid Rule 8 time limits, stating:

A violation of the time limits of Rule 8 does not mandate a dismissal with prejudice. . . . Since that is true, not every attempt to avoid an impending time limit merits dismissal with prejudice. Although there are no Arizona cases directly on point, we think that the same considerations discussed in the cases construing Rule 16 govern whether a dismissal for a Rule 8 violation should be with or without prejudice. In other words, if the defendant can show that the state delayed for the purpose of gaining a tactical advantage over him or to harass him, and if he can show that he actually suffered prejudice as a result of the state's conduct, a dismissal with prejudice would be justified.

170 Ariz. at 248, 823 P.2d at 696 (citations omitted).

¶14 As Rule 16.6(d) and Arizona appellate decisions reflect, the law favors dismissals without prejudice. *State v.*

¹ Rule 8.6 states:

If the court determines after considering the exclusions of Rule 8.4, that a time limit established by Rules 8.2(a), 8.2(b), 8.2(c), 8.2(d), 8.3(a), 8.3(b)(2), or 8.3(b)(3) has been violated, it shall on motion of the defendant, or on its own initiative, dismiss the prosecution with or without prejudice.

Granados, 172 Ariz. 405, 407, 837 P.2d 1140, 1142 (App. 1991); *State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991). In the context of speedy trial violations, "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." *Huffman*, 222 Ariz. at 420, 215 P.3d at 394. See also *Garcia*, 170 Ariz. at 248, 823 P.2d at 696.

¶15 Although the trial court understandably considered the futility of forcing the State to proceed to trial when its primary witness was unavailable, once it decided to instead dismiss the charges, the record needed to support the dismissal with prejudice. The court did not find misconduct by the State, stating:

I do find that the dismissal is an attempt to avoid the time limits of Rule 8. That is not on the record a finding of misconduct by the County Attorney. I don't think that quote "dismissal to avoid the provisions of Rule 8," close quote, necessarily implies misconduct by the State although obviously it could.

Nor did the court identify any prejudice Florek would suffer if the charges were dismissed without prejudice.²

² Additionally, nothing suggests the State attempted to gain a tactical advantage. The prosecutor moved for dismissal

¶16 The most important consideration in deciding whether a dismissal should be with or without prejudice is whether delay will prejudice the defendant. *Granados*, 172 Ariz. at 407, 837 P.2d at 1142 (citation omitted). Prejudice results if the delay impairs the defendant's ability to defend against the charges. *In re Arnulfo G.*, 205 Ariz. 389, 391, ¶ 9, 71 P.3d 916, 918 (App. 2003) (citation omitted).

¶17 At oral argument on the State's motion, Florek's counsel acknowledged the requirement that he demonstrate "some actual prejudice" to garner a dismissal with prejudice. His proffered "prejudice" was that Officer B. had the booking photos of Florek and "is now going to have the opportunity to keep looking at those pictures and keep telling himself that that is the person he arrested or stopped that night." But as the trial court pointed out, this fact could actually *benefit* Florek. At any rate, this type of speculative claim is insufficient to establish actual prejudice. *See, e.g., State v. Youngblood*, 173 Ariz. 502, 507, 844 P.2d 1152, 1157 (1993) (the possibility of prejudice is insufficient to justify dismissal with prejudice--the ultimate sanction).

promptly upon learning he could not secure Officer B.'s presence at trial and well before the last day. Such a delay in prosecution, if the case is re-filed, would not rise to the level of harassment, nor does it demonstrate a deliberate attempt to delay trial to hamper Florek's defense.

¶18 Florek also argued that, if charges were refiled, he would likely "have to sit in custody for another 150 days" because he would be unable to post bond. This claim is also speculative.³ Finally, Florek briefly stated in response to the motion to dismiss that "[he] is a small business owner [with] two employees and his auto shop is floundering without his presence." Financial burden alone is insufficient to establish prejudice. See *State ex rel. DeConcini v. Superior Court (Apodaca)*, 25 Ariz. App. 173, 175, 541 P.2d 964, 966 (1975). We find Florek failed to establish legally cognizable prejudice that would ensue if the charges were dismissed without prejudice.

CONCLUSION

¶19 On this record, we conclude the trial court erred in dismissing the charges with prejudice. We vacate the order of

³ Moreover, Florek's recent incarceration stemmed not only from the criminal charges at issue here, but also from a probation violation for which he was being held.

dismissal with prejudice and remand to the superior court with instructions to dismiss the charges against Florek without prejudice.

/s/

MARGARET H. DOWNIE, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

SHELDON W. WEISBERG, Judge